IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

IN RE: CHARTER COMMUNICATIONS, INC. Subpoena Enforcement Matter	)	
RECORDING INDUSTRY ASSOCIATION OF AMERICA 1330 Connecticut Avenue, N.W., Ste. 300 Washington, D.C. 20001 v. CHARTER COMMUNICATIONS, INC. 12405 Powerscourt Drive, Suite 100 St. Louis, MO 63131	)	Miscellaneous Action Case No. 4:03MC00273CEJ

CHARTER COMMUNICATIONS' MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA SERVED BY RECORDING INDUSTRY ASSOCIATION OF AMERICA

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I. INTRODUCTION

Charter Communications, Inc. ("Charter") respectfully submits this Memorandum in Support of its Motion To Quash the Subpoena Served by the Record Industry Association of America ("RIAA"). [*See* Exh. 1 hereto (Subpoena served September 23, 2003 ("the Subpoena"))] This Subpoena requests Charter to disclose the names, addresses, telephone numbers, and e-mail addresses of up to 93 different subscribers of Charter's Pipeline® Internet service. As a provider of cable internet services, however, Charter is precluded under federal law from divulging this confidential information except in response to a valid court order.[1]

Although the RIAA has taken the position that the instant Subpoena satisfies that condition, in fact the Subpoena suffers from many deficiencies and therefore cannot be a valid court order. In particular, the Subpoena violates Federal Rule of Civil Procedure 45(c) by failing to provide Charter sufficient time for compliance, such that Charter has adequate time both to notify each of its affected subscribers and to gather the requested information. It also violates Rule 45 by failing to protect Charter from undue burden and expense. The Subpoena also fails to fully comply with the requirements of the Digital Millennium Copyright Act ("DMCA"), under which it is purportedly issued.[2] For example, it fails to identify the alleged acts of infringement, it improperly combines a request for information about 93 different IP addresses into a single, omnibus subpoena, and it seeks private subscriber information beyond the scope of the DMCA. For these reasons, the Subpoena should be deemed improper and should be quashed.

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[1] *See* Cable Communications Act of 1984, 47 U.S.C. § 551 ("CCA"). As discussed further *infra*, the CCA precludes a cable service provide like Charter from disclosing any "personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned." 47 U.S.C. § 551 (c)(1) (emphasis added). The CCA provides an exception if the disclosure is ordered by a court. 47 U.S.C. at § 551(c)(2)(B).

[2] The relevant provision is Section 512(h), 17 U.S.C. § 512(h).

II. BACKGROUND

Charter's Motion arises from the RIAA's highly publicized nationwide campaign to curb Internet "file-sharing" by use of the subpoena provisions of the DMCA.[3] The Subpoena is only one of thousands generated by the RIAA's automated "subpoena mill," which uses robot-like software to track down Internet Protocol ("IP") addresses of persons suspected to be engaged in "file-sharing." The RIAA asserts that file-sharing violates the copyrights of its members because music files are copied and distributed without authorization. After the RIAA's robots have identified an IP address supposedly associated with file-sharing, the RIAA proceeds to issue a subpoena to the Internet service provider that assigned the IP address, demanding immediate disclosure of detailed and sensitive personal information concerning the subscriber behind the IP address. Though in the nascent stages of its ever-escalating war on file-sharing, the RIAA has already demanded from Charter information pertaining to nearly 150 IP addresses,[4] and the RIAA continues to flood Charter with repeated waves of new subpoenas issued several times each week. Despite the fact that Charter merely provides Internet access to its cable Internet subscribers, has absolutely no involvement with the alleged illegal file-sharing, and does not store any of the shared files on its network, the RIAA's flood of subpoenas threatens to make Charter a casualty of the RIAA's self-proclaimed war. The RIAA's public threats of filing "thousands" of lawsuits suggest that these already unreasonable demands will only increase.

In the universe of copyright holders, only the RIAA has chosen to use DMCA subpoenas in an effort to obtain information on alleged infringers. As such, the law in this area is still

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[3] *See In re Verizon Internet Services, Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003) ("Verizon I"); *In re Verizon Internet Services, Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003) ("*Verizon II*"); *In re Subpoena to SBC Internet Communications, Inc.*, action pending as 03-MC-1220 (D.D.C. 2003).

[4] The Subpoena at issue lists 93 IP addresses; Charter has since received an additional 54 subpoenas, each requesting information as to a single IP address. Charter has objected to each of these subpoenas on similar grounds as raised herein, and requests that the Court hear Charter's objections to all subpoenas on a consolidated basis.

evolving. For example, it is far from clear whether the DMCA is even a proper mechanism for the RIAA's crusade. Indeed, the constitutionality of the RIAA's attempted use of DMCA subpoenas against "passive" Internet service providers, like Charter, has been raised by Verizon Internet Services, Inc., and is currently under review by the D.C. Circuit Court of Appeals.[5]

The embryonic state of the law regarding the proper construction of the DMCA does not, however, excuse the bullying tactics employed by the RIAA in its purported copyright enforcement efforts. In particular, the RIAA cavalierly disregarded Charter's due process rights by issuing numerous subpoenas from a D.C. District Court, knowing full well that the D.C. court lacked personal jurisdiction over Charter and other ISPs targeted by the RIAA.[6]

Charter previously received 93 subpoenas issued by the RIAA from the D.C. District Court. Those subpoenas requested the same information about the same IP addresses listed in the present Subpoena. Charter objected to the D.C. subpoenas for lack of personal jurisdiction, among other grounds. [Exh. 2.B] After a district court quashed similar RIAA subpoenas due to improper service,[7] the RIAA purportedly re-served the same subpoenas, albeit not upon Charter, but on a Charter affiliate that happens to do business in Maryland. Because Charter itself maintains no presence in Maryland, it objected based on lack of personal jurisdiction. [Exh. 2.C]

The RIAA has now reissued the 93 D.C. subpoenas from this Court, but in one amorphous, omnibus subpoena. Due to the potential for confusion to the Charter subscribers

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[5] *See Verizon I*, 240 F. Supp. 2d 24 (addressing statutory interpretation questions); *Verizon II*, 257 F. Supp. 2d 244 (addressing constitutional challenges). These matters are now pending before the D.C. Circuit in Docket Nos. 03-7015, -7053, in which the court heard oral argument on September 23, 2003.

[6] *See, e.g., In re Subpoena to SBC Internet Communications, Inc.*, action pending as 03-MC-1220 (D.D.C. 2003) (motion to compel pending; challenged, in part, due to improper service); *Pacific Bell Internet Services v. Recording Industry Association of America*, action pending as C-03-3560 (N.D. Cal., complaint filed July 30, 2003) (declaratory judgment action brought by PBIS challenging constitutionality of RIAA's use of DMCA's subpoena provision).

[7] *Massachusetts Institute of Technology v. Recording Industry Association of America*, No. 1:03-MC-10209-JLT (D. Mass., Aug. 7, 2003) (quashing subpoena for improper service).

whose information is sought by the subpoenas, as well as the possibility for conflicting decisions from different courts on identical subpoenas, Charter requested that the RIAA formally withdraw the superseded "D.C. versions" of the Subpoena now before this Court. The RIAA initially agreed to do so in exchange for Charter's agreement to withdraw its objections to jurisdiction and venue. After Charter upheld its end of the bargain, however, the RIAA reneged on its agreement, and has now, inexplicably, refused to withdraw the superseded D.C. subpoenas unless Charter waives all of its properly asserted objections. [Exh. 2.D] This Charter cannot do, due to the numerous burdens imposed by the defective Subpoena. [Exh. 2.A] The RIAA's heavy-handed tactics and ongoing harassment warrant the intervention of this Court to quash the omnibus Subpoena.

Charter expects the RIAA to recount a "parade of horribles" in an effort to generate emotional appeal about the perils of file-sharing. Charter is sensitive to the RIAA's concerns of copyright infringement; however, they are not at issue in this motion. What is at issue is the RIAA's compliance with the law in issuing this Subpoena. Charter is bound by federal law to respect the privacy rights of its subscribers, and thus must hold the RIAA to the letter of the very law that it now seeks to invoke in its copyright enforcement efforts. Moreover, like the RIAA's members, Charter is a business concern, and as such Charter cannot afford to donate its limited resources to the RIAA's cause without compensation for its reasonable expenses. Because the Subpoena fails to take these issues into account, it violates the law and must be quashed.

III. ARGUMENT AND AUTHORITIES

In this Memorandum, Charter does not re-hash the fundamental arguments and objections now under review by the D.C. Circuit, but instead limits its discussion to the procedural protections afforded by the Federal Rules of Civil Procedure and the DMCA itself, which have

been violated or severely compromised by the instant Subpoena.[8] In particular, the Court should quash the RIAA's Subpoena because:

1) The Subpoena violates Fed. R. Civ. P. 45 by failing to allow Charter a reasonable time to comply and by imposing undue burden; and

2) The Subpoena violates the DMCA by failing to identify the allegedly infringed works, by combining multiple IP addresses in a single subpoena, and by seeking confidential information beyond that necessary to "sufficiently identify" the alleged infringer.

In addition to depriving Charter of fundamental rights, each of these violations undermines the validity of the Subpoena, such that Charter's disclosure of the requested information could subject Charter to liability under the Cable Communications Act of 1984 (the "CCA") for violation of a subscriber's privacy. *See* 47 U.S.C. § 551. In particular, the CCA precludes Charter from disclosing any "personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned." 47 U.S.C. § 551(c)(1) (emphasis added). The CCA provides an exception if the disclosure is ordered by a court. *Id.* at § 551(c)(2)(B). But a procedurally defective subpoena issued unilaterally by the RIAA certainly cannot qualify under this exception.

A. The RIAA's Subpoena Violates the Protective Provisions of Rule 45(c) Because It Fails To Allow A "Reasonable Time" For Compliance and Imposes Undue Burden

This Court should quash the RIAA's Subpoena because it violates the protective provisions of Federal Rule of Civil Procedure 45(c).[9] In particular, the Subpoena fails to allow

[8] Charter has raised those arguments in its Motion To Quash so as to preserve them, *e.g.*, in the event of a favorable ruling from the D.C. Circuit Court of Appeals or any other court addressing such arguments.

[9] Although the Subpoena was not issued in connection with a pending litigation, the applicability of the Federal Rules to this subpoena is not subject to debate. Indeed, the DMCA specifically requires that "the procedure for issuance and delivery" of any subpoena issued pursuant to the DMCA "shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service and

"reasonable time for compliance," as required by Rule 45(c)(3)(A)(i). The Subpoena demands compliance by "10:00 a.m. on the 7th calendar day after service date of Subpoena." [Exh. 1 (emph. added)] Compliance within seven (7) calendar days is neither reasonable nor feasible. Unless Charter has sufficient time to give its subscribers advance notice of compliance, Charter could arguably face liability for a violation of the CCA. *See* 47 U.S.C. § 551. For the same reasons, the Subpoena subjects Charter to undue burden, in violation of Rule 45(c)(3)(A)(iv). These violations of Rule 45 require this Court to either quash the Subpoena, or at least to modify it to remove the undue burden and also to allow Charter sufficient time for compliance and notification to subscribers, as further discussed herein. *See* FED. R. CIV. P. 45(c)(3)(A).

a) The 7-Day Response Period Demanded by the RIAA Contravenes the Default Minimum of 14 Days in Rule 45

Rule 45 contemplates a default compliance period of at least "14 days after service." Fed. R. Civ. P. 45(c)(2)(B) (emphasis added); *see also Donahoo v. Ohio Dept. of Youth Svcs.*, 211 F.R.D. 303 (N.D. Ohio 2002) (noting that Rule 45(c)(2)(B) sets a reasonable time for compliance at 14 days, and holding that a one week compliance period was unreasonable).[10] Although Rule 45 contemplates that compliance could be required in less than the default time of 14 days, courts have observed that attorneys do not enjoy "unfettered discretion to issue a subpoena for production in less than 14 days." *See, e.g., Mann v. Univ. of Cincinnati*, 824 F.

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enforcement of a subpoena duces tecum." 17 U.S.C. § 512(h)(6) (emphasis added). This necessarily includes Rule 45, which specifically governs subpoenas. *See In re Verizon Internet Services, Inc.*, 240 F. Supp. 2d at 44 n.21. The RIAA expressly incorporated the provisions of Rule 45 into the subpoena itself. [*See* Exh. 1]

[10] This 14-day period is an extension from the prior compliance period of only 10 days. This extension was made in 1991 as part of significant changes to Rule 45, which included empowering attorneys to issue subpoenas under their own signature to require recipients to produce documents *ex parte* without having to appear at a deposition. FED. R. CIV. P. 45(a)(1), (3). Acknowledging that providing the attorneys with such power constituted a substantial empowerment of the bar, the Advisory Committee warned: "Necessarily accompanying the evolution of this power of the lawyer as an officer of the court is the development of increased responsibility and liability for the misuse of this power." FED. R. CIV. P. 45, Adv. Cmte. Note to 1991 Amendment. Because attorneys could then issue subpoenas without court review or approval, the previous compliance period of only 10 days was considered to be too short, and hence was extended from 10 days to 14 days "to allow more time for ... objections to be made." *Id.*

Supp. 1190, 1201 n.6 (S.D. Ohio 1993) (magistrate report adopted at 152 F.R.D. 119). Rather, such courts have admonished that an abbreviated response period should be reserved for "exigent circumstances requiring such action in an unusual case." *Id.*

As numerous courts have recognized, a mere week's notice is unreasonable and violates Rule 45(c)(2)(B), especially where no urgency is demonstrated to justify such short notice.[11] Moreover, granting only seven "calendar days" for compliance even further reduces the extremely short compliance period, as such a period will necessarily encompass two weekend days.[12] Notably, even law enforcement agencies that request subscriber identification from Charter to aid in pending criminal investigations allow Charter at least 14 days to respond, except in extreme cases involving an immediate threat to the life or person of another. [Wood Decl., Exh. 3, at ¶¶ 2-3] The RIAA can hardly classify its need for the requested information as involving a threat to life or limb, nor has the RIAA articulated any other exigent circumstances necessitating expedited compliance in this case.

This is not to say that Charter treats notice of copyright violations lightly. Nor is Charter ignoring the provisions of the DMCA, which state that "notwithstanding any other provision of law," service providers that receive DMCA subpoenas must "expeditiously disclose" the information sought in the subpoena. 17 U.S.C. § 12(h)(5). But nothing in the DMCA establishes time boundaries for an "expeditious" disclosure. Because the DMCA incorporates by reference the provisions of the Federal Rules, the presumptive 14-day minimum time period for

[11] *See, e.g., Mann v. Univ. of Cincinnati*, 824 F. Supp. 1190, 1202 (S.D. Ohio 1993) (noting that one week was inadequate to give a reasonable opportunity to object); *Donahoo v. Ohio Dept. of Youth Svcs.*, 211 F.R.D. 303 (N.D. Ohio 2002) (noting that Rule 45(c)(2)(B) sets a reasonable time for compliance at 14 days, and holding that a one week compliance period was unreasonable); *U.S. v. Woods*, 931 F. Supp. 433, 442 n.3 (E.D. Va. 1996) (noting that a compliance period of 7 days from issuance was not reasonable); *Anderson v. Shell Oil Co.*, 1996 U.S. Dist. LEXIS 7497 at *7 (E.D. La. 1996) (finding that 7 days notice was unreasonable, and granting protective order requiring future subpoenas to require more than 7 days notice).

[12] As such, this violates Fed. R. Civ. P. 6(a), which provides that any order requiring allowing fewer than 11 days for compliance will not count intervening weekends or holidays.

compliance set forth in Rule 45(c) should apply as a minimum compliance period, unless the circumstances of a particular case reveal a need for more urgent compliance.

b) The Response Period Demanded by the RIAA Precludes Charter from Providing Advance Notice to Its Subscribers, As Required by the CCA

The RIAA's demand of compliance within seven calendar days is not reasonable, and imposes an undue burden on Charter in view of the CCA. As a cable operator,[13] Charter must have sufficient time to provide advance notice to its subscribers in accordance with the provisions of the CCA, 47 U.S.C. § 551. The "court order" exception to the CCA's privacy requirements allows disclosure of a subscriber's personally identifying information only if "the subscriber is notified of such order by the person to whom the order is directed." *Id.* at § 551(c)(2)(B) (emphasis added). This exception is, in turn, further subject to the requirement that the court order offers "clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity ..." and also requires that the "subject of the information [be] afforded the opportunity to appear and contest such entity's claim." *Id.* at § 551(h) (emphasis added). Thus, even assuming that the RIAA's Subpoena is a qualifying court order that would permit Charter's disclosure to the RIAA of the requested "personally identifiable information" about its subscribers, Charter is nevertheless required to give those subscribers advance notice that will allow them to "appear and contest" the RIAA's claim of copyright violations. This cannot be achieved in a mere seven calendar days from service. Rather, Charter needs at least 14 business days for compliance, to ensure that the subscribers

[13] Charter is a "cable operator" by virtue of its cable television service and its complementary cable modem Internet service. The term "cable operator" is defined as "any person or group of persons (A) who provides cable television service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. § 522(5). The CCA further states that "the term 'cable operator' [also includes] ... any person who (i) is owned or controlled by, or under common ownership or control with, a cable operator, and (ii) provides any wire or radio communications service." *Id.* at § 551(a)(2)(C).

receive adequate notice.

Thus, compliance with the RIAA's Subpoena would require Charter to violate federal law by disclosing confidential subscriber information before advance notice can be given to the affected subscribers, as required by the CCA. This fundamental flaw renders the Subpoena unduly burdensome.

In a recent case involving a subpoena served on the U.S. Treasury Department, the court quashed the subpoena to the extent that it requested personal I.R.S. tax records on the grounds that federal law prohibited the disclosure of the records. *Flatow v. Islamic Rep. of Iran*, 196 F.R.D. 203, 207 (D.D.C. 2000), *aff'd* 305 F.3d 1249, 1250 (D.C. Cir. 2002) (vacated on other grounds) ("We affirm the district court's ... order limiting the subpoena."). The *Flatow* court held that it is "surely an undue burden for a subpoena to demand a violation of federal law." *Id.* Charter is faced with the same dilemma that the Treasury department faced in *Flatow* – if Charter complies with the Subpoena, it breaks the law. Following the precedent of *Flatow*, this Court should quash the Subpoena to the extent that it requires a violation of the CCA.

c) The Abbreviated Response Period Demanded by the RIAA Does Not Allow Charter Sufficient Time To Gather the Requested Information

The seven-calendar-day response period is unreasonable for yet another reason: it does not afford Charter sufficient time to gather the requested information. Identifying the subscriber assigned to a particular I.P. address is not a simple look-up task, but an extremely involved, multi-step process that engages Charter employees from numerous regions of the country. [*See* Exh. 4] The sheer number of IP addresses subpoenaed to date compounds this burden on Charter, and there appears to be no end in sight. Charter's available resources are severely taxed by this deluge. At the same time, Charter must reserve some of these same resources to assist law enforcement officials with urgent requests pertaining to ongoing criminal investigations.

In view of the foregoing, the RIAA's requested response period of seven calendar days from service date is manifestly unreasonable, and imposes an undue burden on Charter. Accordingly, this Court should quash this Subpoena, and order that the RIAA allow at least 14 business days from service for compliance with any future subpoenas.

B. The Subpoena Fails To Comply With the Requirements of the DMCA

Not only is the Subpoena improper under the Federal Rules of Civil Procedure, it is also deficient under the DMCA because it fails to provide proper notification of the allegedly infringed copyrighted works, it seeks information about 93 different IP addresses in a single subpoena, and demands disclosure of confidential information outside the scope of the DMCA. To balance the privacy rights of Charter's subscribers with the RIAA's alleged rights of enforcement, this Court must hold the RIAA to the strict letter of the law it now seeks to enforce.

1. The DMCA Requires Identification of the Allegedly Infringed Works

Charter has no obligation to respond to a subpoena unless it first receives proper notification from the copyright holder or representative. Only "upon receipt of the subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A)" must Charter provide the information requested in a subpoena. 17 U.S.C. § 512(h)(5).

The elements of proper notification under the DMCA include, among other things, an "[i]dentification of the copyrighted work claimed to have been infringed ... [and] information reasonably sufficient to permit the service provider to locate the material...." 17 U.S.C. § 512(c)(3). The 93 pages in Exhibit A attached to the Subpoena each merely list an IP address, a date, and the time of day. Conspicuously absent is any "identification of the copyrighted work claimed to have been infringed," as required by the DMCA. Although the cover letter

accompanying the RIAA's Subpoena states that the "related notices" are "[s]erved herewith," they were not, in fact, attached to the copy served on Charter. [Lindsey Decl., Exh. 4, at ¶ 5]

The RIAA will likely argue that this identifying information was attached to the subpoenas that issued out of the District of Columbia. Those subpoenas, however, have been superseded by the RIAA's issuance of the omnibus Subpoena. Charter should not be required to bear the additional burden of digging through a multitude of superseded subpoenas served months ago in order to piece together the required DMCA notice information for each of the 93 IP addresses in the current Subpoena. If the RIAA chooses to use the DMCA as its weapon of choice in its war against file-sharing, it must be held to the exacting standards that the DMCA requires. Without proper notification, as required by the DMCA, Charter is not obligated to respond to the Subpoena, and the Court should quash the Subpoena.

2. The DMCA Requires Separate Subpoenas for Each Alleged Infringer

By requesting information about 93 different IP addresses in a single omnibus subpoena, the Subpoena violates the DMCA for another reason: the DMCA contemplates a separate subpoena for each alleged infringer, as opposed to a single subpoena for scores of alleged infringers the RIAA wants to pursue. For example, the DMCA refers to "an alleged infringer" in the singular. A valid request for a subpoena requires a declaration that the "subpoena is sought to obtain the identity of an alleged infringer ...." 17 U.S.C. § 512(h)(2)(C) (emphasis added). Similarly, in response to a subpoena, the statute requires the disclosure only of "information sufficient to identify the alleged infringer ...." 17 U.S.C. § 512(h)(3) (emphasis added).

By serving its omnibus Subpoena, the RIAA does not reduce the burden on this Court, but likely increases it. For example, if one or more of the alleged infringers identified by the Subpoena decides to file a motion to quash, this Court would be left in a position to consider up to 93 separate "partial" motions to quash the Subpoena, and would be faced with the prospect of

adjudicating each single IP address on a piecemeal basis. And if some of those opposing the subpoena were successful, while others were not, the Court could be left with inconsistent outcomes from enforcement of one subpoena. What ensues is an administrative and logistical nightmare for the Court. The RIAA cannot shortcut the requirements for each DMCA subpoena simply because they have unilaterally decided to pursue hundreds of I.P. addresses at a time.

3. The DMCA Does Not Permit the RIAA To Demand a Subscriber's E-Mail Address or Telephone Number

The RIAA's demand for subscribers' e-mail addresses and telephone numbers is not authorized by the DMCA, and should not be enforced. The DMCA, in Section 512(h)(3), states that demands for information about alleged infringers may include a demand for "information sufficient to identify the alleged infringer." Although this provision of the DMCA is silent as to what sort of information is "sufficient," the subscriber's name and physical address manifestly satisfy this request. More importantly, this limited disclosure of information balances the subscriber's right to privacy with the RIAA's alleged need for contact information to address its claims of copyright infringement. Indeed, the name and address of the subscriber is the best identifying information, as it is tied to the physical location where the Internet services are being provided. This information would allow the RIAA to contact the subscriber in writing, or in person if needed (*e.g.*, for service of process). On the other hand, the additional information demanded by the RIAA – a subscriber's telephone number and e-mail address – is not necessarily accurate identifying information, and presents an unwarranted potential for abuse. Accordingly, the RIAA's demand for this additional information should be rejected.

C. Any Order Compelling Compliance Must Protect Charter from the Significant Expense of Responding to the Subpoena Under the DMCA

The foregoing illustrates why the numerous defects in the Subpoena require that it be quashed. To the extent that this Court were to determine that compliance with this Subpoena –

perhaps with appropriate modification – should be ordered, however, Charter notes that any such order compelling compliance must protect Charter from the significant costs of compliance. FED. R. CIV. P. 45(c)(2)(B). As amended in 1991, Rule 45 states that an award of costs to a nonparty such as Charter is no longer discretionary, but must be made to protect such nonparties from "significant expense resulting from the inspection and copying commanded." FED. R. CIV. P. 45(c)(2)(B); *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001).[14] The court in *Linder* explained that the cost-shifting provision of Rule 45 is automatically invoked if the subpoena "imposes expenses on the non-party" and if the "expenses are 'significant.'" *Id.* If so, "the court must protect the non-party by requiring that the party seeking discovery to bear at least enough of the expense to render the remainder 'non-significant.'" *Id.*

The evidence of undue burden on Charter is compelling. Compliance with the Subpoena would require an inordinate amount of time and resources and would impede Charter's ability to perform normal operations. To date, Charter has received Subpoenas from the RIAA requesting information about 147 different IP addresses.[15] Charter expects that this number will only grow, especially considering the recent press releases by the RIAA announcing its intention to use information from thousands of subpoenas to fuel "what could ultimately be thousands of lawsuits" against consumers of ISPs like Charter. [Exh. 2.E, 2.F] The end result of this expected onslaught of subpoenas is that Charter must expend an inordinate amount of time and effort to process the subpoenas, which will impede Charter's ability to carry on its normal operations.

[14] *See also In re The Exxon Valdez*, 142 F.R.D. 380, 383 (D.D.C. 1992) (noting that 1991 amendment to Rule 45 provides "mandatory language" that represents a "clear change" from the old rule, "which gave district courts discretion to condition the enforcement of subpoenas on the petitioner's paying the costs of production).

[15] In addition to the present Subpoena listing 93 different IP addresses, the RIAA recently served an additional 54 subpoenas out of this Court, and Charter will address those subpoenas, if necessary, by way of a separate motion. These numbers do not include the 93 duplicative subpoenas issued out of the D.C. District Court.

As detailed in the attached Declaration of Diane Lindsey, the cost to Charter to gather and process the information requested for each IP address amounts to at least $60. [Lindsey Decl., Exh. 4, at ¶ 18; Neu Decl., Exh. 5] This figure cannot be viewed alone, but in the aggregate according to the large number of IP addresses identified in the current Subpoena and expected from future subpoenas.[16] To comply with the expected continued onslaught of subpoenas, Charter will be forced to hire personnel dedicated to the gathering of subscriber information demanded by such subpoenas. At the present expected rate of requests by the RIAA, Charter is faced with expending thousands of man-hours and hundreds of thousands of dollars per year just to comply with RIAA subpoenas. And this cost does not even begin to cover Charter's legal costs from addressing the many defects in the RIAA subpoenas. In any event, the expense to Charter is certainly "significant."[17]

In determining how to shift the costs of compliance, courts have applied a multi-factor test, asking for example: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear the costs than the requesting party, and whether the litigation is of public importance." *Linder*, 251 F.3d at 182. In the present case, Charter is a passive provider of cable internet services and has no interest in the outcome of any dispute between the subjects of the subpoena and the RIAA. Further, the RIAA is a large and obviously well-funded organization, with the resources to issue thousands of DMCA notices and subpoenas to Charter, as well as to other Internet service providers. Thus, there is no indication that Charter can more readily bear the costs of compliance than the RIAA. Finally, there is no

[16] *See, e.g., Broussard v. Lemons*, 186 F.R.D. 396, 398 (W.D. La. 1999) (awarding medical facility prepayment of reasonable costs in complying with subpoena duces tecum, in view of aggregate expense facility faces in complying with "numerous subpoenas and other forms of requests for medical records").

[17] *See Linder*, 251 F.3d at 182 (holding that expense of compliance in the amount of $200,000 is "significant," and noting that courts have found a $9000 estimate sufficiently significant to shift costs).

pending "litigation" and, while the "public importance" of the RIAA's nationwide campaign of issuing DMCA subpoenas is debatable, it certainly does not arise to the levels addressed by decisions considering allocation of a portion of the expenses of compliance to the non-party, such as the bombing of Pan Am flight 103[18] or the wreck of the Exxon *Valdez*.[19] Even if this case were deemed to be of great "public importance," that factor alone does not justify saddling Charter with the expenses occasioned by the numerous subpoenas that the RIAA has issued.

Simply put, Charter should be awarded its reasonable costs of compliance with the present Subpoena and any future subpoenas issued by the RIAA. These reasonable costs include Charter's expenses in hiring additional personnel to respond to the subpoenas, Charter's loss of services of its current personnel who may work part-time on responding to such subpoenas, and any costs of document production and redaction as needed.[20] Taking all these costs into consideration, Charter requests reimbursement at the rate of $60 per each subscriber IP address identified in the Subpoena.

IV. CONCLUSION: RELIEF REQUESTED

For the foregoing reasons, Charter respectfully requests that the Subpoena issued by the RIAA be quashed in all respects or, alternatively, modified to afford sufficient time for compliance. If the Court does not quash the Subpoena in its entirety, Charter further prays that the Court will require the RIAA to reimburse Charter's cost of compliance.

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[18] *In re Law Firms of McCourts and McGrigor Donald*, 2000 U.S. Dist. LEXIS 20287 (S.D.N.Y. 2001) (noting that trial arising out of alleged terrorist bombing of Pan Am flight 103 was "undoubtedly of high public interest," but such factor alone did not justify shifting production costs from an "apparently well-funded defense" to a non-party).

[19] *See In re The Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) (acknowledging the "great public importance" of the underlying litigation involving the sinking of the Exxon Valdez and the ensuing environmental disaster in Alaska).

[20] *See U.S. v. CBS, Inc.*, 103 F.R.D. 365 (C.D. Cal. 1984) (holding that nonparty witnesses in large antitrust litigation were entitled to be reimbursed for, *inter alia*, hiring additional personnel to respond to document requests from the parties and the costs of paying permanent personnel for their work on the document production).

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The undersigned hereby certifies that the foregoing document was served on this the 31st day of October 2003, in the manner and upon the persons indicated below.

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