

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

AMERICAN CHEMICAL )  
SOCIETY, )  
 )  
Plaintiff, )  
 )  
v. ) Civil Action No. 1:17cv0726 (LMB)  
 )  
 )  
SCI-HUB HUB d/b/a WWW.SCI- )  
HUB.CC, JOHN DOES 1-99, )  
 )  
Defendants. )  
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**BRIEF OF CCIA AS *AMICUS CURIAE* IN SUPPORT OF OBJECTIONS TO  
MAGISTRATE JUDGE’S PROPOSED FINDINGS OF FACT AND  
RECOMMENDATIONS**

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## INTRODUCTION

Pursuant to a default judgment, Plaintiff in this case is seeking a sweeping injunction that purports to bind all “those in privity with Defendants and those with notice of the injunction, including any Internet search engines, web hosting and Internet service providers” (hereafter, “Neutral Service Providers”) and require them to “cease facilitating access to any or all domain names and websites through which Defendants engage in unlawful access to, use, reproduction, and distribution of the ACS Marks or ACS’s Copyrighted Works.” That is so even though no Neutral Service Provider is a party to this action, and even though Plaintiff has offered no evidence (or indeed made any allegation) that any such nonparty has violated any legal obligation, much less infringed Plaintiff’s copyrights or provided assistance to any of the Defendants aimed at helping them do so.

This portion of the proposed injunction is impermissible. It oversteps the bounds of Fed. R. Civ. P. 65, which strictly limits the circumstances under which nonparties may be enjoined. And even if Plaintiff had named these service providers as defendants and somehow obtained judgments against them, the Digital Millennium Copyright Act (DMCA) would still bar the relief that Plaintiff seeks. For these reasons, the Computer & Communications Industry Association (“CCIA”) submits this brief as *amicus curiae* to respectfully urge the Court to reject the Magistrate Judge Anderson’s recommendation, Dkt. No. 22, at 12, 14-15, insofar as it would extend a permanent injunction in this case to Neutral Service Providers.

## INTERESTS OF THE AMICI

CCIA is an industry association representing more than 20 large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that provide online services to billions of people around the world. A list of CCIA members, including a number of Neutral Service Providers that could be swept up in the proposed injunction in this case, is available at <https://www.ccianet.org/members>.

CCIA and its members recognize the importance of combating copyright infringement online, and work closely with copyright owners against rogue sites that distribute infringing material. At the same time, however, CCIA has a compelling interest in ensuring the rules limiting injunctions against online services are scrupulously followed, particularly in cases where those services are not parties. Here, Plaintiff is seeking—and the Magistrate Judge has recommended—a permanent injunction that would sweep in various Neutral Service Providers, despite their having violated no laws and having no connection to this case. If that recommendation is approved, CCIA’s members may be compelled to purge or block information—and indeed entire websites and Internet domains—from their services and could face contempt proceedings if they decline. Such a result would disregard the established limits on judicial power established in Rule 65 and the balance struck by Congress in the DMCA. These protections cannot be swept aside so readily. Plaintiff does not need, and should not be allowed, to “[c]ut a great road through the law to get after the Devil.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978) (quoting Robert Bolt, *A Man For All Seasons*).

## **ARGUMENT**

### **I. FRCP 65 Does Not Allow An Injunction Against Nonparty Neutral Service Providers Or Similar Online Services**

As nonparties to this case, Neutral Service Providers cannot be bound by an injunction unless they are shown to be working “in active concert or participation” with Defendants. Fed. R. Civ. P. 65(d)(2)(C). This strict standard requires clear evidence that the nonparty is directly working to help the defendant evade an injunction. Here, however, Plaintiff has not even tried to make that showing, and the Magistrate Judge made no such finding regarding the Neutral Service Providers. That alone rules out any application of the permanent injunction to those nonparties.

#### **A. “Active Concert or Participation” Is Required To Bind A Nonparty**

It is a basic rule of due process that “one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by

service of process.” *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). As the Second Circuit has explained, a court is “not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.” *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930) (Hand, J.). Thus, the “only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party.” *Id.* at 833.

Rule 65 of the Federal Rules of Civil Procedure codifies this “well-established principle that, in exercising its equitable powers, a court ‘cannot lawfully enjoin the world at large.’” *New York v. Operation Rescue Nat’l*, 80 F.3d 64, 70 (2d Cir. 1996) (quoting *Alemite Mfg.*, 42 F.2d at 832); *see also, e.g., United States v. Regan*, 858 F.2d 115, 120 (2d Cir. 1988) (“a court generally may not issue an order against a nonparty”); *Haizlip v. Alston*, 1:14CV770, 2015 WL 8668230, at \*1 (M.D.N.C. Dec. 11, 2015) (“A non-party cannot be bound by the terms of an injunction unless the non-party is found to be acting in active concert or participation with the party against whom injunctive relief is sought.”). The Rule mandates that an injunction can bind only a limited universe of people: (1) the parties; (2) their “officers, agents, servants, employees, and attorneys”; or (3) those in “active concert or participation” with them. Fed. R. Civ. P. 65(d)(2); *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969) (“a nonparty with notice cannot be held in contempt until shown to be in concert or participation”); *see also Little v. Associated Tech. Training Services, Inc.*, 12 F.3d 205 (4th Cir. 1993) (“a court must legally identify the participant with the named party before enjoining both persons.”).

The “active concert or participation” standard is deliberately narrow. Its purpose is simply to ensure that “defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors.” *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945); *accord Alemite Mfg.*, 42 F.2d at 833 (“it is not the act described which the decree may forbid, but only that act *when the defendant does it*”) (emphasis added). The relationship between the party and the nonparty must be “that of associate or confederate.” *Chase Nat’l Bank v. City of Norwalk*,

291 U.S. 431, 436-37 (1934); *see also* *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 43 (1st Cir. 2000) (“active concert” requires a “close alliance with the enjoined defendant”). That ensures that “[a] nonparty who has acted independently of the enjoined defendant will not be bound by the injunction.” *Microsystems Software*, 226 F.3d at 43.

B. *Amici and Other Service Providers Cannot Be Enjoined Because They Are Not In Active Concert With Defendants*

Plaintiff’s proposed injunction includes some language that incorporates Rule 65’s limitations. Dkt. 22, at 12 (injunction would apply to Defendant “together with its officers, directors, principals, agents, servants, employees, successors and assigns, and all those in active concert or participation with them”). The provision of the injunction that applies to Neutral Service Providers, in contrast, pointedly lacks any mention of a limitation to those who “are in active concert or participation” with the Defendants. *Id.* at 12. This sweeps beyond the limits of Rule 65. The Neutral Service Providers are not parties in this action, and Plaintiff makes no showing that any such Providers have or are likely to aid and abet any of the Defendants in circumventing an injunction issued in this case.

Plaintiff offers no evidence that any of these intermediaries have done anything that would satisfy Rule 65(d)(2)(C). The complaint in this case includes no such allegations, and Plaintiff submitted no evidence in support of its motion for a default judgment. The Magistrate Judge’s recommendation does not purport to make any such finding. In the absence of such evidence—which in order to satisfy due process would have to be presented in a proceeding where those entities were given an opportunity to be heard (*see generally* *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950))—this Court cannot enter an order that purports to bind them. *See, e.g., Zenith Radio*, 395 U.S. at 112 (“It was error to enter the injunction against Hazeltine, without having made [the ‘active concert or participation’] determination in a proceeding to which Hazeltine was a party.”); *Bobolas v. Does*, 2010 U.S. Dist. LEXIS 110856, at \*6-7 (D. Ariz. Aug. 1, 2010) (“Plaintiff’s counsel argued that GoDaddy is an agent of Defendants given its role as website host and domain name registrar, but Plaintiff



has made no such allegation in the complaint and provides no factual or legal proof on this point in its papers. As a result, the Court cannot enter a TRO against GoDaddy.”).

Beyond this procedural problem is a more fundamental substantive one. The intermediaries at issue here are not sufficiently connected to Defendants’ alleged illegality to be subject to the Court’s injunctive power. Consider, for example, the search engines that are targeted by the proposed injunction. These services catalogue an enormous array of material from all over the Internet in order to return results that they believe are most responsive to their users’ search queries. *See generally Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1155 (9th Cir. 2007). Even assuming that links to Defendants’ websites or other information about their activities are sometimes included in those results, that would not remotely suggest that the search engines are “confederates” of the Defendants, “aiders and abettors,” or are working together with them to violate the law. Indeed, search engines provide search results to their billions of users independently of anything Defendants do. Including Defendants’ website among the hundreds of millions that a search engine indexes cannot make the search engine a “participant” in Defendants’ alleged illegality, any more than a mapmaker can be said to “participate” by including Defendants’ physical address on a map. *See, e.g., Paramount Pictures Corp. v. Carol Publ’g Grp.*, 25 F. Supp. 2d 372 (S.D.N.Y. 1998) (book retailers not “in active concert” with infringing publisher by selling previously purchased copies of infringing book).

*Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010), is instructive. In that case, the Seventh Circuit held that the operators of a nonparty website (Ripoff Report) could not be bound by an injunction against users of its service who posted defamatory comments about the plaintiffs. The court reached that conclusion even though Ripoff Report had a contractual agreement with the defendants governing their use of the site and even though Ripoff Report continued to provide service to the defendants after the injunction issued. *Id.* at 567-68. The court explained that Ripoff Report’s actions simply did not amount to “active concert or participation” under Rule 65. *Id.* at 569-70 (“Rule 65(d)(2)(C) is not broad enough to bind [the website operators] to the terms of this injunction in light of their inactivity.”).

The Neutral Service Providers here are several steps further removed from Defendants than Ripoff Report was from its users in *Blockowicz*. Plaintiff has failed to make a showing that *any* such provider had a contract with these Defendants or any direct contact with their activities—much less that *all* of the providers who would be swept up by the proposed injunction had such a connection. And even if they did, as *Blockowicz* makes clear, that would not be enough to bind them as nonparties to an injunction. Likewise, the mere fact that one or more of the Neutral Service Providers might have the capacity to impede access to Defendants’ websites is not enough. As a matter of law, the fact that a service provider “is technologically capable of removing the postings does not render its failure to do so aiding and abetting.” *Id.* at 568. “Rule 65 (d)(2)(C) is not the appropriate mechanism for achieving the removal of the defendants’ posts.” *Id.* at 569.

An injunction cannot apply to “independent action taken by nonparties on their own behalf.” *Carol Publ’g*, 25 F. Supp. 2d at 375. That is the situation here. Under Rule 65, *amici* and other online services operating independently from Defendants must be excluded from any injunction in this case.

## **II. Plaintiff Cannot Circumvent The DMCA By Seeking Broad Ex Parte Injunctive Relief Against Search Engines And Similar Services**

Plaintiff’s bid for a sweeping injunction against nonparty intermediaries also runs headlong into the DMCA safe harbors. The DMCA imposes strict limits on the injunctions that can be issued against online service providers—even *after they have been found liable for copyright infringement*. The DMCA expresses Congress’s intent that concerns about infringement on the Internet be resolved through the statutory mechanisms established by Congress, coupled with voluntary cooperation between service providers and copyright owners. Plaintiff’s approach here would end-run that legislative scheme. Indeed, Plaintiff is seeking an injunction against online service providers as nonparties that would be barred by the DMCA against those same service providers had they been adjudicated as culpable defendants. For this reason as well, the proposed injunction goes too far.

A. The DMCA Protects Online Service Providers Against Copyright Liability and Strictly Limits The Injunctions That Can Be Imposed

The DMCA was enacted in 1998 to “update domestic copyright law for the digital age.” *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26-27 (2d Cir. 2012). A key part of that project was to “clarify the liability faced by service providers who transmit potentially infringing material over their networks.” *Id.* at 27 (quoting S. REP. NO. 105-190, at 2 (1998)). Congress recognized that “in the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability.” S. REP. NO. 105-190, at 8. By limiting providers’ “legal exposure for infringements that may occur in the course of their activities” (*Amazon*, 508 F.3d at 1158), the “DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.” S. REP. NO. 105-190, at 8; *see also CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 552 (4th Cir. 2004) (“[T]he DMCA was designed to provide ISPs with a safe harbor from copyright liability”).

To that end, Congress created a series of “safe harbors for certain common activities of service providers.” *Id.* at 19. The safe harbors “allow qualifying service providers to limit their liability for claims of copyright infringement based on (a) ‘transitory digital network communications,’ (b) ‘system caching,’ (c) ‘information residing on systems or networks at [the] direction of users,’ and (d) ‘information location tools.’” *Viacom*, 676 F.3d at 27 (quoting 17 U.S.C. § 512(a)-(d)). The DMCA safe harbors offer far-reaching protection: “A service provider that qualifies for such protection is not liable for monetary relief and may be subject only to the narrow injunctive relief set forth in section 512(j).” *Amazon*, 508 F.3d at 1158; *see also* S. REP. NO. 105-190, at 52-53 (section 512(j) expressly “limits the scope of injunctive relief that may be ordered against a qualifying provider”); *In re Subpoena To Univ. of N. Carolina at Chapel Hill*, 367 F. Supp. 2d 945, 948 (M.D.N.C. 2005) (“even if a plaintiff can show that a safe harbor-eligible service provider has violated her copyright, the plaintiff will only be entitled to the limited injunctive relief set forth in 17 U.S.C. §§ 512(j)”).

This means that *even if a qualifying online service provider is itself found liable for copyright infringement*, the only remedies available to the plaintiff are those permitted by the DMCA. S. REP. NO. 105-190, at 40 (explaining that the DMCA’s “limitations on liability apply if the provider is found to be liable under existing principles of law”). A service provider does not need a safe harbor from remedies if it has not violated the law—in that case, no remedies would be available at all. The DMCA thus puts bedrock limits on the injunctions that can be imposed on qualifying providers (such as the Neutral Service Providers here) if they are named as defendants and are held liable as infringers. *See CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004) (“Congress intended the DMCA’s safe harbor for ISPs to be a floor, not a ceiling, of protection.”).<sup>1</sup> Plaintiff here ignores that. What ACS seeks, in the posture of a permanent injunction against nonparties, goes beyond what Congress was willing to permit, even against service providers against whom an actual judgment of infringement has been entered. That request must be rejected.

The DMCA provides that a “court may grant injunctive relief with respect to a service provider *only* in one or more” of the forms set out in the statute. 17 U.S.C. § 512(j)(1) (emphasis added). That ensures that any injunction issued against a service provider covered by the Section 512(b), (c), or (d) safe harbors focuses narrowly on “material or activity residing at a particular online site” (§512(j)(1)(A)(i)), and is the “least burdensome to the service provider among the forms of relief comparably effective for that purpose” (§512(j)(1)(A)(iii)). For providers covered by Section 512(a), which include those who transmit material over the Internet or provide connections to websites, Congress imposed even more stringent limits. §512(j)(1)(B). Any order directed at such providers in a case involving a foreign website must specify “reasonable steps”

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<sup>1</sup> Likewise, the DMCA’s provisions limiting injunctive relief supplement the ordinary rules governing injunctions. *See* S. REP. NO. 105-190, at 52 (section 512(j) “defines the terms and conditions under which an injunction may be issued against a service provider” that is “otherwise subject to an injunction under existing principles of law”). They thus provide an additional set of procedural and substantive protections to service providers beyond, for example, the limits imposed by Fed. R. Civ. P. 65.

for the provider to take to block access “to a *specific, identified*, online location outside the United States.” §512(j)(1)(B)(ii) (emphasis added).

In order to further protect the interests and operations of service providers, Section 512(j)(2) “identifies factors a court *must consider* in deciding whether to grant injunctive relief and in determining the appropriate scope of injunctive relief.” S. REP. NO. 105-190, at 53 (emphasis added). Those include:

- “whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider’s system or network” (§512(j)(2)(A));
- “whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available” (§512(j)(2)(D)).

Beyond all that, subsection (j) includes a vital procedural protection: “injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided.” §512(j)(3). This provision “prohibits most forms of ex parte injunctive relief (including temporary and preliminary relief) against a service provider qualifying for a liability limitation under section 512.” S. REP. NO. 105-190, at 53.

B. Plaintiff’s Requested Injunction Would Be Improper Even If The Neutral Service Providers Were Culpable Defendants

All of these limitations apply to any injunction targeting the Neutral Service Providers (assuming they could be found to be culpable defendants, which they cannot), because each of them performs various functions covered by Section 512 and is therefore a “service provider” that qualifies for the protections of the DMCA safe harbors. 17 U.S.C. § 512(k)(1); *accord Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 744 (S.D.N.Y. 2012) (“The DMCA’s definition of ‘service provider’ is intended to encompass a broad set of Internet entities.”); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004) (same). Search engines provide “information location tools” that are protected by the Section 512(d) safe harbor. S. REP. NO. 105-190, at 47 (“The term information location tools includes, for example: a

directory or index of online sites or material such as a search engine that identifies pages by specified criteria....”). “Web hosting and internet service providers” store material uploaded by users (covered by the Section 512(c) safe harbor) and/or transmit information across their networks (covered by the Section 512(a) safe harbor). *See id.* at 43 (examples of online “storage” covered by 512(c) include “providing server space for a user’s web site”); *id.* at 41 (Section 512(a) applies to “communications functions associated with sending digital communications of others across digital networks, such as the Internet and other online networks”).

Accordingly, if the Neutral Service Providers had been named as defendants— and had been found liable for copyright infringement for linking to, hosting, or transmitting infringing material from Defendants’ websites—any injunction issued against those service providers would be subject to the requirements of 17 U.S.C. § 512(j). But Plaintiff here has not named any Neutral Service Provider as a defendant. It has come forward with no allegations or evidence suggesting that any Neutral Service Provider is secondarily liable for any copyright infringements occurring on the Defendants’ websites. Nevertheless, Plaintiff now seeks an injunction that purports to bind “any” Neutral Service Provider as a nonparty upon after-the-fact notice of the injunction. That is not permissible: under the DMCA, any such injunction is required to focus on particular content or a specified, identified location, would need to have been shown to be the least burdensome relief available, and could only be issued following proper consideration of the factors set out in the bullets above. Plaintiff’s proposed order ignores these requirements, leading to the potentially absurd result of copyright plaintiffs obtaining injunctions against online service providers *as nonparties* that would have been barred by the DMCA against those same service providers had they been adjudicated as *culpable defendants*. Endorsing that result would do unacceptable violence to the balanced statutory scheme set out by Congress in the DMCA.<sup>2</sup>

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<sup>2</sup> Respecting the DMCA does not leave Plaintiff without recourse. Not only might it get an injunction against Defendants themselves, Plaintiff can use the DMCA’s notice-and-takedown  
(continued...)

### III. The Proposed Order’s Reference To “Privity” is Ambiguous and Overbroad

These problems are not solved by the proposed language limiting the injunction to those “in privity with Sci-Hub.” Dkt. No. 22, at 12. This purported limitation is profoundly ambiguous, and as such it fails to give proper notice as to which nonparties might be caught by the injunction. Even beyond its ambiguity (itself a serious due process problem), the formulation is improper no matter how it is interpreted: if “privity” is simply supposed to be coextensive with Rule 65’s “active concert or participation” standard, the request is unnecessary (and cannot apply to the Neutral Service providers who are listed as its targets for all the reasons discussed above); conversely, if the “privity” concept is meant to impose obligations on nonparties who would not otherwise be covered by Rule 65, that request is plainly overbroad and impermissible.

#### A. The Proposed Order Fails to Give Fair Notice to Its Targets

In contrast to the more precise language of Rule 65, “privity” is a vague term encompassing a wide variety of potential legal relationships. Crucially, such relationships do not necessarily bear any connection to the infringing conduct that Plaintiff seeks to enjoin in this case. For example, any party that provides a product or service governed by a contractual agreement—including a software license, email services, online content hosting, or providing internet access, all of which are routinely covered by standardized agreements between the service provider and its users – could theoretically be said to be “in privity” with the its user

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 regime to alert service providers to Defendants’ allegedly infringing material. The statute creates a streamlined, non-judicial process for removing suspected infringing material from online services and search engines. Copyright owners provide service providers with specified information (under penalty of perjury) about particular infringing material on their systems (§512(c)(3)) or search results (§512(d)(3)). In response, the service provider will “expeditiously” remove the identified material. §§ 512(c)(1)(C), 512(d)(3). The “DMCA notification regime works efficiently,” *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 524 (S.D.N.Y. 2010), *aff’d in part & vacated in part*, 676 F.3d 19 (2d Cir. 2012), giving clarity to service providers and copyright owners while setting the stage for voluntary cooperation between them. By putting this process at the heart of the DMCA, Congress indicated its preference that service providers and copyright owners work together outside the formal legal process.

under the common-law definition of that term. *See, e.g., Blacks Law Dictionary, Rev'd* (4th ed 1976) (privity is “that connection or relationship which exists between two or more contracting parties”); *RML Corp. v. Lincoln Window Products, Inc.*, 2004 WL 3568223 (Va. Circuit Ct. Dec. 3, 2004) (same). But that would not remotely suggest that such a service provider would be in “active concert or participation” with its users in the way required by Rule 65. An email service, for example, would not become a co-conspirator in copyright infringement merely by continuing to allow the Defendant to send and receive corporate emails. The use of the term “privity” in the proposed order thus threatens to impermissibly sweep in a wide range of activity by Neutral Service Providers.

That problem is exacerbated by the fact that many Neutral Service Providers offer a wide variety of services, only some of which are contractual. Yet the proposed order, read literally, could suggest that if any service provider happens to be “in privity” with any of the Defendants (in the broad sense of that term), it could be bound by the injunction even in ways that have nothing to do with that service. For example, if a Defendant happens to have a license to use Windows 10 software or a LinkedIn profile (both of which are governed by a standard-form agreement with Microsoft), the Proposed Order could be read to require Microsoft to purge Defendant’s websites from its Bing search engine. Additional problems arise because many of the contractual services offered by Neutral Service Providers are open to any member of the public. Such providers only have limited information about who their actual users are, making it very difficult for them to know even whether they might be deemed “in privity” with a particular person. Neither Rule 65 nor due process allows injunctions to be so vague about who they cover. *Accord Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (“Rule [65] was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.”).

B. “Privity” Can Only Bind Nonparties Who Are Alter-Egos of Defendants



In light of these considerations, the only circumstance where a nonparty can be bound to an injunction on the basis of “privity” is where that nonparty has such a close legal relationship with an actual party that the party effectively represented the interests of the nonparty in the proceeding. *See Regal Knitware*, 324 U.S. at 14. “When privity is invoked as a basis for binding a nonparty to an injunction, it is ‘restricted to persons so identified in interest with those named in the decree that it would be reasonable to conclude that their rights and interests have been represented and adjudicated in the original injunction proceeding.’” *Nat’l Spiritual Assembly*, 628 F.3d at 849 (citation omitted); *accord Microsystems Software*, 226 F.3d at 43; *see also Weinberger v. Tucker*, 510 F.3d 486, 491 (4th Cir. 2007) (“Under both Fourth Circuit and Virginia decisions, the test for privity is [ ] the same: whether the interests of one party are so identified with the interests of another that representation by one party is representation of the other's legal right.”).

If this is what the proposed injunction means by “in privity,” however, it still provides no basis for enjoining any Neutral Service Provider. Plaintiff has made no allegation, much less offered any evidence, that any search engine, web hosting service, or internet service provider has any kind of legal relationship with the Defendants, much less is their agent, servant, employee, or legal alter ego. Nor could they. Someone who uses an online service—even if the exchange involves a contract—does not thereby establish a representational relationship with the service provider or gain the ability to bind the provider in legal proceedings. As such, “privity” is not an appropriate basis for sweeping Neutral Service Providers into any injunction in this case. It is also unnecessary, as Rule 65 already provides that a nonparty with actual notice of an injunction can be enjoined if it is in “active concert or participation” with the Defendants. Given that, to include the term “privity” in any permanent injunction, as the Magistrate Judge has recommended, would only add confusion, creating uncertainty about who is bound and threatening the established rights of a wide range of Neutral Service Providers.

## CONCLUSION

For these reasons, CCIA asks this Court to reject the Magistrate Judge's recommendation insofar as it would extend an injunction in this case to Neutral Service Providers. CCIA further respectfully requests that the Court not only strike that language from the proposed injunction, but also issue a ruling making clear that due process, Rule 65, and the DMCA, do not allow an injunction against online service providers in circumstances such as these.

Dated: October 12, 2017

Respectfully submitted,

s/ Veronica Ascarrunz

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**CERTIFICATE OF SERVICE**

I certify that on October 12, 2017, I will electronically file the **Brief of CCIA as *Amicus Curiae* in Support of Objections to Magistrate Judge's Proposed Findings of Fact and Recommendations** with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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