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 **ORAL ARGUMENT REQUESTED**

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

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INTRODUCTION

The Recording Industry Association of America ("RIAA")[1] hereby files this opposition to Charter Communications, Inc.'s ("Charter's") Motion to Quash Subpoena.

Charter's brief is long on hyperbole and short on substance. Setting aside Charter's rhetoric, the facts of this case are simple. Between late June and early August, RIAA identified 93 Charter subscribers who have been disseminating *over 100,000* copyrighted sound recordings without the authorization of RIAA's members, the major recording companies. To protect the rights of its members, RIAA obtained subpoenas to Charter issued by the clerk of the District Court for the District of Columbia under 17 U.S.C. § 512(h) of the Digital Millennium Copyright Act ("DMCA"). Between July 9 and August 15, 2003, those subpoenas were served on Charter's DMCA agent (which it is required by statute to designate) and on Charter's registered agent in Baltimore, MD. After Charter objected to those subpoenas and requested that RIAA obtain a subpoena for the exact same information – names, addresses, phone numbers, and e-mail addresses of the 93 infringers – from this Court, RIAA sought, and the Clerk of this Court issued, a subpoena on September 22, 2003. That subpoena was served the next day.

Charter thus has had all the information it needed to comply with the subpoena since early August. There is no dispute that Charter already knows who the infringing subscribers are and that it has notified those subscribers that RIAA is seeking their identities pursuant to a DMCA subpoena. Nonetheless, Charter complains that it needs more time to comply. That claim, on this record, is ridiculous. Moreover, it is contrary both to Congress's express and repeated direction in the DMCA that Internet Service Providers (ISPs), such as Charter, respond to DMCA subpoenas "expeditiously" – which can only mean more quickly than the "default" 14-

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[1]RIAA is acting in this case as the agent of its members, Universal Music Group, EMI Recorded Music, Sony Music Entertainment, BMG Music Group, and Univision Music, Inc.

day period that Charter claims applies to Rule 45 subpoenas – and to Congress's clear mandate that an ISP's obligations under the DMCA subpoena supersede other statutes, such as the Cable Communications Act, because ISPs must comply "notwithstanding any other provision of law."

Charter's other complaints are similarly baseless. RIAA has complied with all of the requirements of the DMCA, and Charter cannot hold the subpoena process of the DMCA hostage in order to extract payment. The Court should therefore deny Charter's Motion to Quash and direct it to comply with the subpoena within 2 days of the Court's order.

BACKGROUND

The Digital Millennium Copyright Act. Congress enacted the DMCA in 1998 to encourage development of the Internet's potential, while at the same time protecting against the "massive piracy" of copyrighted works that Internet technology permits. S. Rep. No. 105-190, at 8 (1998) ("S. Rep."). In Title II of the DMCA, codified at 17 U.S.C. § 512, Congress addressed two concerns – (1) the threat of copyright piracy, which could be committed anonymously over the Internet, and (2) the fear of ISPs that they would be subject to enormous liability for facilitating illegal conduct over their computer networks. In § 512, Congress both carved out certain limitations on the liability of ISPs and required ISPs to act "expeditiously" when they are made aware of copyright infringement. By creating benefits for and obligations on ISPs, Congress intended that copyright owners and ISPs would "cooperate to detect and deal with copyright infringements that take place in the digital networked environment." S. Rep. at 40.

As part of this package of benefits for and obligations on ISPs, Congress enacted the provision at issue here, § 512(h). Congress recognized that, in many circumstances, copyright owners cannot determine the identities of individuals infringing their copyrights over the Internet; only the ISPs that serve such infringers know their identities. Section 512(h) thus obligates ISPs to provide the identity of subscribers who use their networks to infringe. Under

§ 512(h)(1), a copyright owner or its agent may request that "the clerk of any United States district court" issue a subpoena requiring an ISP to disclose the identity of such infringers when the copyright owner presents good faith claims of infringement. § 512(h)(1). Pursuant to § 512(h)(4), the clerk must ensure that the copyright owner's request includes a notice letter identifying the works that are being infringed, a proposed subpoena, and a declaration indicating that information obtained shall be used only to enforce the copyright owner's rights under federal law. If so, the clerk "shall expeditiously issue" the subpoena. *Id.*

As Congress recognized, DMCA subpoenas can serve their purpose only if they bear fruit quickly. An individual Internet pirate can cause tens of thousands of infringing copies to be distributed in a single day. Especially in the case of sound recordings not yet publicly released, the economic impact of infringement can be devastating. Thus, Congress mandated that such subpoenas be issued and complied with "expeditiously." Congress was so intent on an "expeditious" process that it used the word three times in the statute itself and repeatedly in the legislative history. *See, e.g.*, § 512(h)(5) (requiring the ISP to "expeditiously disclose" the information sought); S. Rep. at 51 (describing the need for expedition); *see In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 34 (D.D.C. 2003) ("*Verizon I*") (noting "Congress's express and repeated direction to make the subpoena process 'expeditious'"). Congress also resolved all conflicts of federal, state, and local law in favor of disclosure pursuant to § 512(h). An ISP must comply with a DMCA subpoena "notwithstanding any other provision of law." § 512(h)(5).

Internet Piracy. Congress's prediction that the Internet would beget massive piracy of copyrighted works has unquestionably come true. Peer-to-peer networks (P2P), such as the Napster system shut down by a federal court injunction, *see A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), are havens for copyright piracy. By downloading P2P software, and logging onto a P2P network, an infringer makes files on a home or office computer available

to Internet users worldwide. Approximately 90% of the content on such P2P networks is copyrighted material disseminated without authorization. *Id.* at 1013. There is no dispute that this uploading and downloading of copyrighted works is illegal. *Id.* at 1014-15; *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

The propagation of illegal digital copies over the Internet has had a devastating impact on the music industry. *See In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 273 (D.D.C. 2003) ("*Verizon II*"). Music industry retail sales declined 7% in 2000, 10% in 2001 and 11% last year. *See* http://www.riaa.com/news/marketingdata/pdf/year_end_2002.pdf. In contrast, cable ISPs such as Charter profit handsomely from this illegal conduct. P2P systems are critical to driving the growth in demand for high-end broadband services that are lucrative for cable ISPs. Those who download music over P2P systems use large amounts of bandwidth and thus tend to subscribe to services such as cable modem service. Between 50% and 70% of the usage of cable networks is by those who are copying files on P2P systems. Declaration of Jonathan Whitehead, Ex. 1 ("Whitehead Decl."), ¶ 10. In the meantime, Charter's revenues from its ISP service more than doubled in 2002, as did its subscriber base (from 550,000 to 1,100,000). *See Charter Communications, 2002 Annual Report, Form 10-K,* filed with SEC on April 15, 2003, at 5, at http://www.sec.gov/Archives/edgar/data/1091667/000095012303004266/y85418e10vk.htm. While Charter's revenues were doubling, piracy on the Internet was growing exponentially.

Subpoenas to Charter. The DMCA has been in existence for 5 years and has been used hundreds of times to identify those infringing copyrights on the Internet.[2] Whitehead Decl. ¶ 17. In two challenges by ISPs, the District Court for the District of Columbia has twice rejected attempts to limit or invalidate § 512(h). *See Verizon I*; *Verizon II*.

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[2]Charter is wrong when it claims that only RIAA has chosen to use DMCA subpoenas to identify infringers. Charter Mem. at 2. Those who own the copyrights in everything from motion pictures to embroidery patterns use DMCA subpoenas to track down infringers. *See* Whitehead Decl. ¶ 17.

On June 25, 2003, RIAA announced a nationwide enforcement effort to identify and eventually sue individuals committing copyright infringement over P2P networks. From late June to early August 2003, RIAA discovered 93 significant infringers using Charter's network to disseminate copyrighted music without the authorization of the copyright owners. Whitehead Decl. ¶ 18. RIAA found these individuals as anyone else would – by logging onto P2P networks and finding individuals who were freely offering copyrighted works for anyone who wanted them. *Id.* ¶¶ 11, 18. Combined, the 93 Charter subscribers were offering *more than 100,000 copyrighted works* without the authorization of the copyrighted owners. *Id.* ¶ 18. RIAA downloaded a representative list of the files being offered by each of the infringers and ascertained that they were indeed illegal copies of copyrighted music. *Id.* ¶ 19. Contrary to Charter's baseless assertion about an "automated 'subpoena mill'," Charter Mem. at 2, individuals reviewed each claim of infringement prior to the decision to seek a subpoena under the DMCA, and a lawyer reviewed each request for a subpoena. Whitehead Decl. ¶ 19.

Between July 1 and August 13, 2003, RIAA obtained subpoenas to Charter from the District Court for the District of Columbia to identify these 93 infringers. *Id.* ¶ 20. Beginning on July 9, 2003, RIAA served Charter with subpoenas, as it had in the past, in St. Louis, the location of the DMCA agent that Charter is required by law to register with the Copyright Office. *See* § 512(c)(2).[3] This time Charter refused to comply, raising a host of objections, including that it did not have to comply with subpoenas issued from D.C. and served in St. Louis. RIAA then served Charter's registered agent in Baltimore, MD (within 100 miles of D.C.) with all 93 of the subpoenas to Charter that RIAA had obtained, but Charter refused to comply again, claiming that the registered agent serves in that capacity only for different

[3]In 2000, RIAA subpoenaed Charter with respect to another infringer disseminating copyrighted sound recordings from his home computer. Charter complied without demanding compensation and without objecting to that subpoena, which was issued from D.C. and delivered to Charter's DMCA agent in St. Louis. Whitehead Decl. ¶ 15.

corporate entities. As the parties negotiated over compliance, RIAA did not seek to enforce the subpoenas. When negotiations failed to result in an agreement, RIAA obtained a subpoena from this Court, seeking the identities of the same 93 individuals who had previously been the subject of the D.C. subpoenas. That subpoena – at issue here – was served, along with all of the relevant documents, including notification letters identifying copyrighted works being infringed by each subscriber, on Charter on September 23, 2003. See Declaration of John J. Roth, Ex. 2 ("Roth Decl."), ¶ 2. That subpoena required compliance by September 30.

ARGUMENT

"The burden of proving that a subpoena is oppressive is on the party moving to quash and is a heavy one." *Plant Genetic Sys., N.V. v. Northrup King Co.*, 6 F. Supp. 2d 859, 862 (E.D. Mo. 1998) (quoting *Heat and Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1025 (Fed. Cir. 1986)). Charter has fallen well short of meeting its burden here.

I. CHARTER HAS HAD MORE THAN ENOUGH TIME TO COMPLY.

A. Charter Has Had the Information It Needs to Comply for Months.

Charter's primary complaint is that the September 23rd subpoena was oppressive or unreasonable because it did not allow 14 days for Charter to respond. Charter is wrong both on the facts and on the law. As a factual matter, Charter has had far more than 14 days to respond to RIAA's request for information. As a legal matter, the DMCA requires ISPs to respond to § 512(h) subpoenas in far less time than the default 14-day rule that Charter claims is applicable.

Charter's complaint about the subpoena's 7-day deadline has now long been mooted. As Charter itself admits, this subpoena was served on Charter on September 23, more than two weeks ago and more than three weeks prior to the date when this motion will be fully briefed and ready for decision. Declaration of Matthew P. Harper, Ex. 2 to Charter Mem. ("Harper Decl."), ¶ 2. Indeed, as Charter admits, it has been on notice that RIAA was seeking information about

exactly these subscribers since as early as *July* of this year, when RIAA first issued subpoenas from a different court and served them on Charter in St. Louis and in Maryland. *Id.* ¶¶ 3-4.

Charter has thus had as long as 3 months and no less than 8 weeks to obtain the responsive information and to notify each of the Charter subscribers described in the subpoena at issue here. Indeed, Charter has *already* 1) identified these subscribers and 2) notified them that RIAA is seeking their identities. Several Charter subscribers who are the subjects of this subpoena and have been notified by Charter have already called RIAA to discuss possible settlement of the copyright infringement claims against them. Whitehead Decl. ¶ 28. And although the original subpoenas were served in July and August, and this subpoena was served over two weeks ago, no Charter subscriber has come forward with an objection or a motion to quash. Charter simply cannot claim that it needs more time to do what it has already done.

But even if Charter's cry of wolf was not foreclosed as a factual matter, its argument that it is entitled to 14 days to respond is legally foreclosed by the DMCA itself. Charter claims that, under Rule 45, 14 days is, as a default, a reasonable period for compliance. But in the DMCA Congress made clear that § 512(h) subpoenas were to be issued and complied with *more quickly* than the ordinary subpoena, expressly requiring that ISPs comply with them "expeditiously." *See* § 512(h)(5) (ISP must "expeditiously disclose" the information sought); *Verizon I*, 240 F. Supp. at 34 (noting "Congress's express and repeated direction to make the subpoena process 'expeditious'"). Whatever "expeditious" means, it clearly means something *less* than 14 days.[4]

[4]Indeed, because DMCA subpoenas seek far more targeted and limited information than Rule 45 subpoenas, which can literally seek anything, requiring a response in less than the default assumed under Rule 45 is not unreasonable. DMCA subpoenas are far more narrow than the typical law enforcement subpoena which, according to Charter, can be answered in 14 days. *See* NYC Police Department subpoena, Ex. A to Declaration of Laurie J. Wood, Ex. 4 to Charter Mem. (seeking "detailed records, logs, method of payment, and all other email accounts" for a given user); *id.* ¶ 4. In certain situations, such as where a CD is being disseminated unlawfully on the Internet prior to even being released, RIAA believes that, depending on the circumstances, an ISP may be asked to respond in hours, not days.

Congress mandated quick compliance because of "'the ease with which digital works can be copied and distributed worldwide virtually instantaneously,'" *Verizon II*, 257 F. Supp. 2d at 273 (quoting S. Rep. at 8). Copyright piracy propagates on P2P networks like a virus, as each new copy is itself made available again to anyone on the Internet. When it comes to enforcing copyrights, every second counts because the irreparable harm being suffered by the copyright owner is exacerbated each moment that the owner's copyrighted work is being disseminated (and re-disseminated) over the Internet. *See Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d 1039, 1041-42 (8th Cir. 2003) (copyright infringement is presumed to be irreparable harm).

Charter's claim that ISPs must be given 14 business days to respond simply reads the word "expeditious" entirely out of § 512. To be sure, Congress referenced limited parts of Rule 45 in the DMCA, *see* § 512(h)(6) (adopting only "the procedure for issuance and delivery of the subpoena, and the remedies for non-compliance"), but did not either expressly or by implication adopt Rule 45's time periods for compliance. Indeed, Congress took pains to specify in § 512(h)(6) that Rule 45 only applies "[u]nless otherwise provided" by the DMCA. Congress did otherwise provide – by requiring DMCA subpoenas to be responded to "expeditiously."

Finally, even if Rule 45 did apply in this context, it would still support RIAA's position. Rule 45 *expressly* contemplates that a subpoena might demand compliance in less than 14 days. *See* Rule 45(c)(2)(B) (recipient may serve objections "within 14 days after service of the subpoena *or before the time specified for compliance if such time is less than 14 days*") (emphasis added). All that Rule 45 requires is that the time for compliance be reasonable under the circumstances. *See* Rule 45(c)(3)(A)(i) (subpoena can be quashed if it "fails to allow reasonable time for compliance"). Here, where the information sought is limited, precisely defined, and easy to obtain; where Charter has had literally months to obtain it; and where the ongoing harm to the copyright owners is irreparable, a seven-day period is more than reasonable.

B. The Cable Communications Act Is No Basis For a Delay in Compliance.

Charter suggests that the subpoena should be quashed because it cannot comply with obligations under the Cable Communications Act ("CCA") in sufficient time. First, as discussed above, whatever Charter's obligations under the CCA, it has now had more than enough time to comply with them. But, more importantly, those obligations are simply trumped by the DMCA.

An ISP, such as Charter, must comply with a DMCA subpoena, "notwithstanding any other provision of law." 17 U.S.C. § 512(h)(5). As the Supreme Court and virtually every circuit has recognized, such "'notwithstanding' language . . . supersede[s] all other laws." *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (internal quotation omitted); *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 30 (D.C. Cir. 1998). Where a provision includes such "notwithstanding" language, the court "need not consider the appropriate interaction" between laws. *Campbell v. Minneapolis Public Housing Auth. ex rel. City of Minneapolis*, 168 F.3d 1069, 1075 (8th Cir. 1999) ("notwithstanding" language trumps federal and state anti-discrimination laws concerning disclosure of medical records). Rather, the provision with the "notwithstanding" clause supersedes any obligation that would be inconsistent with it. In interpreting a law that "command[ed] that the WWII Memorial shall be constructed expeditiously 'notwithstanding any other provision of law,'" one district court held that the law's direction that the memorial be built "expeditiously" superseded application of environmental laws that would have resulted in "lengthy proceedings" and "further delays." *See National Coalition to Save Our Mall v. Norton*, 161 F. Supp. 2d 14, 21 (D.D.C. 2001). The same principle applies here. While RIAA has no objection to Charter notifying its subscribers, Charter cannot use the CCA as a basis for delaying "expeditious" compliance under the DMCA.[5]

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[5] Nor can Charter show that responding to DMCA subpoenas in seven days would threaten its obligations to law enforcement, as it contends. Charter's argument is based solely on a single sentence in

II. THE RIAA SUBPOENA FULLY COMPLIES WITH THE DMCA.

A. Contrary to Charter's Contentions, It Has Received Notice Letters from RIAA Identifying the Infringed Works.

Charter concedes that it has previously received DMCA notices of infringement for all of the 93 infringers at issue, but argues that, because it allegedly did not receive a *third copy* of those notices *with* the subpoena at issue here, the subpoena is somehow defective. Charter Mem. at 10-11. That claim is wrong, both as a matter of fact and as a matter of law.

First, Charter *did* receive copies of the notification letters when it was served with the subpoena at issue here. As explained in the declaration of John J. Roth, Charter was served in St. Louis with copies of all of the notices. Roth Decl. ¶ 2. Moreover, Mr. Roth has reviewed Charter's filing and attests that the information in Charter's declaration is simply incorrect. *Id.* ¶ 4. He served Charter with all of the material attached to his declaration.

But the Court need not resolve this factual dispute, because Charter concedes that it had previously been provided with notifications identifying the infringing works for each individual subscriber. Charter Mem. at 11. The DMCA expressly provides for notice letters to be sent in advance of a subpoena because notice letters may trigger other obligations on the ISP (such as taking down infringing material). Section 512(h)(5) requires an ISP to respond to a DMCA subpoena "either accompanying or subsequent to the receipt of a [notice letter]." Thus, Charter's obligation to respond was triggered when it received the subpoena because it had (in most cases twice) previously received notifications for each and every infringer.

B. The DMCA Does Not Require a Separate Subpoena for Each Infringer.

Charter objects to this subpoena because it requests 93 subscribers' identities as opposed to just one, and claims that the DMCA does not permit a demand for more than one subscriber's

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a conclusory affidavit that does not begin to explain why Charter could not adequately satisfy both the needs of law enforcement and the obligations Congress has imposed on it. *See* Wood Decl. ¶ 4.

information per subpoena. Charter's argument here is nothing more than formalistic game-playing in furtherance of its goal to obstruct enforcement of the copyrights of RIAA's members.

Charter cannot claim to have been deprived of any information to which it is entitled. It has the IP addresses of the 93 infringers, a subpoena validly issued by the Clerk of this Court, a declaration complying with all of the requirements of the DMCA, and notices listing the copyrighted works illegally disseminated by each infringer. Charter claims instead that the DMCA *requires* RIAA to fill out 93 different subpoena forms that will differ *only* as to the IP address and to file 93 different declarations that will differ *only* as to the IP address. Charter's goal is transparent – to increase the paperwork burden on copyright holders, rather than to make this process streamlined and expeditious as Congress required.

Charter rests its entire argument on the slender reed that the DMCA's subpoena provision refers to "an alleged infringer," *see* Charter Mem. at 11, citing 17 U.S.C. §§ 512(h)(1), (h)(3). Neither of the references upon which Charter relies purports to define the number of infringers that may be listed in a single subpoena. Moreover, Charter's argument is totally inconsistent with basic principles of statutory interpretation. The Eighth Circuit long ago noted the "well-settled rule of construction that the singular may often import the plural as well." *Grier v. Kennan*, 64 F.2d 605, 607 (8th Cir. 1933). Congress established this principle in the Dictionary Act, 1 U.S.C. § 1, which states that "[i]n determining the meaning of an Act of Congress, unless the context indicates otherwise – words importing the singular include and apply to several persons, parties, or things." *See also Barr v. United States*, 324 U.S. 83, 90-92 (1945) (use of "buying rate" in statute concerning exchange rates does not preclude consideration of several different rates for a given foreign country); *Grier*, 64 F.2d at 607 (statute ordering release after 30 days for nonpayment of "a fine" applied to one imprisoned for nonpayment of two fines, without need for 30 days to elapse for each individual fine).

In order to succeed, Charter must demonstrate that Congress *expressly* intended to limit subpoenas to a single IP address. *See Grier*, 64 F.2d at 607 (in deciding significance of singular versus plural usage in a statute, "[t]he paramount duty of the court ... is to ascertain and give effect to the legislative intent"). Congress sought to foster cooperation between copyright holders and ISPs in rooting out Internet piracy as quickly as possible, not to create a new forum for procedural wrangling based on technicalities. *See* S. Rep. at 40; *Verizon I*, 240 F. Supp. at 36-39 (discussing policy behind enactment of the DMCA).[6]

Finally, contrary to Charter's suggestion, requiring individual subpoenas for each infringer will burden the Clerk of this Court, who processes the subpoenas and must open a miscellaneous file for each subpoena issued. Charter suggests that the Court would not be able to manage it if individual subscribers file their own motions to quash. But courts routinely handle subpoenas which request multiple categories of information, and there are no unique managerial difficulties when a court orders disclosure of some, but not all, of the information sought. The Court could easily fashion an order providing for release of information relating to some subscribers and not others. Charter wholly fails to explain how such an order would burden the Court more than opening and administering 93 different miscellaneous dockets.

C. RIAA Is Fully Entitled to the Subscriber's Telephone Number and E-mail Address Under the DMCA.

Charter concedes that a copyright holder is entitled to obtain "information sufficient to identify the alleged infringer," § 512(h)(3), and that such information includes name and address. Charter Mem. at 12. Charter contends, however, that a phone number and e-mail address are not "identifying" information. That argument is both obstructionist and wrong.

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[6]Charter's Motion stands in stark contrast to its public announcements that it intends to "fully cooperate" with RIAA's DMCA subpoenas. *See* Peter Shinkle, "SBC fights record industry requests," *St. Louis Post Dispatch* (Sept. 24, 2003) (quoting Charter spokesperson).

Besides having no textual basis, Charter's argument ignores the underlying purpose of § 512(h). Congress did not intend copyright owners to have the power to identify copyright infringers for their own personal edification. The statutory right would be hollow if it did not authorize disclosure of sufficient information to contact infringers and demand that they cease infringing. Above all else, Congress enacted § 512(h) for the purpose of "protecting rights" of copyright owners. *See* § 512(h)(2)(C). The entire point of the DMCA subpoena process is to give the copyright owner the opportunity to stop copyright infringement and enforce its rights as quickly as possible. *See Verizon I*, 240 F. Supp. 2d at 34. Whatever the steps chosen, they invariably will require contacting the infringer, which in the context of a P2P user will occur most quickly through a telephone call or e-mail message demanding that they stop committing infringement. Finally, given that all of the illegal conduct in this case occurs in cyberspace, we are simply past the time when a party – particularly an ISP – can plausibly claim that an e-mail address is different in a relevant way from a physical address.[7]

III. CHARTER IS NOT ENTITLED TO HOLD THE DMCA SUBPOENA PROCESS HOSTAGE TO ITS DEMANDS FOR COMPENSATION.

The text of the DMCA does not provide compensation to ISPs for complying with their legal obligations. The DMCA adopts only limited parts of Rule 45 – "the procedure for issuance and delivery of the subpoena, and the remedies for non-compliance" – but does not adopt Rule 45's cost-shifting principles expressly or implicitly. § 512(h)(6). Moreover, the DMCA makes clear that even these limited Rule 45 provisions – which do not embrace cost-shifting principles – themselves only apply "[u]nless otherwise provided" by the DMCA. § 512(h)(6). In this case

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[7] In other contexts, Congress has made clear that e-mail addresses and telephone numbers are the sort of basic information that can be disclosed without raising privacy or other concerns. Indeed, the Department of Education has made clear that e-mail addresses are "directory information" that universities may freely provide without special authorization from students or their parents pursuant to the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. *See* 34 C.F.R. § 99.3 (including "electronic mail address" in the definition of "directory information").

Congress *has* otherwise provided – by setting forth a careful balance of benefits and burdens in Section 512 that is simply incompatible with the idea of further compensation for ISPs in the case of subpoenas. *See Verizon I*, 240 F. Supp. 2d at 37.

Charter wants the Court to believe that it is somehow a victim here with no stake in the DMCA subpoena process. That is simply not true. The DMCA gives Charter, and other ISPs, an enormous benefit – limitations on its liability – in exchange for imposing specific and defined obligations on Charter. One of those obligations is to respond "expeditiously" to DMCA subpoenas. Under Charter's interpretation, DMCA subpoenas would be transformed into lengthy battles over whether ISPs should receive exorbitant fees. Nothing could be more inconsistent with an expeditious DMCA process than what Charter claims here – the right to refuse compliance until such time as a copyright owner pays what Charter demands.

Even if Rule 45's compensatory scheme did apply, Charter still would not be entitled to compensation. Rule 45 authorizes payment of costs only if a party claiming "undue burden" is faced with "significant expense." *See* Rule 45(c)(2)(B)-(C). Charter has not alleged that it must do anything other than what Congress required – provide the identities of those using its network for copyright infringement. By definition, this cannot be an "undue burden" – it is the exact burden that Congress contemplated. Moreover, Charter cannot credibly claim that the cost of compliance (allegedly $60 per IP address) is "significant" when compared to the $4.6 billion in revenues Charter reported to the SEC in 2002, *see Charter Communications, Inc. 2002 Annual Report, supra*, at 4, or to the massive benefit Charter receives by being relieved of millions of dollars of liability for copyright infringement by the DMCA. Indeed, the minor cost to Charter pales in comparison to the damage done to RIAA's members by Charter's refusal to comply.

Finally, Charter's claim that it must be paid $60 because it takes 1 3/4 hours to identify an infringer is simply not credible. Charter claims that the task of identifying a subscriber is "an

extremely involved, multi-step process." Charter Mem. at 9. But according to its declaration, the process for identifying a subscriber involves a sum total of two computer lookups, *see* Declaration of Eunice D. Lindsey, Ex. 4 to Charter Mem. ("Lindsey Decl."), ¶¶ 9, 11, and three e-mails between departments for each IP address, *see id.* ¶¶ 9, 10 & 12. Two lookups and three emails should be a task that can be accomplished in minutes, not 1 3/4 hours as Charter contends.[8] By stark contrast, *another ISP, Verizon, has contended that it can respond to DMCA subpoenas in 15-20 minutes*. Whitehead Decl. ¶ 13. Similarly, SBC has contended that it can respond in 15-45 minutes. *Id.* Charter's claim as to burden is thus wildly inflated.

At bottom, what Charter seeks here is not compensation, but ransom. Congress did not intend the DMCA to operate in such an unfair and one-sided manner.

IV. CHARTER HAS WAIVED ALL OF ITS OTHER ARGUMENTS.

Charter purports to "reserve" other grounds for quashing the subpoena, including all of the arguments rejected in the *Verizon I* and *Verizon II* litigation. Charter Mot. at 3. This is improper and a clear violation of the rules of this Court, which require that "the moving party shall file with each motion a memorandum in support of the motion, including citation of any authorities on which the party relies." E.D. Mo. L.R. 7-4.01(A); *see also Lusby v. Union Pacific R.R. Co.*, 4 F.3d 639, 642 (8th Cir. 1993) ("When a point is argued but unsupported by citations and authorities, the court might well decide not to trouble itself with independent research, and reject the point on its merits"). Charter has waived any other objections.

CONCLUSION

RIAA respectfully requests that the Court deny Charter's Motion and direct Charter to comply with the subpoena within 2 days of the Court's order. A proposed order is attached.

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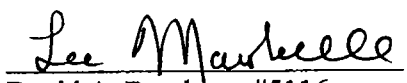
[8]Charter's declarations are notably vague on exactly why it takes so much time to perform these look-ups and why its price tag should be padded another 50% for "copying" and postage costs. *See* Lindsey Decl. ¶ 18 (adding $18 for copying and postage).

Respectfully Submitted,



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Dated: October 10, 2003

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. NW, Suite 300 Washington, DC 20001 v. CHARTER COMMUNICATIONS, INC. 12405 Powerscourt Drive, Suite 100 St Louis, MO 63131	Miscellaneous Action Case No. 4:03MC00273CEJ

[PROPOSED] ORDER RE:
CHARTER COMMUNICATIONS' MOTION TO QUASH SUBPOENA

Upon consideration of the Motion to Quash and the Opposition thereto, the Motion to Quash is DENIED. Charter is hereby ORDERED to comply with the subpoena within two days of the issuance of this Order.

_____
Judge Carol E. Jackson

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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