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FiOS Content: A Good Deal or Undermining Precedent?

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I. Introduction

In order to compete in a satellite and cable television marketplace, Verizon Internet Services has added one new product to the mix of services consumers can use to get hundreds of channels into their homes. In 2005, the telecommunications giant began launching its “Verizon Fiber Optic Service” (FiOS) in select markets throughout the United States. The service, which would allow municipalities to receive pay television and other services, such as high-speed internet and telephone, over its fiber optic, internet service network, marks the entry of Verizon into the highly competitive content-delivery marketplace.

Like cable and satellite providers, Verizon must make deals with content owners and broadcast networks in order to carry programming for FiOS TV and make its service viable as a business and marketable to the consumer. However, a recent deal between Verizon and Disney may function to undercut a 2003 decision by the Court of Appeals for the D.C. Circuit which sustained due process protections in how content and internet service providers subpoena possible copyright violators and do copyright tracking.²

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² Recording Indus. Ass’n of America, Inc. v. Verizon Internet Services, Inc., 351 F.3d 1229 (D.C. Cir. 2003).

According to terms in the recent agreement, “Verizon would forward and track notices to its subscribers allegedly engaged in the unauthorized distribution of Disney’s copyrighted works, without identifying the subscribers to Disney....”³ The 2003 ruling by the D.C. Circuit essentially required content owners, like Disney, to sue individuals for copyright piracy before Internet Service Providers, like Verizon, disconnected the alleged violators. This most recent agreement between Verizon and the Walt Disney Company may mean Verizon could “terminate...services to individuals who infringed upon Disney’s copyright” by passing along information to Disney without first subpoenaing alleged infringers.⁴

This note will examine how the recent deal between Verizon and Disney squares with the 2003 holding by the U.S. Court of Appeals for the D.C. circuit that “a subpoena may be issued only to an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity” pursuant to § 512(h) of the Digital Millennium Copyright Act.⁵ It will also examine other market and legal factors that contributed to Verizon’s decision to reach the type of agreement with Disney that it, in some ways, refused to do with the RIAA.

II. Argument

While the terms of the agreement between Verizon and Disney would allow Verizon to terminate its FiOS service to customers who infringe on Disney’s copyright without first subpoenaing them, the agreement would not facially undercut the 2003 due

³ Press Release, Verizon, Verizon and The Walt Disney Company Sign Long-Term Programming Agreement (Sept. 21, 2005), <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=92857>.

⁴ Drew Clark, *Verizon Executive Criticizes House Draft Telecom Bill*, NAT’L J., Sept. 22, 2005, <http://www.njtelecomupdate.com/lenya/telco/live/tb-USVF1127346400334.html>.

⁵ *Recording Indus. Ass’n of America, Inc.* 351 F.3d at 1233.

process decision by the Court of Appeals for the D.C. Circuit because the terms of the Verizon-Disney agreement call for termination of service only after infringers receive multiple notices, or “‘lawfully served subpoenas.’”⁶

III. What is FiOS?

Verizon officially introduced its Fiber Optic Service (FiOS) in May 2004, beginning what it called “the first-ever large-scale deployment of fiber optic technology to individual homes and businesses.”⁷ FiOS, Verizon hopes, will allow the company to compete directly against cable (Time Warner, Cox, etc.) and satellite providers (The Dish Network and DirecTV) by making available a speedier product with similar offerings.⁸ In short, it will give them an avenue into a territory currently occupied by cable companies.⁹

Verizon began deploying fiber optic lines in response to the cable industry’s entrance into the telephone business.¹⁰ Cable providers like Time Warner offer customers “Triple Play” service. This mix of services gives customers the option to receive broadband cable internet, digital cable television and Voice-over Internet Protocol (VoIP) telephone service in one packaged deal, through one provider, on one bill.¹¹

Indeed the service offered by cable companies and coming on-line from Verizon embodies the notion of ‘convergence’ -- “the combination of both new and existing media

⁶ Verizon and The Walt Disney Company Sign Long-Term Programming Agreement, *supra* note 3.

⁷ FTTP and FiOS News, <http://newscenter.verizon.com/kit/fiber/> (last visited Oct. 15, 2005).

⁸ Press Release, Verizon, Verizon FiOS TV Is Here!: New Video Service Harnesses the Speed and the Capacity of Broadband With the Power of Broadcast to Offer Consumer Choice in TV (Sept. 22, 2005), <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=92862>.

⁹*Id.*

¹⁰ Bara Vaida, *The Clash Of The High-Tech Titans*, NAT’L J., Sept. 28, 2005, available at <http://www.njtelecomupdate.com/tb-ZLCM1127945542869.html>.

¹¹ *Id.*

– e.g. broadcasting, cable, fiber optics, satellites – into one integrated system for delivery of video, voice, and data.”¹²

Triple play offerings by cable companies have caused traditional “wire-line” carriers like Verizon to lose their traditional base of customers. Voiceover Internet Protocol (VoIP) has evolved into a relatively reliable and cost effective way to make phone calls.¹³ The future for traditional wire-line subscriptions also looks bleak for the industry.¹⁴ By 2008, an estimated 17.1 millions people will subscribe to telephone service through their cable carrier whereas 3.18 million will subscribe to television service through their telephone carrier.¹⁵ Since such numbers do not bode well for the wire-line carriers, “a war to capture subscribers for bundled TV, phone and Internet services” has begun.¹⁶ While Verizon seems committed to spending money on technology to launch its subscription TV service in order to take away customers from the cable companies, it also must commit significant resources to trying to get legislation changed at all levels of government to create entry into the marketplace.¹⁷

¹² Michael H. Botein, *Antitrust Issues in the Telecommunications and Software Industries*, 25 SW. U. L. REV. 569, 569 (1996).

¹³ Federal Communications Commission Consumer & Governmental Affairs Bureau, FCC Consumer Facts, VoIP / Internet Voice (Dec. 5, 2005), <http://www.fcc.gov/cgb/consumerfacts/voip.pdf>.

¹⁴ Catherine Yang, Tom Lowry, Roger O. Crockett, & Peter Burrows, *Cable vs. Fiber*, BUS. WK., Nov. 1, 2004, available at http://www.businessweek.com/magazine/content/04_44/b3906044_mz011.htm.

¹⁵ Bill McConnell, *Cable vs. Telco: What Happens When Competition Outpaces Washington Rules*, BROADCASTING & CABLE, May 9, 2005, available at <http://www.broadcastingcable.com/article/CA600129.html?display=Feature>.

¹⁶ *Id.*

¹⁷ *Id.*

IV. Playing on Cable's Chessboard

In order for Verizon to start going after subscribers for video services, it has the burden of complying with rules from fifty-two different jurisdictions and thousands of local franchising authorities who decide which companies get to offer services to local customers.¹⁸ Cable companies could easily launch Internet based service, like telephone service and internet because “the FCC has taken a hands-off approach.”¹⁹ Municipal governments subjected the cable industry to fees and regulations at the outset of its entrance into the marketplace in the 1980's because federal law required cable companies to obtain local franchise permits if they wanted to deliver service.²⁰ When cable companies wanted to get into the broadband internet business, the cables were already laid, and in some instances upgrades to the line improved service.²¹ Franchise agreements between cable television providers and local governments essentially allow cable providers to operate as local monopolies by preventing other service providers from having the ability to offer service to duplicate users.²² Because of the franchise agreements, telephone companies argue that they would have to spend a significant amount of time working out such individual agreements.²³ The cable providers contend that the telephone companies should not get permission to compete in their marketplaces under a different set of rules.²⁴

¹⁸ McConnell, *supra* note 15.

¹⁹ *Id.*

²⁰ Vaida, *supra* note 10.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

In Rhode Island, the most competitive telephone market in the nation, Verizon, has lost money on its local telephone operations since Cox Communications (“Cox”), a cable provider, started offering phone service in the state.²⁵ In 1999, Verizon provided 673,712 access lines throughout the state.²⁶ By the end of 2004, nearly five years after Cox entered the market, Verizon provided 458,894 access lines in the state.²⁷ Verizon’s 32% decrease in access lines over the last five years may have resulted from Cox offering telephone service.²⁸

The topic of telecommunications regulations for local markets could consume a lot of space. This note, however, does not delve thoroughly into franchise agreements or the on-going debate between the service offerings of the cable industry versus the telecom industry. Both sides present compelling arguments for the role in which government regulation – at all levels – should or should not play into their business. The telecom industry feels at a disadvantage because in launching telephone service, cable companies did not have to face the same hurdles they once did – and to some extent currently do – in launching television or high speed internet service.²⁹ However, the cable industry was better positioned to offer telephone service through their already existing cable lines than was the telecom industry to offer television through their antiquated copper wire. Further, the 1996 Telecommunications Reform Act did not consider the speed at which technology

²⁵ Timothy C. Barmann, *Verizon losing share of business in R.I.*, THE PROVIDENCE JOURNAL, May 29, 2005, available at http://www.projo.com/business/impact50/content/projo_20050529_tele29.1d3f905.html.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Vaida, *supra* note 10.

could develop to make such a wide array of services available from just one service provider.³⁰

Thousands of local governments and municipalities regulate the video business which Verizon wants to enter; the same local governments demand franchise fees, public access channels, and upgraded infrastructure.³¹ Some telephone companies seek a federal solution to the hurdle of negotiating with the thousands of jurisdictions.³² However, Verizon did not wait for Congress or the FCC to get around to changing regulations.³³ Realizing a federal solution would take time, they have negotiated with over 100 different franchise authorities nationwide in order to launch FiOS.³⁴ The company asked two states – California and Virginia – to grant statewide licenses for video service.³⁵ The company also did not wait to get local franchise authority before it began developing and testing the fiber-optic technology for its FiOS service.³⁶

V. FiOS: An overview of the technology

The technology used to make the deployment possible, Fiber to the Premises (FTTP), uses thin threads of fiber optic glass – instead of traditional copper wires – and

³⁰ *Id.*

³¹ *Id.*

³² Drew Clark, *Ensign Files Bill To Deregulate Both Phone And Cable Markets*, NAT'L J., July 27, 2005, available at <http://njtelecomupdate.com/lenya/telco/live/tb-TMZF1122495372234.html>.

³³ Vaida, *supra* note 10.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

other types of optical electronics to deliver broadband service to subscribers.³⁷ Over the past decade, telephone companies have worked to replace the copper wire, which delivered their voice service to consumers since the beginning of the twentieth century, with fiber-optics.³⁸

Through its FTTP network, Verizon can offer internet, telephone and television service to customers at speeds much faster than current digital subscriber lines (DSL) or cable modems.³⁹ Cable modems allow users to transfer data – both uploads and downloads – at between one to five megabits per second (Mbps).⁴⁰ With the installation of fiber lines, users can download data at “between 5 and 100 Mbps” and they can upload it at “2 Mbps.”⁴¹ Verizon hopes that the FiOS product will allow them to compete directly against the cable industry; an industry which has crawled into Verizon’s territory by offering consumers the “Triple Play” option of services.⁴²

To offer FiOS, Verizon uses a Gigabit Passive Optical Network (G-PON) configuration.⁴³ In the G-PON configuration, as illustrated in the diagram below, unpowered optical splitters enable a single optical fiber to deliver service to approximately

³⁷ Lance Ulanoff, *FTTP Changes Everything*, PC MAGAZINE, June 15, 2005, available at http://www.pcmag.com/print_article2/0,1217,a=154123,00.asp.

³⁸ *Id.*

³⁹ Mike Musgrove, *FiOS Speeds Up Web, Phone and TV Access*, WASH. POST, May 8, 2005, at F07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/07/AR2005050700178.html>.

⁴⁰ Ulanoff, *supra* note 37.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Press Release, Verizon, Verizon Widens Broadband Speed Advantage on the Company’s Industry Leading Fiber-to-the-Premises Network (July 27, 2006) <http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=30078536>.

thirty-two different premises.⁴⁴ A G-PON involves three main sites.⁴⁵ For Verizon, their central office houses a “Circuit or Packet Switch” and an “Optical Line Terminal (OLT).”⁴⁶ In between Verizon’s central office and the end-user, the fiber-optic cable goes to the unpowered optical splitters before delivery to the end user’s “Optical Network Terminal.”⁴⁷ This network uses a “point-to-multipoint” configuration where a single server — here the OLT — sends signals to several receiving points.⁴⁸

Once in the home, the signal will reach a digital video recorder (DVR).⁴⁹ While cable companies use the DVR to deliver a higher quality of service to customers who will pay for it, the DVR offered by Verizon and manufactured by Motorola will work “as a multimedia hub that lets consumers access and share video recordings, video-on-demand (VOD) content, pictures and music in and around the home”⁵⁰ The Multimedia over Coaxial Alliance (MoCA) technology that allows users to set up the home network in order to share content means customers can create a multimedia network using the already - existing coaxial cables within the home.⁵¹

⁴⁴Biznet Networks - Glossary, www.biz.net.id/En/Support/Glossary.aspx (last visited Feb. 26, 2007).

⁴⁵ Verizon FTTP Architecture, http://www22.verizon.com/about/community/tx/technology/fttp_arch.html (last visited Feb. 18, 2007).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

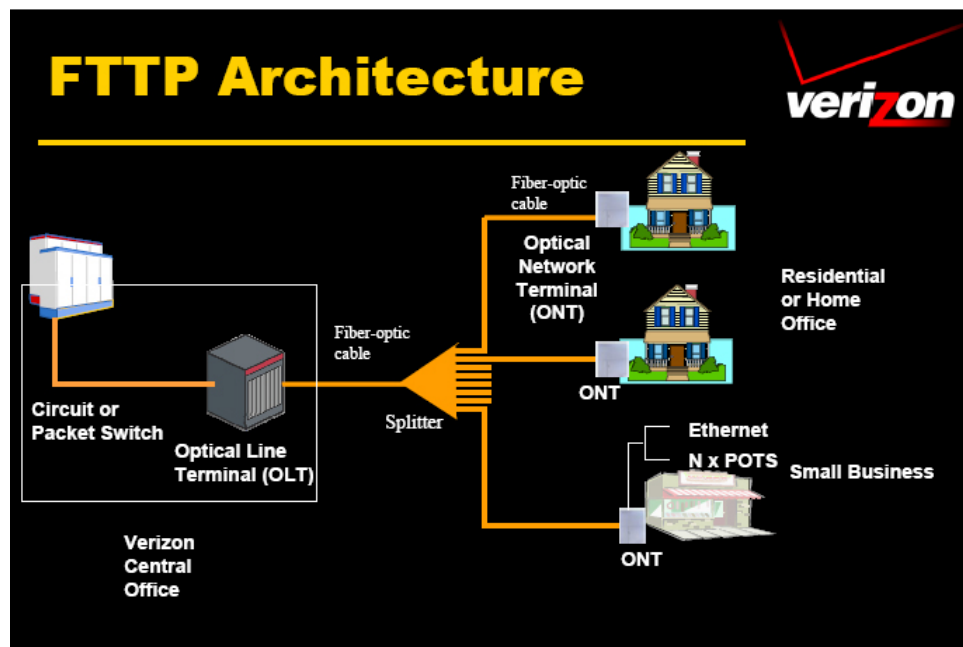
⁴⁹ *Motorola Set-Top Simplifies Whole-Home DVR*, CD COMPUTING NEWS, Feb. 1, 2006.

⁵⁰ *Id.*

⁵¹ *Id.*

The word “FiOS” is not engineering jargon. To describe the type of fiber-optic networks telecommunications companies use, engineers and developers use “FTTP.”⁵² Verizon, however, hopes FiOS is becoming a marketable brand name, since, according to the trademark filing, “the English translation of FIOS is ‘knowledge’”⁵³ Under the FiOS umbrella the company offers high-speed Internet service, voice service and television programming.⁵⁴ While this note examines the programming deals between Verizon and content providers, the pricing model for the entire FiOS business begs examination because the different offerings will allow consumers to pay for varying speeds.

FTTP Architecture⁵⁵



⁵² Paul Green, Fiber-to-the-Home White Paper, Fiber to the Home Council, *available at* <http://www.ftthcouncil.org/documents/FTTH%20White%20Paper%20PaulGreen%200203.pdf> (last visited on March 28, 2007).

⁵³ Verizon FiOS, U.S. Trademark No. 78429111 (filed June 3, 2004).

⁵⁴ Verizon Bundles, <http://www22.verizon.com/Residential/VZPackages/> (last visited March 28, 2007).

⁵⁵ Verizon FTTP Architecture, *supra* note 45.

For its FiOS Internet service, customers can pay for different speeds. Essentially the only limitation on download speeds is what one is willing to pay.⁵⁶ For \$34.95 a month a customer can pay for 5 Mbps uploads and 2 Mbps downloads.⁵⁷ At \$44.95 a month, a customer can get downloads at 15 Mbps.⁵⁸ At \$199.95 a month, download speeds of 30 Mbps and upload speeds of 5 Mbps are available.⁵⁹ Broadband cable connections can offer speeds of between 10 and 20 Mbps, but depending on the amount of use, that number can fluctuate.⁶⁰

By the end of 2005, only residents in Keller, Texas, a suburb of Dallas, could subscribe to the FiOS television service.⁶¹ Beginning in 2006, the company planned to announce and rollout service to more markets.⁶² The offerings Verizon makes available to its television customers look almost identical to those that cable subscribers enjoy.⁶³ The basic FiOS TV service includes 180 digital video and music channels for \$39.95 a month.⁶⁴ With that comes access to 20 High Definition channels and 1,800 video-on-demand titles.⁶⁵ In order to gain access to carry the channels and the movies to consumers,

⁵⁶ Ulanoff, *supra* note 37.

⁵⁷ The Services: Verizon FiOS, <http://newscenter.verizon.com/kit/fiber/fios.vtml> (last visited Feb. 18, 2007).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Broadband Info.com, Broadband Cable Internet Access, <http://www.broadbandinfo.com/internet-connections-101/types-of-internet-connections/cable/default.html> (last visited Feb. 18, 2007).

⁶¹ Press Release, Verizon FiOS TV is Here!, *supra* note 8.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

Verizon and other content providers have to reach agreements which might fall within the scope of *RIAA v. Verizon Internet*, 351 F.3d 1229 (D.C. Cir. 2003).

VI. Changes in technology – and the marketplace – since the Telecommunications Act of 1996.

In 1996, Congress passed the “first major overhaul in telecommunications law” in more than six decades.⁶⁶ The Telecommunications Act of 1996 was designed to deregulate the communications industry by letting “anyone enter any communications business” and allowing any communications business to compete in any market against any other.”⁶⁷ For the long distance firms and the local service Baby Bells, the act allowed entrance into each other’s voice markets.⁶⁸ To some extent, that happened; but after the passage of the act, the Bells began to merge with each other while at the same time litigating against an FCC regulation requiring the Bell companies to lease their lines and networks to smaller competitors, and an FCC checklist of rules that they had to meet before they could enter the long distance market.⁶⁹

The Act also lifted any prohibitions on the Bells’ entering the video market occupied by cable companies.⁷⁰ Since the passage of the act a decade ago, that provision has gone from a legal possibility to a reality with Verizon’s launch of fiber optic

⁶⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), <http://www.fcc.gov/telecom.html> (last visited Feb. 26, 2007).

⁶⁷ *Id.*

⁶⁸ Vaida, *supra* note 10.

⁶⁹ *Id.*

⁷⁰ *Id.*

television.⁷¹ The Act also invited other competition into the video market once dominated by cable. While the Act relieved the cable industry of price-caps for service, it also allowed satellite service like DirecTV into the marketplace.⁷² Currently, there are approximately 66.1 million cable television subscribers and 23.16 million direct broadcast satellite subscribers in the U.S.⁷³ While the DBS lags behind cable companies in terms of subscribers, DBS has experienced a great deal of growth, while the cable industry has not. However, the offerings of DBS have forced the cable industry to up the ante when it comes to their own service. Both cable and satellite companies offer subscribers many tiers – and hundreds of channels – of digital programming for competitive prices. Indeed the FCC credits the DBS industry with keeping cable service modern and desirable to consumers.⁷⁴ The rise of DBS is just one of the developments in the industry since the 1996 Telecommunications Act. While traditional cable service remains the first choice of the majority of consumers, DBS options through the Dish Network and DirecTV have gained in popularity since Congress passed legislation allowing DBS services to carry local market channels.⁷⁵

Since the passage of the 1996 Telecommunications Act, one type of communications service has evolved which has raised some regulatory challenges.⁷⁶ Voice

⁷¹ *Id.*

⁷² *Id.*

⁷³ FEDERAL COMMUNICATION COMMISSION, ANNUAL ASSESSMENT OF THE STATUS OF COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING (2005) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-13A1.pdf.

⁷⁴ *Id.*

⁷⁵ Satellite Home Viewer Improvement Act of 1999, S. 1948 106th Cong. (1999).

⁷⁶ STUART M. BENJAMIN, DOUGLAS G. LICHTMAN, HOWARD SHELANSKI, AND PHILIP J. WEISER, TELECOMMUNICATIONS LAW AND POLICY 1029, (2d ed. 2006).

over Internet Protocol (VoIP) allows users to make calls over the internet.⁷⁷ Cable companies like Time Warner Cable and Cox employ VoIP technology to offer voice service to consumers.⁷⁸ Such an offering threatens the traditional telephone companies like Verizon by enticing customers to sign up for convenient triple play services.⁷⁹ As VoIP becomes a mainstream product, consumers – from corporations to home-users – have begun using the service by tapping into the resources of their existing broadband connections.⁸⁰ Corporate consumers, especially multinational companies, may benefit by cost savings and improved functionality. Individual consumers benefit from VoIP service through less expensive rates for long-distance and international calling.⁸¹

Unlike the traditional public switched telephone network (PSTN), VoIP users can simultaneously exchange data, audio or video with one another – something not possible over a traditional telephone line.⁸² From a legal standpoint, regulation and judicial treatment of oral telephone communications and electronic data communications differs.⁸³ In terms of privacy protection, oral telephone communications receives a higher level than that afforded to electronic data communications such as transactions completed over the

⁷⁷ The VoIP Mechanism (Voice Over Internet Protocol-VOIP), <http://www.aboutvoipsolution.com/the-voip-mechanism>.

⁷⁸ Ben Charney and Evan Hansen Time Warner OK with VoIP Regulation (Nov. 13, 2004), *available at* http://news.com.com/Time+Warner+OK+with+VoIP+regulation/2100-7352_3-5107148.html.

⁷⁹ The VoIP Mechanism, *supra* note 77.

⁸⁰ Daniel B. Garrie, Mathew J. Armstrong & Donald P. Harris, *Voice over Internet Protocol and the Wiretap Act: Is your Conversation Protected?*, 29 SEATTLE U. L. REV. 97, 101 (2005).

⁸¹ *Id.* at 102.

⁸² *Id.* at 101.

⁸³ *Id.* at 100.

internet.⁸⁴ This distinction is particularly noteworthy because a court’s analysis in a matter involving the exchange of consumer data between the service provider and the content provider will perhaps turn on a consideration of whether third parties may be permitted to track, store and sell data packets with the implied or explicit consent of either party engaged in the transmission.⁸⁵

As Verizon prepares to introduce FiOS, it must remain mindful of the competition it faces from the established cable and DBS services. Whether it can successfully compete in the already competitive marketplace depends on how it offers its services. Several factors that may determine its success include: whether it offers its television service at competitive prices; whether it offers unique programming; and whether it offers a degree of interactivity not yet available from providers who offer similar service.

This Article has thus far distinguished between a cable company and a telecom company even though advances in technology have allowed each to offer similar services. Language in the 1996 Act also served to draw a line between the two different communications networks, or “silos.”⁸⁶ In the legislation, “telecom” referred to hand devices held to the ear and “cable” referred to television.⁸⁷ This is evidence that the drafters of the bill did not entirely consider that cable companies would one day offer services once reserved to the telecoms and vice versa.

Further evidence that Congress did not fully consider the drastic changes that would take place following the passage of the Act comes from the total count of the

⁸⁴ *Id.* at 101.

⁸⁵ Garrie, *supra* note 80, at 100.

⁸⁶ Vaida, *supra* note 10.

⁸⁷ *Id.*

number of times the word “internet” appears in the legislation. While the 128-page legislation references “interactive computer services” and “advanced telecommunications services” many times, the word “internet” appears only 11 times.⁸⁸ While certainly aware of the changing technology, the speed at which the technology changed did not get incorporated into the elasticity of the legislation; thus some of the dilemmas currently faced by the industry.

To account for changes in technology since the 1996 Act, proposed legislation in the House of Representatives would replace a section of existing law in the 1996 Act with regulations for services provided over the internet like voice, video and other forms of data.⁸⁹ Under the proposed legislation, the language ignores the type of delivery technology – whether it is cable, wireless, telecom, or satellite – and has rules that apply “Internet Protocol-based networks and services.” Further, broadband is defined as an “interstate service” serving to take it out of the realm of regulation through local franchise agreements.⁹⁰ Indeed to address video franchise questions, the proposed legislation would establish federal jurisdiction over video services delivered through a broadband connection, thereby freeing companies like Verizon from having to commit resources to going through the local franchise process.⁹¹ Yet it would also require those same companies to pay a franchise fee to the communities in which the companies offer service;

⁸⁸ *Id*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Vaida, *supra* note 10.

the local communities would also have authority over how and where the networks get built.⁹²

VII. An Analysis of RIAA v. Verizon (2003)

The Recording Industry Association of America is a trade association that represents the U.S. recording industry.⁹³ Its membership is comprised of hundreds of record companies that create and distribute much of the music heard around the world.⁹⁴ The RIAA functions to serve as the music industry's policy and research arm and it works to protect the intellectual property rights of its members.⁹⁵

In 1998, Congress passed, and the President signed, the Digital Millennium Copyright Act. As enacted, the DMCA gives copyright holders the ability and the tools to try to curb the pirating of music, films, computer games and other copyrighted material by, among other things, compelling service providers to terminate the account of a copyright offender and remove illegal website material hosted on its servers.⁹⁶

On July 24, 2002, the association served Verizon with a subpoena under 17 U.S.C. § 512(h) permitting a copyright owner to obtain and serve a subpoena on a service provider seeking the identity of a customer alleged to be infringing the owner's copyright.⁹⁷

⁹² *Id.*

⁹³ Recording Industry Association of America: Who We Are, <http://www.riaa.com/aboutus.php> (last visited Mar. 1, 2007).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Mark H. Anderson, *Supreme Court Rejects Music Industry's Appeal*, WALL ST. J., Oct. 12, 2004, <http://online.wsj.com/article/SB109759112406242978.html>.

⁹⁷ Recording Indus. Ass'n of Am. v. Verizon Internet Servs. (*In re Verizon Internet Servs.*), 240 F.Supp.2d 24 (D.D.C. 2003) The DMCA contains a novel provision in subsection (h) -- which lies at the heart of the dispute before the Court -- permitting a copyright owner to obtain and serve a subpoena on a service provider seeking the identity of a customer alleged to be infringing the owner's copyright

Generally, whether courts enforce such a subpoena turns on a balancing test: weighing the First Amendment interests of the users against the plaintiffs' need for the information.⁹⁸ However, it does appear on its face that 512(h) gives copyright owners the capability, in some instances, to obtain the identities of alleged infringers without having to file a lawsuit.⁹⁹ The RIAA served the subpoena seeking identifying information about an anonymous copyright infringer allegedly using Verizon's network to download copyrighted songs through a peer-to-peer (P2P) program called KaZaA, without obtaining authorization from the holder of the copyright.¹⁰⁰ The RIAA has directed its anti-infringement efforts against individual users of P2P file sharing programs such as KaZaA.¹⁰¹ In order to pursue alleged infringers, the RIAA needs information to identify users who share and trade files using P2P programs.¹⁰² Under § 512(h), the copyright owner may request the clerk of any United States district court to issue a subpoena to [an

The subpoena is issued by the clerk of any United States District Court upon a request by the copyright owner (or one authorized to act on the owner's behalf) containing the proposed subpoena, "a copy of a notification described in subsection (c)(3)(A)," and a sworn declaration ensuring that the subpoena is solely to obtain the identity of the alleged infringer, which information will be used only to protect rights to the copyright. Id. § 512(h)(2). The subpoena, in turn, authorizes and orders the recipient service provider "to expeditiously disclose" information sufficient to identify the alleged infringer. Id. § 512(h)(3). The clerk "shall expeditiously issue" the subpoena if it is in proper form, the declaration is properly executed, and "the notification filed satisfies the provisions of subsection (c)(3)(A)." Id. § 512(h)(4). The service provider, upon receipt of the subpoena, "shall expeditiously disclose" the information required by the subpoena to the copyright owner (or authorized person). Id. § 512(h)(5). The issuance, delivery and enforcement of subpoenas is to be governed (to the extent practicable) by the provisions of the Federal Rules of Civil Procedure dealing with subpoenas duces tecum. Id. § 512(h)(6).

⁹⁸ Columbia Ins. Co. v. Seescandy.Com, 185 F.R.D. 573 (N.D.Cal.1999).

⁹⁹ KEVIN P. CRONIN & RONALD N. WEIKERS, DATA SECURITY AND PRIVACY LAW: COMBATING CYBERTHREATS § 9:107:30 (2006).

¹⁰⁰ *Id.*

¹⁰¹ *Recording Indus. Ass'n of Am.*, 351 F.3d at 1231.

¹⁰² *Id.* at 1232.

ISP] for identification of an alleged infringer.¹⁰³ A copyright owner (or its agent, such as the RIAA) must file three items along with its request that the Clerk or a district court issue a subpoena: (1) a ‘notification of claimed infringement’ identifying the copyrighted work(s) claimed to have been infringed and the infringing material or activity, and providing information reasonably sufficient for the ISP to locate the material, all as further specified in § 512(c)(3)(A); (2) the proposed subpoena directed to the ISP; and (3) a sworn declaration that the purpose of the subpoena is ‘to obtain the identity of an alleged infringer and that such information will only be used for the purposes of protecting’ rights under the copyright laws of the United States.¹⁰⁴

With the subpoena came a list – provided by RIAA – of more than 600 files of songs downloaded by the Verizon subscriber over the course of a day.¹⁰⁵ The subpoena had information that included both the user’s specified internet-protocol (IP) address so Verizon could locate the computer where the alleged infringement took place.¹⁰⁶ While all internet identities are traceable, only the Verizon – the ISP – may link the IP address used to access a P2P program with the name and address of the customer who can then be contacted or possibly sued by the RIAA.¹⁰⁷ The subpoena also informed Verizon of the time and date of the file downloads.¹⁰⁸ RIAA further requested the Verizon disable access to the infringing files.¹⁰⁹

¹⁰³ 17 U.S.C. § 512 (h)(1) (1999).

¹⁰⁴ 17 U.S.C. § 512 (h)(2) (1999)

¹⁰⁵ *In re Verizon Internet Servs.*, 240 F. Supp. 2d at 28-29.

¹⁰⁶ *Id.*

¹⁰⁷ *Recording Indus. Ass’n of Am.*, 351 F.3d at 1232.

¹⁰⁸ *In re Verizon Internet Servs.*, 240 F. Supp. 2d at 28-29.

Verizon refused to comply with the subpoena from the RIAA with a letter stating the view that the DMCA subpoena power applies only if the infringed material is stored or controlled on the service provider's system or network under § 512(c).¹¹⁰ According to Verizon, the files in question did not reside on any Verizon system or Verizon controlled or operated by the company – rather, the alleged infringer has them stored on the customer's personal computer.¹¹¹ Because of this, Verizon argued that § 512(c)(3)(A) nor § 512(h) applies and that they could not come under the subpoena of the RIAA.¹¹² By contending that it only provided the user's internet connection, it falls under §512(a) and not (c); thus outside the subpoena authority granted to the RIAA in subsection (h); that the subpoena issued was an invalid use of the RIAA's subpoena power.¹¹³

The RIAA argued that the subpoena power given to it in the DMCA under §512(h) applies to all service providers.¹¹⁴ And indeed before the 2003 District of Columbia Circuit opinion, the RIAA widely employed the subpoena procedure set forth in §512(h) to halt alleged infringement through P2P file-sharing.¹¹⁵ However, the court held that §512(h) does not authorize a party like the RIAA to issue a subpoena to an ISP that solely transmits copyrighted – or allegedly infringed – material.¹¹⁶ A subpoena will be upheld, though, if

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *In re Verizon Internet Servs.*, 240 F. Supp. 2d at 28-29.

¹¹⁴ *Recording Indus. Ass'n of Am.*, 351 F.3d at 1233.

¹¹⁵ CRONIN & WEIKERS, *supra* note 99.

¹¹⁶ *Id.*

the ISP stores infringing material on its own servers; not in circumstance when the ISP acts “only as a conduit for data transferred between two internet users, such as ... sharing P2P files.”¹¹⁷ While Verizon argued that the RIAA could not gain this information under statutory and constitutional grounds, the court did not reach the constitutional question and used only statutory interpretation to reach its decision.¹¹⁸

Two decisions in 2005 – one by the Eighth Circuit and another in a federal district court – adhered to the 2003 decision by the D.C. Circuit.¹¹⁹ In both cases, the rulings seem to prohibit alleged infringement victims such as the RIAA from using §512(h) as a means of obtaining the identity of people who use P2P software to download copyrighted material.¹²⁰ The question left open in the decisions asks whether §512(h) is a “constitutionally permissible means of obtaining the identity of alleged infringers when an ISP *does* store copyrighted material on its servers.”¹²¹ These decisions also moved the RIAA to its current strategy of filing “Doe suits” against named defendants.¹²² The success

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Recording Indus. Ass’n v. Charter Communs., Inc (*In re Charter Communs., Inc.*), 393 F.3d 771 (8th Cir. 2005), *reh’g* and *reh’g en banc denied*, (Apr. 6, 2005); CRONIN & WEIKERS, *supra* note 99, at n. 37 (“mirroring D.C. Circuit’s *Verizon* reasoning in holding that RIAA may not use § 512(h) subpoenas to get information from ISPs acting as mere conduits for infringing material”); Recording Indus. Ass’n of Am. V. Univ. of N.C. at Chapel Hill, 367 F. Supp. 2d 945 (D.N.C. 2005) (ruling that § 512(h) subpoenas may not be issued against university that does not store infringing material).

¹²⁰ CRONIN & WEIKERS, *supra* note 99.

¹²¹ *Id.*

¹²² *Id.* (referring to lawsuits as Doe suits because the RIAA or a similar “plaintiff can, using the alleged infringer’s IP address, subpoena the individual’s identity from the ISP responsible for that IP address.”)

of these suits turns on identifying “P2P users accessing the internet using commercial ISPs and through their college campus internet connections.”¹²³

VIII. Squaring *RIAA v. Verizon* with the 2005 Verizon-Disney Content Deal

Though it is a direct competitor to the established cable and satellite industries, the television service Verizon offers through FiOS will not drastically differ from that already available to a Time Warner, Cox or DirecTV subscriber. As it expands its pay television service, though, Verizon must strike deals with content-makers; the entertainment companies and already established channels that provide content to cable and satellite providers.

In September of 2005, Verizon and The Walt Disney Company announced a first-of-its-kind deal for the television industry.¹²⁴ In order to carry Disney programming, Verizon will send a warning to Internet users suspected of pirating Disney on its broadband services.¹²⁵ According to a press release announcing the agreement, “Verizon and Disney...agreed to cooperate, consistent with the U.S. Digital Millennium Copyright Act, to help curb infringement of Disney’s copyrighted works over the Internet while at the same time appropriately safeguarding the privacy of Verizon Internet service subscribers.”¹²⁶ It further includes an agreement whereby:

Verizon would forward and track notices to its subscribers allegedly engaged in unauthorized distribution of Disney’s copyrighted works, without identifying the subscribers to Disney, and either provide subscriber identifying information pursuant to lawfully served subpoenas or terminate Verizon Internet service

¹²³ *Id.*

¹²⁴ Dionne Searcey and Merissa Marr, *Verizon to Police Web Customers To Protect Disney From Piracy*, WALL ST. J. , Sept. 22, 2005, at D4.

¹²⁵ *Id.*

¹²⁶ Verizon and The Walt Disney Company Sign Long-Term Programming Agreement, *supra* note 3.

provided to subscribers who have infringed Disney copyrights and received multiple notices.¹²⁷

In the face of the D.C. Circuit’s 2003 ruling in *RIAA v. Verizon*, some have questioned whether the deal “could undercut” the decision requiring content owners to sue individuals for copyright piracy before service providers terminated service to alleged infringers.¹²⁸ In that case, the court sustained the due process protections for the way in which service termination takes place; yet in the new deal, Verizon has the ability – and now indeed the duty – to terminate service upon suspecting copyright infringement from one of its users. Indeed, in the 2003 litigation Verizon fought to keep the music industry from gaining access to customer data without first filing a lawsuit.¹²⁹

Further, a Disney Company, Walt Disney Records belongs to the membership of the RIAA thus calling into question whether the latest agreement undermines the 2003 ruling. Additionally, whether the ruling applies to this latest service or whether Verizon and Disney have found their way around litigating against each other depends on what happens after Verizon terminates service at the suspicion of infringement.

Because the agreement between Verizon and Disney appears to give significant weight to the DMCA, it may appear that §512(h), the subpoena provision, has received a new lease on life. However, since the private agreement essentially allows Verizon to terminate service when Disney falls victim to alleged copyright infringement, or after a lawfully served subpoena, the agreement would survive due process scrutiny.

Additionally, the Verizon-Disney agreement removes the ISP as an impediment to seeking

¹²⁷ *Id.*

¹²⁸ Clark, *supra* note 4.

¹²⁹ Anderson, *supra* note 96.

damages from alleged infringers. Further, the agreement does not harmfully undercut the due process protections sustained by the D.C. Circuit in 2003, since alleged infringers will receive repeated notice prior to the termination of service.

Each time a consumer signs on to a new service, downloads a piece of software or buys a new product, he or she will more often than not come across some sort of a notice or an agreement. The very important but frequently ignored and overlooked fine print can serve to spell-out the rights that one acquires with the new product; it can also serve to put one on notice – that improper use could result in an undesirable consequence. When a customer signs up for FiOS service, Verizon supplies a “FiOS TV Subscriber Privacy Notice.”¹³⁰ The purpose of the notice is to advise subscribers on what Verizon may or may not do with regard to “personally identifiable information” it collects on subscribers.¹³¹

For Verizon the agreement may help it reach more deals of the sort with content providers seeking ways to prevent the unauthorized piracy of their products. For content providers, the agreement constitutes an efficient means of preventing the theft of copyrights outside of the realm of potential litigation with the ISP. However, it does call into question the practices Verizon uses when ensuring that data on customers reaches the levels of privacy protections which it promises.

The efficacy of the agreement also depends on the extent to which Verizon coöperates with content providers when it provides usage information that indicates infringement. In policing usage among its customers, Verizon has the ability to collect

¹³⁰ Privacy and Customer Security Policies – FiOs TV Subscriber Privacy Notice, *available at* <http://www22.verizon.com/about/privacy/fiosprivacy/> (last visited Feb. 8, 2007) (According to the agreement, Verizon amended it on September 20, 2005; a day after its agreement with The Walt Disney Company).

¹³¹ *Id.*

information on the “services you subscribe to and your navigation through those services and the purchases you make over the system, and the types and number of devices you use to connect to the system.”¹³² It is unclear whether the success of the agreement depends upon what Verizon does with that data; whether it keeps the data internal as its “General Privacy Principles” document demands or whether it lets some of it get to Disney so they can act to curb alleged infringement.

While Verizon seems committed to protecting the privacy of its customers, the technology it deploys with the FiOS TV service may indeed create an atmosphere that fosters duplication or sharing of copyrighted material. In launching FiOS, Verizon contracted with Motorola to provide the set-top conversion boxes which customers use to get service. The set-tops include “built-in home media networking capabilities...capable of transporting high-definition video, high-quality digital voice, and high speed data to televisions, DVR, game consoles, wireless access points and home computers.”¹³³ While the advantages of the new Motorola box gives users unparalleled flexibility in how they receive and view content, it also appears to give users the ability to move content around in ways which might make content providers leery.

IX. Conclusion

Even though it might appear that Verizon has yielded to the desires of the content providers by teaming up with them to halt copyright infringing, the 2003 decision by the D.C. circuit is not undercut by the Verizon-Disney deal. While the terms of the agreement

¹³² *Id.*

¹³³ Motorola Media Center – Press Releases, Motorola Introduces First All-Digital Set-Top Family With Built-In Home Media Networking Capabilities, *available at* http://www.motorola.com/mediacenter/news/detail.jsp?globalObjectId=6257_6212_23 (last visited Feb. 8, 2007).

between Verizon and Disney would allow Verizon to terminate its FiOS service to customers who infringe on Disney's copyright without first – in some instances – subpoenaing them, the agreement would not facially undercut the 2003 due process decision by the Court of Appeals for the D.C. Circuit because the terms of the Verizon-Disney agreement call for termination of service only after infringers receive multiple notices, or “lawfully served subpoenas.”¹³⁴

¹³⁴ Verizon and The Walt Disney Company Sign Long-Term Programming Agreement, *supra* note 3.