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 FOR PROTECTIVE ORDER

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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 for a protective order regarding subpoenas issued by the RIAA out of the District Court for the District of Columbia ("D.C. Court").

Charter's motion wastes this Court's time and resources to no purpose. RIAA obtained a subpoena from this Court and served it on Charter to *avoid* needless litigation in the D.C. Court over jurisdiction and venue. Charter now seeks affirmatively to inject those issues – related to the jurisdiction of another court – into proceedings in this Court. But, as both the Eighth Circuit and the Federal Rules of Civil Procedure make clear, this Court simply has no jurisdiction to enter the extraordinary order that Charter seeks. *See In re Digital Equipment Corp.*, 949 F.2d 228, 231 (8th Cir. 1991) (only court that issued subpoena has jurisdiction to rule on objections to that subpoena); Rule 45(c)(3)(A) (only providing mechanism for "the court by which a subpoena was issued" to quash or modify subpoena); *see also In re Sealed Case*, 141 F.3d 337, 341 (D.C. Cir. 1998) ("only the issuing court has the power to act on its subpoenas").

Charter's effort to needlessly invoke the jurisdiction of this Court is simply part of Charter's strategy to delay, obstruct, and ultimately avoid compliance with any of RIAA's subpoenas. In its Motion to Quash, Charter challenges the subpoena issued from this Court. At the same time that it challenges *that* subpoena as invalid, it asks this Court, by this Motion for a Protective Order, to reach beyond its jurisdiction and prohibit enforcement of subpoenas issued by another court as duplicative. Thus, if Charter had its way, it would not have to comply with any subpoena, leaving RIAA and its members unable to pursue their claims of copyright

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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.

infringement against the 93 Charter subscribers at issue who are together disseminating over 100,000 copyrighted works without authorization. It is Charter, not RIAA, that seeks to have it both ways.

In contrast, RIAA seeks to have its dispute with Charter fully resolved through consideration of Charter's (meritless) Motion to Quash. Consideration of *that* motion is within this Court's jurisdiction and will clearly and completely resolve the dispute between the parties over Charter's obligations under the DMCA. Consideration of *this* motion, however, would inject the Court into a dispute that simply does not exist currently (RIAA has not sought to enforce the subpoenas issued out of D.C.), likely will never exist (if Charter is ordered to comply with the subpoena issued from this Court), and is not within this Court's power to hear (because it is within the exclusive jurisdiction of another federal court).

For all of these reasons and those discussed below, Charter's motion should be denied in its entirety.

BACKGROUND

RIAA has already provided some of the background behind the D.C. subpoenas in its opposition to Charter's Motion to Quash filed four days ago, on October 10, 2003. Several elements of that background are relevant to this motion and bear repeating here.

As explained in the opposition to the Motion to Quash, RIAA announced on June 25, 2003 a nationwide enforcement effort to identify and eventually sue individuals committing copyright infringement over peer-to-peer computer networks. From late June to early August, RIAA discovered 93 significant copyright infringers who use Charter's network to disseminate copyrighted music without the authorization of the copyright owners. Declaration of Jonathan Whitehead, Ex. 1 to RIAA Opposition to Motion to Quash ("Whitehead Decl."), ¶ 18. Combined, the 93 individuals were offering more than 100,000 copyrighted works without the

authorization of the copyrighted owners. *Id.* 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.

From July 1 to August 13, 2003, RIAA obtained subpoenas to Charter from the District Court for the District of Columbia to identify these 93 infringers. *Id.* ¶ 20. RIAA served Charter's DMCA agent at Charter's St. Louis headquarters. Issuance by the Clerk of the District Court for the District of Columbia and service on ISPs, wherever they are located, is consistent with RIAA's practice since the DMCA was enacted. *Id.* ¶ 14. Prior to July of this year, no ISP had ever refused to respond to a DMCA subpoena issued out of the D.C. Court on the ground that personal jurisdiction or venue was lacking. *Id.* ¶ 16. Rather, ISPs recognized that the DMCA subpoena process was intended to permit copyright owners to obtain information expeditiously; thus, ISPs – without exception – complied with DMCA subpoenas delivered to the agent that the DMCA requires every ISP to register with the United States Copyright Office. *Id.* ¶ *16; see also* 17 U.S.C. § 512(c)(2). Indeed, in 2000, RIAA obtained a DMCA subpoena from the D.C. Court in order to identify a Charter subscriber using his home computer to disseminate unlawfully hundreds of copyrighted sound recordings. Whitehead Decl. ¶¶ 15, 21-22. Charter raised no objection to this earlier subpoena and responded with information identifying the Charter subscriber committing copyright infringement. *Id.* ¶ 15.

In July and August of 2003, however, Charter refused to comply with the DMCA subpoenas RIAA served upon it, and instead raised a host of objections, including that it would no longer comply with DMCA subpoenas unless they were issued by a court within 100 miles of Charter's offices. RIAA then served Charter's registered agent in Baltimore, MD, but Charter refused to comply again, claiming that the registered agent serves different corporate entities in

the Charter family.[2] Notably, all the various entities in the Charter family of companies use the same website, market under the same trade name, and have registered with the Copyright Office the same address for copyright owners to use when sending notices of infringement. *See* http://www.copyright.gov/onlinesp/agents/chartcom.pdf. That contact information specifies an address in St. Louis.

At no point did Charter move to quash the D.C. subpoenas, and RIAA did not seek to enforce them. Rather, counsel for RIAA and Charter made several attempts to reach agreement on service and compliance, but were unable to do so. In order to avoid needless litigation in D.C. over issues of service and jurisdiction, RIAA did as Charter requested and obtained a subpoena from this Court and served it on Charter's office in St. Louis. That subpoena – which is the subject of Charter's Motion to Quash – seeks the identities of the same 93 individuals who are the subject of the D.C. subpoenas. That subpoena was served, along with all of the relevant documents, on Charter on September 23, 2003. See Declaration of John J. Roth, Ex. 2 to RIAA's Opposition to Motion to Quash, ¶ 2.

Charter repeatedly suggests that there was some agreement between RIAA and Charter, but that is simply not true, as is demonstrated by Charter's inability to produce any document from RIAA suggesting the existence of such an agreement.[3] Charter's suggestion that RIAA agreed to withdraw the D.C. subpoenas as consideration for Charter refusing to assert jurisdiction and venue objections to the St. Louis subpoena makes no sense – *Charter has no jurisdiction and venue objections to the St. Louis subpoena*, as it has consistently conceded.

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[2]Because RIAA does not know where the 93 infringers in this case reside, it does not know whether any of them reside in Maryland or are customers of Charter's Maryland affiliates.

[3]Charter's claim that RIAA "reneged" on an agreement is both untrue and irrelevant. Charter's attempt to make use of such discussions is also wholly inconsistent with Federal Rule of Evidence 408.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION TO BAR THE ENFORCEMENT OF SUBPOENAS ISSUED IN ANOTHER DISTRICT.

Charter's request for a protective order is nothing more than a request for this Court to exercise jurisdiction where it has none. Under binding precedent in this Circuit, only the court that issues the subpoenas – in this case, the D.C. Court – has the right to hear objections to those subpoenas. *In re Digital Equipment Corp.*, 949 F.2d 228, 231 (8th Cir. 1991).

In *Digital Equipment*, the plaintiff in litigation pending in the District of South Dakota issued a third party subpoena out of the District of Oregon. After the recipients of the subpoena objected, the plaintiff then sought and obtained an order from the District of South Dakota to enforce the subpoenas. On appeal, the Eighth Circuit reversed. The court held that under the Federal Rules of Civil Procedure, only the court which issues a subpoena has jurisdiction to rule on objections to that subpoena. 949 F.2d at 231. Accordingly, the court held, "the District Court for the District of South Dakota lacks jurisdiction to rule on [the third parties'] objections." *Id.*

Since *In re Digital Equipment Corporation*, the 1991 amendments to the Federal Rules of Civil Procedure have reinforced, in even stronger terms, the proposition set forth by the Eighth Circuit. As amended in 1991, Rule 45 specifies that only "the court by which a subpoena was issued" has the power to quash or modify a subpoena. Fed. R. Civ. P. 45(c)(3)(A). Courts and commentators have agreed that Rule 45's reference to "the court by which a subpoena was issued" was intended to vest exclusive jurisdiction in the issuing court. As Wright & Miller explain, "[t]he 1991 amendments to Rule 45(c) now make it clear that motions to quash, modify, or condition the subpoena are to be made to the district court of the district from which the subpoena issued." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2459 at 40-41 (2d ed. 1995). *See also Visx, Inc. v. Nidek Co.*, 208 F.R.D. 615, 616 n.1 (N.D. Cal. 2002) ("only the court by which the subpoena was issued shall quash or modify the

subpoena") (internal citation omitted); *In re Sealed Case*, 141 F.3d 337, 341 (D.C. Cir. 1998) ("only the issuing court has the power to act on its subpoenas"); *Productos Mistolin, S.A. v. Mosquera*, 141 F.R.D. 226, 227 (D.P.R. 1992) ("there is no mention in Rule 45 in relation to recourse to any court other than the one where the subpoena was issued").

It makes no difference that Charter has styled this action as a motion for a protective order as opposed to a motion to quash. Regardless of how it is styled, the underlying purpose of its motion is the same – to obtain from this Court a ruling on the merits of the D.C. subpoenas. Rule 26(c) applies only to discovery obtained for use in the pending action itself – not to discovery relating to an action pending elsewhere. "[A] district court's power to control discovery [via a protective order] does not extend to material discovered in a separate action, notwithstanding the fact that the parties were identical." *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1081 (9th Cir. 1988); *see also Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940, 945 (2d Cir.1983) (holding that Rule 26(c) does not authorize a court to enter a protective order with respect to information not obtained as part of discovery in the case).[4]

Rather than address the obvious jurisdictional defect of its motion, Charter alleges – without any support or explanation – that RIAA is seeking to "strip" this Court of its jurisdiction. Charter Mem. at 4. RIAA is doing nothing of the kind. RIAA has done nothing to prevent this Court from exercising its jurisdiction and is not seeking conflicting rulings from any court. RIAA is before this Court seeking only enforcement of the subpoena issued by the Clerk of this Court. Rather, it is Charter that seeks to strip the D.C. court of jurisdiction – albeit jurisdiction

[4]Moreover, neither Rule 26(c) nor 28 U.S.C. § 1651, which Charter also invokes, provides an independent basis for subject matter jurisdiction that would enlarge this Court's powers beyond the confines set forth by the Eighth Circuit in *Digital Equipment. See, e.g., White v. Nat'l Football League*, 41 F.3d 402, 402 (8th Cir. 1994) (All Writs Act "is not an independent grant of jurisdiction"); *Application of U.S. for Order Authorizing Installation and Use of Pen Register*, 546 F.2d 243, 246 n.7 (8th Cir. 1976) (same). This Court therefore has no jurisdiction to rule on the merits of the D.C. subpoenas.

that it has not been called upon to exercise. There is no reason for this Court to take the extraordinary steps that Charter seeks, particularly where whatever issues exist between the parties will be resolved in the proceeding that this Court does have jurisdiction over – Charter's Motion to Quash.

Finally, even if subject matter jurisdiction were somehow proper here, Charter's request for a protective order is an unnecessary affront to the D.C. Court. Normally a party that seeks to enjoin litigation in another federal court at least does the other court the courtesy of asking it to step aside first. *See, e.g., Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002 (8th Cir. 1993) (affirming Minnesota court injunction against parallel Texas proceeding after Texas court denied motion to stay or transfer venue). If it were genuinely concerned that the D.C. Court might take up the subpoenas pending there and order compliance with them, Charter could simply have waited until RIAA moved to enforce and raised its objections then (or moved to stay or transfer) in that court. If for some unexplained reason it were somehow unsatisfied with the fact that RIAA has not moved to compel, Charter could have sought a protective order from the D.C. Court. In short, Charter had many options in the District of Columbia, but seeking protection from this Court simply is not one of them.

II. CHARTER'S REQUEST FOR A PROTECTIVE ORDER IS PRECLUDED BY THE DMCA.

Charter is also precluded from seeking this protective order under the terms of the DMCA. Allowing ISPs to seek protective orders in foreign courts is flatly inconsistent with the DMCA's command that parties receiving DMCA subpoenas respond to them "expeditiously."

As RIAA explained in detail in its opposition to the Motion to Quash, the DMCA and its supporting legislative history make clear that Congress intended DMCA subpoenas to be resolved in a streamlined process, with a minimum of procedural wrangling. Indeed, Congress used the word "expeditiously" 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. No. 105-190, at 45 (1998) ("S. Rep.") (when a service provider is notified of infringing activity, the limitation on liability is maintained only if "the service provider acts expeditiously either to remove the infringing material from its system or to prevent further access to the infringing material"). *See also In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 34 (D.D.C. 2003) (noting "Congress's express and repeated direction to make the subpoena process 'expeditious'").

If, however, an ISP could challenge DMCA subpoenas through a motion for a protective order in a forum of its choosing, § 512(h) would cease to function as intended. Rather than an "expeditious" process to protect the rights of copyright owners, the DMCA would instead be a burdensome process in which the ISP chose its preferred forum and would be able to drag out proceedings, during which time the copyright owner would continue to suffer irreparable harm from infringement on the Internet. Had Charter attempted to bring a free-standing declaratory action in this Court to bar the enforcement of the D.C. subpoenas, it would have been prevented from doing so by the clear terms of Rule 57, which bar declaratory actions that duplicate alternative statutory remedies established by Congress. See Rule 57 Advisory Committee Notes ("[a] declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case"). Similarly, because the DMCA provides for the issuing court to determine objections to subpoenas by adopting the enforcement provisions of Rule 45, Charter has no right to enlist this Court in an evasion of the subpoena enforcement procedures set forth by Congress. *See, e.g., Morris v. Gressette*, 432 U.S. 491, 504-05 (1977) (holding that a clearly expressed legislative intention to resolve a matter expeditiously bars litigation that would thwart that legislative aim).

Charter cannot claim that it would not have a full and fair opportunity to litigate its objections to RIAA's subpoenas in the event that RIAA sought to enforce them. But collateral litigation over such subpoenas is simply inconsistent with Congress's goals in enacting the DMCA.

III. CONSIDERATION OF CHARTER'S MOTION WOULD NEEDLESSLY INJECT THIS COURT INTO ISSUES OF ANOTHER COURT'S JURISDICTION.

For all of the above discussed reasons, this Court simply has no authority to consider Charter's objections to the subpoenas issued from the D.C. Court or to enter a protective order with respect to those subpoenas. Moreover, consideration of the merits of Charter's motion would needlessly inject this Court into issues which – if they ever needed to be litigated – are properly for the D.C. Court and that court alone.

Charter's sole objection to the D.C. subpoenas is its claim that the D.C. Court does not have jurisdiction over it. But the question of the jurisdiction of the D.C. Court is necessarily the province of that court. "Each [federal] court has jurisdiction to determine its own jurisdiction, but not the jurisdiction of others." *Chiron Corp. v. Advanced Chemtech, Inc.*, 869 F. Supp. 800, 801 (N.D Cal. 1994) (citing *United States v. United Mine Workers of America,* 330 U.S. 258, 292 n.57 (1947)). It is the D.C. Court which would have to determine, with respect to the subpoenas issued by it, whether the DMCA requires compliance with subpoenas delivered to the DMCA agent that Charter is required by statute to designate,[5] whether the DMCA authorizes nationwide service of process,[6] or whether service on Charter's affiliate in Baltimore is sufficient

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[5] *See* 17 U.S.C. § 512(c)(2) (requiring ISPs to designate a DMCA agent with the United States Copyright Office to receive notices of infringement if the ISP desires the DMCA's limitations on liability); 17 U.S.C. § 512(h)(4) (requiring expeditious compliance "upon receipt of the issued subpoena, either accompanying or subsequent to the receipt" of a DMCA notice of infringement).

[6] "Congressional power to authorize nationwide service of process in cases involving the enforcement of federal law is beyond question." *Mariash v. Morrill*, 496 F.2d 1138, 1143 n.6 (2d Cir. 1974); *United States v. Congress Constr. Co.*, 222 U.S. 199 (1911). Moreover, Congress can authorize nationwide service either expressly or impliedly. *See Robertson v. Railroad Labor Bd.*, 268 U.S. 619,

to require compliance with the subpoenas issued out of the D.C. Court. The latter question is a particularly fact-intensive question, given that Charter maintains numerous corporate entities that operate within 100 miles of the District of Columbia, all of which do business as "Charter Communications," all of which use IP addresses registered to "Charter Communications," and all of which share the same contact information for their designated DMCA agent.[7]

But none of these issues are properly before this Court. Charter has no possible jurisdiction or venue objections to the subpoena issued from this Court. Notably, it did not raise any venue or jurisdiction arguments in its Motion to Quash. What Charter asks is for this Court to reach out and decide issues that Charter could have chosen to litigate in D.C. – but did not – and that may never be at issue because resolution of Charter's Motion to Quash likely will resolve the issues before the parties on all fronts. There is thus no reason to even entertain the extraordinary and overreaching exercise of authority that Charter's motion requests.[8]

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622 (1925); *First Nat'l Bank of Canton v. Williams*, 252 U.S. 504, 509-10 (1920); *FTC v. Browning*, 435 F.2d 96, 100 (D.C. Cir. 1970) (finding implied authorization of nationwide service where necessary to "effectuate the purpose of the regulatory scheme"); *United States v. Bliss*, 108 F.R.D. 127, 135 (E.D. Mo. 1985) (holding that "[t]he doctrine of implicit authorization of nationwide service of process is firmly established in federal case law" and finding such authorization in CERCLA) (citations omitted). If Congress has authorized nationwide service, it has also authorized exercise of personal jurisdiction nationwide. *See In re Federal Foundation, Inc.* 165 F.3d 600, 601-02 (8th Cir. 1999) (en banc) ("Congress has . . . quite frequently exercised its authority to furnish federal district courts with the power to exert personal jurisdiction nationwide.").

[7] Charter tries to make that issue look simple by stating summarily, without citation to anything other than one of its own self-serving objection letters, that it maintains no presence in Maryland. Charter Mem. at 2. There are, however, at least four different Charter entities registered to do business in Maryland (Charter Communications Holding Company, LLC; Charter Communications VI, LLC; Charter Communications VII, LLC; and Falcon Cable Media), all of which do business as Charter Communications. They are four of the at least 54 corporate entities, all sharing the same name and using the same address for its DMCA agent, that Charter has registered with the Copyright Office. *See* http://www.copyright.gov/onlinesp/agents/chartcom.pdf

[8] Even if this Court were to reach the underlying jurisdictional issues, Charter's citation of *Boston College v. RIAA* and *Massachusetts Inst. of Tech. v. RIAA* would be to no avail. Charter Mem. at 13; Ex. 4.H to Charter Mem. Those decisions are nothing more than single-sentence orders. They provide absolutely no analysis in support of Charter's claims, and are further distinguishable because Charter has also been served in Maryland, within 100 miles of the place of production.

IV. CHARTER'S MOTION FAILS EVEN UNDER RULE 26 AND IS A WASTE OF JUDICIAL RESOURCES.

A protective order may not be issued without "good cause." Fed. R. Civ. P. 26(c). "The burden is therefore upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973).

Even if there was jurisdiction to hear Charter's claim, Charter simply has not met its burden. Charter attempts to fabricate a principle that all "duplicative" subpoenas are an undue burden, but the cases which it cites simply do not stand for that proposition. Charter Mem. at 6. Those cases do no more than say that a party cannot force someone to look again for documents that have already been produced, *In re Nova Biomedical Corp.*, 182 F.R.D. 419, 423 (S.D.N.Y. 1998) (nonparty asked to produce documents when it had already complied with an identical earlier subpoena), or to seek documents from a nonparty where a more suitable forum is available to obtain them from a party, *Fleet Business Credit v. Hill City Oil*, 2003 U.S. Dist. LEXIS 3354, at *9-*11 (E.D. La. 2003) (third party subpoena was attempted end run around earlier-asserted privilege claims by another party that were more properly addressed by the court where the action was pending); *Frankford Hosp. v. Carolyne K. Davis*, 1985 U.S. Dist. LEXIS 20187, *3-*4 (E.D. Pa. 1985) (party must exhaust option of obtaining documents from other party before seeking same documents from nonparty). In this case, however, Charter has not complied with any subpoena, and there is no other party from whom the information can be obtained. Indeed, the fact that the D.C. and St. Louis subpoenas seek the same information simply demonstrates that there is no burden on Charter. It need only do what it has already done – identify the 93 subscribers who were infringing the copyrights of RIAA's members using particular IP addresses at particular times – and provide this information to RIAA. Charter resorts to rhetoric about the "sword of Damocles," but it can point to no actual threat posed to it

by the D.C. subpoenas, nor is there any realistic possibility that it will be under conflicting orders from this Court and the D.C. Court.[9]

Charter's last resort is to invoke "confusion" among its subscribers. But there is no evidence of Charter's subscribers being confused at all. Indeed, what seems clear is that Charter has been telling its subscribers – for weeks if not months – that it is going to have to turn over information to the RIAA at any moment, and none of those subscribers has raised an objection. Rather, several have contacted RIAA in an effort to settle their underlying copyright infringement liability. Whitehead Decl. ¶ 28. The only confusion here is that which Charter seeks to engender through its repetitive and needless motions.

CONCLUSION

For all the foregoing reasons, the Court should deny Charter's motion for a protective order.

[9]Charter once again invokes the Cable Communications Act, although it concedes that it must comply with DMCA subpoenas – regardless of the CCA – if they are validly issued. That is because, as RIAA demonstrated in its Opposition to Charter's Motion to Quash, ISPs such as Charter must comply with DMCA subpoenas, "notwithstanding any other provision of law." 17 U.S.C. § 512(h)(5).

Respectfully submitted,

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Dated: October 14, 2003

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 14th day of October, 2003.

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