

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 Ave., N.W., Suite 300)
Washington, DC 20001)
)
v.)
)
CHARTER COMMUNICATIONS, INC.)
12405 Powerscourt Drive, Suite 100)
St Louis, MO 63131)
_____)
)


Miscellaneous Action
Case No. 4:03MC00273CEJ

**EXHIBITS IN SUPPORT OF
RECORDING INDUSTRY ASSOCIATION OF AMERICA'S
MEMORANDUM IN OPPOSITION TO
CHARTER COMMUNICATIONS' MOTION TO QUASH SUBPOENA**

The Recording Industry Association of America ("RIAA") hereby submits its exhibits in support of its memorandum in opposition to Charter Communications' Motion to Quash Subpoena.

Dated October 10, 2003

Respectfully submitted,



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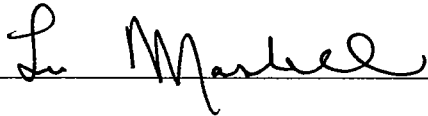
PROOF OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via hand-delivery, on the following this 10th day of October, 2003.

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Declaration of Jonathan Whitehead in Support of Recording Industry Association of America's Opposition to Charter Communications' Motion to Quash Subpoena

I, Jonathan Whitehead, have personal knowledge of the facts stated below and, under penalty of perjury, hereby declare:

1. I am Vice President and Counsel for Online Copyright Protection for the Recording Industry Association of America ("RIAA"), where I have been employed for over 6 years. My office is located at 1330 Connecticut Avenue, N.W., Washington, DC 20036. I submit this declaration in support of RIAA's Opposition to Charter Communications' ("Charter's") Motion to Quash a Subpoena issued by RIAA.



2. This declaration is based on my personal knowledge, and if called upon to do so, I would be prepared to testify as to its truth and accuracy.

**RIAA's Role In Protecting Its Member Recording Industry Companies
From Copyright Infringement**

3. RIAA is a not-for-profit trade association whose member record companies create, manufacture and/or distribute approximately ninety percent of all legitimate sound recordings produced and sold in the United States. RIAA's member record companies comprise the most vibrant national music industry in the world. A critical part of RIAA's mission is to assist member companies in protecting their intellectual property in the United States and in fighting against online and other forms of piracy.

4. The RIAA investigates the unauthorized reproduction and distribution of copyrighted sound recordings online. As Vice President and Counsel for Online Copyright Protection, I am responsible for formulating and implementing online strategies for RIAA, including investigations into the online infringement of copyrighted sound recordings of all kinds.

The Internet and Music Piracy

5. The Internet is a vast collection of interconnected computers and computer networks that communicate with each other. It allows hundreds of millions of people around the world to communicate freely and easily and to exchange ideas and information, including academic research, literary works, financial data, music, movies, graphics, and an unending and ever-changing array of other data. Unfortunately, the Internet also has afforded opportunities for

the wide-scale piracy of sound recordings and musical compositions. Once a sound recording has been transformed into an unsecured digital format, it can be copied further and distributed an unlimited number of times over the Internet, without significant degradation in sound quality.

6. Much of the unlawful distribution of copyrighted sound recordings over the Internet occurs via “peer-to-peer” file copying. The most notorious example to date has been Napster, which is now subject to a federal court preliminary injunction. In addition, there are many other peer-to-peer file copying services, including KaZaA, iMesh, Grokster and Gnutella, that continue to operate and to facilitate wide-spread copyright piracy. The major recording companies are currently engaged in litigation against KaZaA, Grokster and iMesh.

7. “Peer-to-peer” file copying, at least in its most popular form, refers to a computer system or process that enables Internet users to: (1) make files (including audio recordings) stored on a computer available for copying by other users; (2) search for files stored on other users’ computers; and (3) transfer exact copies of files from one computer to another via the Internet. Peer-to-peer systems enable users who otherwise would have no connection with, or knowledge of, each other to offer to each other for distribution and copying files off of their PCs; provide a sophisticated search mechanism by which users can locate these files for downloading; and provide a means of effecting downloads.

8. The major record companies have generally not authorized their sound recordings to be reproduced and distributed in unsecured formats by means of peer-to-peer file copying. Thus, the vast majority of the content that is distributed on peer-to-peer networks is unauthorized by the copyright owner – that is, the distribution violates the copyright laws. In the Napster case

for example, the Court found, based on a study conducted by RIAA, that at least 87% of the content exchanged on Napster's service was infringing.

9. The scope of online piracy of copyrighted works cannot be underestimated. The RIAA member companies lose significant revenues on an annual basis due to the millions of downloads of well-known recordings that are made available on the Internet by infringers who, in virtually all cases, have the ability to maintain their anonymity to all but the Internet Service Provider ("ISP") they use to supply them with access to the Internet.

10. In contrast to the terrible harm to copyright owners, ISPs likely benefit from P2P systems. Those who would unlawfully upload and download copyrighted music often use large amounts of bandwidth (because music files are so large). They thus tend to subscribe to services, such as DSL and cable modems, that are far more expensive than ordinary telephone service. One publication recently estimated that 50-70% of the bandwidth of cable broadband networks was being used for P2P file copying. *See* Alan Brezneck, "Service Control Vendors vie for MSO Business," *Cable Datacom News* (March 1, 2003).

RIAA's Identification of Infringers and Use of Digital Millennium Copyright Act Subpoenas

11. In order to assist its members in combating copyright piracy, RIAA conducts searches of the Internet, as well as file-copying services, for infringing copies of sound recordings whose copyrights are owned by RIAA members. A search can be as simple as logging onto a P2P network and examining what files are being offered by others logged onto the network. These searches generally result in the identification of specific IP (Internet Protocol)

addresses from which infringers are making unauthorized copies of sound recordings available to the public. An IP address is a unique identifier that, along with the date and time, specifically identifies a particular computer or server using the Internet. An IP address also allows RIAA to use publicly-available databases to ascertain, in general terms, the ISP that provides the infringer with access to the Internet.

12. The subpoena provision of the Digital Millennium Copyright Act (“DMCA”) provides RIAA with a right to obtain subscriber identification information from Internet service providers so that RIAA can take appropriate action against copyright infringers. Pursuant to that provision, RIAA typically includes in each DMCA subpoena to an ISP an IP address and a date and time on which RIAA observed use of the IP address in connection with allegedly infringing activity. In some instances, providing the IP address itself is enough to enable the ISP to identify the infringer. Providing the date and time further assists some ISPs in identifying infringers, especially ISPs that use “dynamic IP addressing” such that a single computer may be assigned different IP addresses at different times, including, for example, each time it logs into the Internet.

13. Once an ISP has the IP address, date, and time, determining the identity of the infringer should be a relatively straightforward task. Indeed, one ISP, Verizon Internet Services, Inc. (“Verizon”), which uses dynamic IP addressing, previously submitted a declaration to the United States District Court for the District of Columbia indicating that it takes Verizon an average of 15-25 minutes to obtain the information responsive to a DMCA subpoena. SBC Internet Services, Inc. (“SBC”) submitted a similar declaration to the District of Columbia Court

indicating that it takes SBC 15-45 minutes to obtain the information responsive to a DMCA subpoena.

14. Between the enactment of the DMCA in 1998 and June 2003, RIAA utilized the DMCA's subpoena provision approximately 100 times to obtain the identities of alleged infringers of copyrighted sound recordings on the Internet. In each case, RIAA obtained a DMCA subpoena from the United States District Court for the District of Columbia. RIAA delivered those approximately 100 subpoenas to ISPs all across the country.

15. One of the subpoenas that RIAA delivered to an ISP's DMCA agent between 1998 and June 2003 was a subpoena issued to Charter by the United States District Court for the District of Columbia. The subpoena sought identification information regarding a Charter subscriber whom RIAA observed offering copyrighted music files for distribution from the subscriber's home computer via a FTP (file transfer protocol) site. In accord with the registration statement that Charter had filed with the United States Copyright Office, RIAA delivered the subpoena to Charter's DMCA agent in St. Louis, Missouri. Charter responded to the subpoena without raising a jurisdiction objection or any objection at all. Moreover, Charter responded to the subpoena without demanding compensation.

16. Until July of this year – after RIAA had announced its nationwide enforcement effort – no service provider had ever refused to respond to a DMCA subpoena due to an allegation that it was improper for RIAA to obtain subpoenas from the United States District Court for the District of Columbia and deliver them to the ISP's DMCA agent, wherever that agent resided. Indeed, in virtually every case, service providers complied with DMCA subpoenas delivered by RIAA. Until July 2003, only one ISP – Verizon – had refused to comply

with a DMCA subpoena for any reason other than the ISP's inability to respond due to the ISP's destruction of necessary information before the ISP had received the subpoena.

17. To date, RIAA and others have used DMCA subpoenas hundreds of times to identify individuals who were or are infringing copyrights on the Internet.

RIAA's Identification of the Infringers & Issuance of the DMCA Subpoenas In This Case

18. In the ordinary course of doing its investigations of online copyright infringement between late June and early August 2003, RIAA became aware of 93 individuals who use Charter's network to offer large numbers of music files for distribution over the Internet. As a group, those individuals appear to be distributing more than 100,000 copyrighted works without the authorization of the copyright owners. By way of example, one of those individuals appears to be distributing more than 5800 copyrighted works without authorization.

19. RIAA engages in a painstaking process to determine whether it is appropriate to seek a subpoena. That process relies on RIAA personnel personally reviewing evidence supporting the allegation of infringement that underlies the request for a subpoena. Indeed, RIAA downloaded and RIAA personnel listened to representative lists of the files offered by each of the 93 individuals at issue in Charter's motion to quash. In each instance, RIAA determined that the files the individuals were offering for distribution were illegal copies of sound recordings whose copyrights are owned by RIAA members. In each instance, RIAA determined (from the IP address) that the individual had obtained access to the Internet by using Charter's network. In each instance, RIAA personnel determined that the infringement was sufficiently severe to warrant pursuit of the infringer in order to stop the infringement. Each

time that RIAA made that determination with respect to one of the individuals, RIAA sent a notice to inform Charter that the individual was using Charter's network to commit copyright infringement. Each notice further informed Charter that RIAA planned to obtain a subpoena to identify the individual described in the notice.

20. Between July 1, 2003 and August 13, 2003, RIAA sought and obtained from the Clerk of the United States District Court for the District of Columbia individual DMCA subpoenas issued to Charter in order to uncover the identity of the 93 individuals who RIAA had discovered were using Charter's network to offer for distribution large numbers of copyrighted music files. Consistent with RIAA's standard practice when requesting DMCA subpoenas from federal courts and the requirements of the DMCA, RIAA attached to each subpoena a list of copyrighted recordings that RIAA had downloaded to confirm that the individual described in the subpoena was committing copyright infringement and the date and time on which RIAA observed such infringement.

21. Between July 9, 2003 and August 15, 2003, RIAA delivered to the DMCA agent that Charter had registered with the United States Copyright Office or to other Charter employees at the DMCA agent's St. Louis, Missouri address 85 of the 93 DMCA subpoenas that RIAA obtained from the District of Columbia Court in July and August 2003 in order to identify individuals who were using Charter's network to offer large numbers of copyrighted music files for distribution. Consistent with RIAA's standard practice and the requirements of the DMCA, each of the 85 subpoenas that RIAA delivered to Charter's DMCA agent in July and August 2003 included a sample list of the copyrighted works that RIAA had observed being infringed by the Charter subscriber described in the subpoena.

22. Although Charter had responded to the only DMCA subpoena that RIAA had obtained from the District of Columbia Court and had delivered to Charter's DMCA agent in St. Louis prior to July 2003, Charter objected to the new subpoenas that RIAA delivered to Charter's DMCA agent in July and August 2003 on the grounds that the District of Columbia Court lacks jurisdiction to issue subpoenas to parties located more than 100 miles from the District of Columbia.

23. Communications between Charter and RIAA in July and August 2003 made clear that, due to Charter's jurisdictional objection, Charter would not respond to the 85 DMCA subpoenas that RIAA had delivered to Charter's DMCA agent in St. Louis. Consequently, RIAA sought to address Charter's jurisdictional objection by serving DMCA subpoenas on Charter within 100 miles of the District of Columbia. RIAA located Charter's registered agent in Baltimore, Maryland, which is well within 100 miles of the District of Columbia. In late July and August 2003, RIAA served on that agent 93 DMCA subpoenas that RIAA had obtained from the District of Columbia Court: the same 85 subpoenas that RIAA had served on Charter's DMCA agent in St. Louis and 8 additional subpoenas. Consistent with RIAA's standard practice and the requirements of the DMCA, each of the 93 subpoenas that RIAA delivered to Charter's Baltimore, Maryland registered agent in July and August 2003 included a sample list of the copyrighted works that RIAA had observed being infringed by the Charter subscriber described in the subpoena.

24. Charter objected to RIAA's delivery of the 93 DMCA subpoenas to Charter's Baltimore, Maryland registered agent on multiple grounds. Charter's objections did not allege,

however, that any of the subpoenas failed to identify copyrighted works that had been infringed by the Charter subscriber described in the subpoena.

25. After communications between Charter and RIAA made clear that Charter would not respond to the 93 subpoenas that RIAA delivered to Charter's Baltimore, Maryland registered agent, RIAA discussed with Charter its intent to honor Charter's request that RIAA instead issue subpoenas to Charter from the United States District Court for the Eastern District of Missouri. RIAA explained that it intended to obtain a single subpoena from the Eastern District of Missouri Court that would request identification information for all 93 Charter subscribers described in the subpoenas from the District of Columbia Court that RIAA had already served on Charter. Because Charter indicated that it would be easier for Charter to notify the 93 subscribers at issue if RIAA listed each subscriber's IP address and date and time of observed infringement on a separate one-page attachment to the new subpoena, RIAA agreed to and did list the information regarding each subscriber on a separate one-page attachment to the subpoena. As discussed in the Declaration of John J. Roth, RIAA also attached to the subpoena individual pages showing a representative list of the copyrighted files offered for distribution by each of the 93 individuals described in the subpoena. RIAA obtained the subpoena from the Eastern District of Missouri Court on September 22, 2003, and served it on Charter's DMCA agent on September 23, 2003. Charter's pending motion seeks to quash that subpoena. The other subpoenas that RIAA has obtained from the Eastern District of Missouri Court each pertain to only one Charter subscriber.

26. The subpoena that Charter seeks to quash requests subscriber identification information only for the same 93 Charter subscribers who are described in the subpoenas that

RIAA obtained from the United States District Court for the District of Columbia between July 1, 2003, and August 13, 2003 and delivered to Charter in St. Louis and Baltimore between July 9, 2003 and August 15, 2003. Consequently, Charter has possessed for more than 3 months the information it needs to identify some of the individuals described in the subpoenas and has possessed for at least 8 weeks the information it needs to identify each of the 93 individuals.

27. Prior to Charter filing its motion to quash, counsel for Charter and RIAA had multiple discussions regarding Charter's objections to the DMCA subpoenas that RIAA has served on Charter after obtaining them both from the District of Columbia Court and the Eastern District of Missouri Court. Counsel were unable to reach an agreement regarding those objections. At no time did RIAA did agree to withdraw the subpoenas it obtained from the District of Columbia Court. To the extent that Charter suggests that RIAA reached any type of agreement, that is simply false.

**Evidence that Charter Has Already Identified and Notified the Individuals
Who are Described in the Subpoena Charter Seeks to Quash**

28. As of today, counsel for RIAA have received voice mail messages from or have spoken to at least 7 individuals who have identified themselves as Charter subscribers who wish to enter into settlement agreements with RIAA before RIAA members file copyright infringement lawsuits against the individuals. Several of the individuals explained that they called RIAA's counsel in response to receiving from Charter copies of a subpoena showing that RIAA seeks the individuals' identification information from Charter based on RIAA having provided their IP addresses to Charter. The individuals' statements provide strong evidence that

Charter has already identified the individuals described in the subpoena that Charter seeks to quash and has already notified them.

The Importance of Expeditious Compliance with DMCA Subpoenas

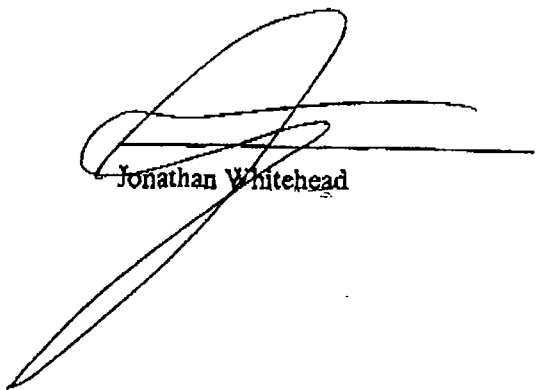
29. Obtaining information via the DMCA's "expeditious" subpoena process is critical to stopping the piracy of RIAA members' copyrighted works. Speed is of the essence for at least three reasons. First, every day that copyrighted material is disseminated without the authorization of the copyright owner, the copyright owner is economically harmed. Prompt responses to DMCA subpoenas are necessary in order for copyright owners to take quick action to stop unlawful dissemination of their works and minimize their economic losses. Second, service providers have different policies pertaining to the length of time they preserve "logs" which identify their users. If a service provider does not respond expeditiously to the subpoena request, the identification information in the service provider's logs may be destroyed, making it impossible for the ISP to determine the identity of the infringer and taking away the copyright owner's ability to take action to stop the infringement. Third, infringement often occurs with respect to sound recordings that have not yet been distributed publicly. Such infringement inflicts great harm on the initial market for new works. Prompt responses to DMCA subpoenas are necessary so that artists who create new sound recordings can enter the market on a level footing and enjoy a fair chance to reap the benefits of their labor.

30. Charter's prolonged and continued refusal to identify the subscribers at issue subjects RIAA's members to immeasurable harm. Every moment that the Charter subscribers are permitted to continue offering copyrighted music files for distribution over the Internet

without Charter fulfilling its duties under the DMCA presents further opportunity for the copyrighted files to be unlawfully copied and distributed over the Internet to countless other copyright infringers.

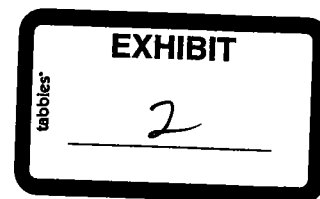
I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: October 10, 2003



Jonathan Whitehead

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI



In re Subpoena to
CHARTER COMMUNICATIONS, INC.

Case No.: 4:03MC00273CEJ

DECLARATION OF JOHN J. ROTH

I, John J. Roth, declare and state as follows:

1. I am John J. Roth. I am over 21 years of age and have never been convicted of a felony. I am of sound mind and fully competent to make this declaration. The factual matters stated herein are based on my personal knowledge, and I know them to be true and correct.

2. I work as a process server for Markell & Associates. On the morning of September 23, 2003, I picked up a subpoena with a large number of attachments from the offices of Bryan Cave LLP at 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102. Each attachment, which was separately paperclipped together, contained a letter with the heading "Re: Notice of Copyright Infringement (17 U.S.C. § 512(c)(3))" from Yvette Molinaro of Mitchell Silberberg & Knupp LLP to Laurie Jill Wood of Charter Communications, Inc., and a separate sheet listing an IP address and a number of representative recordings. A copy of that subpoena with a copy of the attachments is attached hereto as Exhibit A.

3. I was instructed to serve the subpoena and the attachments on Charter Communications, Inc., 12405 Powerscout Drive, St. Louis, Missouri 63131.

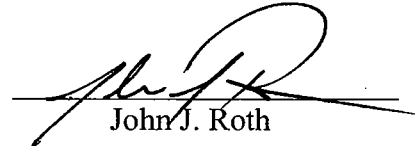
4. At 10:29 a.m. on September 23, 2003, I served the subpoena and attachments on Diane Lindsey of Charter Communications, Inc. Shortly thereafter, I filled out and signed the Proof of Service and Declaration, which is attached hereto as Exhibit B.

5. I have reviewed Exhibit 1 to Charter Communications' Memorandum in Support of Motion to Quash Subpoena Served by Recording Industry Association of America, which

Charter represents to be the subpoena served on it. Exhibit 1 is incomplete and does not contain the proof of service page or the attachments to the subpoena described above in paragraph 2, which I served on Charter.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 8, 2003



John J. Roth