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

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

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

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I. INTRODUCTION

As Charter predicted, the RIAA's response to Charter's Motion to Quash the RIAA's non-compliant, omnibus Subpoena is little more than a diatribe against Internet file-sharing, which totally misses the point of Charter's motion. Indeed, the RIAA even stoops to the absurd suggestion that Charter somehow condones copyright violations. Charter's reply directs the Court to the key issues before it, issues that the RIAA's response attempts to obscure:

1. Can the RIAA prevent Charter from complying with federal law – which requires that Charter notify its subscribers before releasing identifying information – by unilaterally imposing a deadline for responding to its Subpoena that effectively precludes advance notice to the affected subscribers?

2. Does an e-mail address or phone number – neither of which identifies a subscriber – fall within the limited information "sufficient to identify" a subscriber that is required by the DMCA? and

3. Given the RIAA's continuing onslaught of DMCA subpoenas – with many more filed each week – should Charter solely bear the significant cumulative expense of gathering and producing the information sought by the RIAA subpoenas merely because the allegedly infringing transmissions happened to travel, unbeknownst to Charter, on part of its network?

II. BACKGROUND AND SUMMARY OF THE REPLY

The RIAA **never disputes** that the Cable Communications Act ("CCA")[1] protects the privacy of the subscriber-identifying information held by Charter. Nor can the RIAA deny that the CCA reflects Congress' express intent that, absent "a court order," cable subscribers are entitled to prior written notice before a cable operator may disclose "personally identifiable information concerning any subscriber."[2] And even with a court order, the subscriber is entitled to an opportunity to "appear and contest" the claim – which requires prior notice. While the RIAA falsely asserts that these issues were decided by the *Verizon* decisions (which are now on

[1] 47 U.S.C. § 551.

[2] *Id*. at § 551(h).

appeal), no court has ever addressed the proper reconciliation between the statutory protections of the CCA and the disclosure requirements of the DMCA. In this case of first impression, the RIAA would have this Court ignore federal law, disregard the Federal Rules of Civil Procedure, and cast aside the fundamental due process rights of Charter's subscribers, merely because the RIAA asserts – without proof – that the billion-dollar mega-corporations[3] that make up the RIAA's membership might lose a few CD sales[4] during the brief time that it would take to provide Charter's affected subscribers with the notice required by federal law.

In an obvious effort to thwart Charter's ability to notify its subscribers prior to releasing any personally identifiable information, the RIAA has unilaterally imposed a deadline of no more than five business days to respond to its DMCA subpoenas. Not only does this unreasonable time for compliance barely afford Charter enough time to gather the requested information, it is clearly designed to preclude Charter's affected subscribers from exercising their right, provided by the CCA, to contest the subpoenas if they so choose.

The RIAA compounds its attempted abuse of the DMCA by demanding that Charter disclose private subscriber information beyond that required by the DMCA. The RIAA concedes that it seeks this additional information not to "identify" the subscribers (as required by the DMCA), but simply to make it more convenient for the RIAA to "contact" the subscribers it is targeting. However, in striking a balance between the self-help measures of the DMCA and the privacy rights protected by the CCA, the Court should not permit the RIAA to misuse DMCA

[3] The RIAA is purporting to act on behalf of such mega-companies as Universal Music Group, EMI Recorded Music, Sony Music Entertainment, BMG Music Group, and Univision Music, Inc. [Opp. at n.1], whose combined annual revenues dwarf those earned by Charter.

[4] The RIAA's claims of the alleged demise of the recording industry as a result of peer-to-peer file sharing (as opposed to general economic conditions, a perceived deterioration in the quality of the music, or the manner in which it is now marketed) [Opp. at 3-4] is based entirely on supposed evidence that the RIAA has not placed before this Court. Similarly, these asserted "facts" were not before Congress in 1998, when the DMCA was enacted. As the district court found in *Verizon I*, peer-to-peer file sharing was "not even a glimmer in anyone's eye when the DMCA was enacted." *In re Verizon Internet Services, Inc.*, 240 F. Supp. 2d 24, 38 (D.D.C. 2003).

subpoenas to obtain subscribers' telephone numbers (home, work, cell, fax or otherwise), e-mail addresses or any information beyond the minimum information sufficient to "identify" the subscriber behind an IP address – which is all that the subpoena provision of the DMCA permits.[5] Nor should the RIAA be permitted to inject further confusion by issuing omnibus subpoenas simply for its own ease of service. Indeed, even the RIAA does not believe its own argument that the DMCA authorizes such multifarious subpoenas. Every other subpoena served by the RIAA upon Charter – including the original D.C. subpoenas for the 93 IP addresses at issue here – is a subpoena for the identity of the user of a single IP address.[6]

Finally, the RIAA insists that Charter, not the RIAA, must bear the entire burden and expense of compliance with the RIAA's repeated invocation of "self-help" measures under the DMCA. The RIAA vainly attempts to justify this unauthorized burden-shifting by trying to implicate Charter in the alleged misdeeds of Charter's subscribers[7] – contrary to established copyright law. Even the *Verizon* decisions recognized that the DMCA does not trump the protection of Rule 45; to the contrary, DMCA subpoenas must comply with Rule 45 "to the greatest extent practicable."[8] This expressed intent is not "trumped" by the implied intent that the RIAA attempts to impose from multiple appearances of the word "expeditiously" in the Act. And because compliance with the wave of DMCA subpoenas imposes a significant expense upon Charter, a third-party from whom information is sought, the Court should order the RIAA to reimburse Charter's reasonable expenses incurred in connection with the DMCA subpoenas.

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[5] 17 U.S.C. § 512(h)(3).

[6] *See* Whitehead Decl., Exh. 1 to Opp. at ¶ 25.

[7] Contrary to the RIAA's insinuations, Charter is not "profiting" from copyright violations that are allegedly committed by any of its subscribers. Charter's subscriber base may be growing – as the popularity of legitimate high-speed access to the Internet has grown – but it defies logic and credulity for the RIAA to suggest that Charter's growth is attributable principally to hordes of alleged copyright violators.

[8] 17 U.S.C. § 512(h)(6).

III. ARGUMENT AND AUTHORITIES

A. The RIAA's Subpoena Requires Charter to Violate the CCA by Failing To Allow a "Reasonable Time" To Notify the Affected Customers

1. The "Expeditious" Terminology in the DMCA Does Not Trump the Advance Notice Requirement of the CCA

Although Charter is the party opposing the RIAA's enforcement of the defective Subpoena, the Court should not lose sight of the fact that those most affected are the 93 Charter subscribers whose personal identifying information is being sought. Being merely a custodian of this confidential information, Charter is legally obligated to ensure that the subscriber's privacy rights, including those afforded by the CCA, are not trampled upon by the RIAA. The unreasonably short compliance period demanded by the RIAA not only compromises Charter's fundamental duty of loyalty to its subscribers, but could subject Charter to significant liability for failing to provide advance notice to its subscribers.[9]

Yet the RIAA boldly asserts that Charter's "obligations are simply trumped by the DMCA." [Opp. at 9] The RIAA mistakenly bases this assertion on the DMCA's reference to "notwithstanding any other provision of law" and insists that this means not just that disclosure of the information is authorized by the Act (the only sensible reading of this phrase), but that Charter must ignore all pre-disclosure notice requirements imposed by federal law. [*Id*., citing 17 U.S.C. § 512(h)(5)] Under the RIAA's interpretation, the DMCA requires a cable ISP to associate a subscriber's personal identifying information with particular content exchanged over the Internet without affording the subscriber sufficient advance notice and a meaningful

[9] *See, e.g., Wilson v. American Cablevision of Kansas City, Inc.*, 133 F.R.D. 573, 579 (W.D. Mo. 1990) (noting that the CCA "provides every individual subscriber to cable television with an appropriate remedy by way of individual actions for violations of the requirement of that Act, including but not limited to the recovery of damages, attorney's fees and court costs"). Certainly, Congress did not intend to impose additional civil liability on cable ISPs in enacting the DMCA.

"opportunity to appear and contest" the RIAA's claim, as mandated by the CCA. *See* 47 U.S.C. § 551(h).

This supposed abolition of due process and privacy rights finds no support in the DMCA; indeed, it flies in the face of the legislative history of the DMCA itself. While providing in the DMCA certain "self-help" remedies for copyright owners (such as the subpoena provision of section 512(h)), Congress also recognized the substantial need to protect the privacy and freedom of expression of the over 100 million Internet users in this country. *See* 17 U.S.C. §§ 512(m), 1205; *see also* S. Rep. No. 105-190, at 18 (1998) ("[T]he committee concluded that it was prudent to rule out any scenario in which section 1201 might be relied upon to make it harder, rather than easier, to protect personal privacy on the Internet."). Given that the DMCA does not expressly override the subscribers' privacy rights – protected, *inter alia*, through the CCA – the "expeditious" disclosure provision of the DMCA cannot be read to implicitly "trump" Charter's obligations under the CCA, but, rather, must be read in harmony with them. As the Supreme Court admonished in *Morton v. Mancari*:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

417 U.S. 535, 551 (1974). Because nothing in the DMCA establishes a five-day time limit for an "expeditious" disclosure, affording Charter the minimum time needed to provide its subscribers with advance notice and an "opportunity to appear and contest" the Subpoena satisfies this Court's obligation to harmonize this express requirement of the CCA with the DMCA.

2. Compliance In Five Business Days Is Not "Reasonable" Under Rule 45

In addition to arguing that the DMCA trumps the notice provision of the CCA, the RIAA further argues that the DMCA's use of the term "expeditiously" trumps any notice provision in

Federal Rule of Civil Procedure 45. [Opp. at 8] In the alternative, the RIAA insists that Rule 45 does not provide for a minimum compliance period of 14 days, and argues that it requires only that the compliance period be "reasonable" under the circumstances. [*Id*.]

The RIAA's "trumping" argument has already been rejected in the RIAA's *Verizon* test case. In holding that the Internet user's rights were protected under the DMCA, the court noted that DMCA subpoenas are subject to all of the protections of Rule 45:

> [T]he Federal Rules of Civil Procedure govern the issuance, service, enforcement and compliance of subpoenas. 17 U.S.C. § 512(h)(6). Hence, access to the courts and the judicial supervision Verizon urges to protect Internet users is available. Service providers or their subscribers, for example, can employ FED. R. CIV. P. 45 to object to, modify or move to quash a subpoena, or even to seek sanctions.

In re Verizon Internet Services, Inc., 257 F. Supp. 2d 244, 263 (D.D.C. 2003) ("Verizon II"). Indeed, the availability of Rule 45 as "yet another layer of protection for Internet users" was central to the court's conclusion that the DMCA does not violate the First Amendment, including user's rights to anonymous speech on the Internet. *Id*. The RIAA itself seized on these protections for Internet users in subsequent briefing on Verizon's appeal to the D.C. Circuit Court of Appeals, representing that the subpoena power of the DMCA does not violate the First Amendment because it "provides for case-by-case adjudication through the Rule 45 process so that the subpoena can be challenged prior to enforcement."[10] Having relied on Rule 45 to bolster its argument that the DMCA is constitutional, the RIAA cannot now argue the opposite, *i.e.*, that the DMCA is not subject to the protections of Rule 45, and that subscribers have no practical opportunity or means to challenge a DMCA subpoena "prior to enforcement."

The need to protect the subscribers' rights is not merely hypothetical, nor is it futile. Third parties whose confidential information is sought in a proceeding between two other parties

[10] Brief of Appellee Recording Industry Association of America at 38, *In re Verizon Internet Services, Inc.*, Nos. 03-7015 & 03-7053 (D.C. Cir., filed July 10, 2003) (emphasis added).

have routinely been granted the right to intervene under Federal Rule 24 to protect their confidential information from being improperly disclosed.[11] One such action currently challenges a DMCA subpoena served by the RIAA, where the subscriber, identified only by her peer-to-peer nickname – "nycfashiongirl" – is being represented anonymously by counsel.[12] In pleadings filed in connection with the RIAA's motion to enforce the subpoena, filed in August, the RIAA has consented to the subscriber's intervention. *Id.*

In fact, since the filing of Charter's Motion to Quash, several of the affected subscribers or their counsel have contacted Charter and indicated that they may take action to preserve their rights. [Lindsey Supp. Decl., Exh. 1 hereto, at ¶ 5] Thus, Charter is not raising the subscriber notice issue as a mere technical argument, but in support of important obligations owed to Charter's subscribers – real people who may wish to protect their rights.

Although the 14-day default period set forth in Rule 45 should apply as a minimum in the absence of an articulated basis for a shorter period [Memorandum at 6-8], this Court need not resolve that issue. As explained in Charter's opening Memorandum, numerous courts have recognized that seven days is not a "reasonable" amount of time under Rule 45 for compliance with a subpoena *duces tecum*. [Memorandum at 7] This is particularly true where, as here, the information sought does not legally belong to Charter, but to the affected subscriber. In any event, a compliance period that does not afford the affected subscriber an opportunity to challenge the Subpoena effectively nullifies the protections of the CCA, and should not be upheld by this Court.

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[11] *Cf. In re: Sealed Case*, 237 F.3d 657, 664 (D.C. Cir. 2001) (observing that "[o]nce the information included in the FEC's subpoena enforcement action is released, 'the cast is out of the bag,' and Appellant's statutorily guaranteed confidentiality would be forever lost.").

[12] *In re Subpoena to Verizon Internet Services, Inc.*, Misc. Action No. 03-MC-804-HHK/JMF (subpoena issued July 9, 2003) ("Verizon III"), Motion To Intervene filed August 21, 2003.

For the reasons explained above, five business days is not "reasonable" under these circumstances. Unless the RIAA can articulate exigent circumstances that require accelerated compliance,[13] it should be required to allow at least 14 business days for compliance with all DMCA subpoenas so that Charter will have sufficient time to gather the necessary information, notify its affected subscriber(s), and allow the affected subscribers to protect their rights.

3. Charter's Notice Arguments Are Not Moot

Attempting to gloss over the foregoing facts, the RIAA argues that, because the omnibus Subpoena is a re-issuance of 93 prior subpoenas, Charter has effectively had "months" to respond, and thus the Subpoena's failure on its face to afford adequate time for compliance is somehow irrelevant. [Opp. at 6-8] It is completely disingenuous, however, for the RIAA to argue that Charter's Motion to Quash is moot due to the passage of time, because it was Charter's timely lodging of objections[14] and the filing of this Motion – not the Subpoena itself – that afforded Charter additional time to notify its subscribers.

The RIAA's argument also requires this Court to overlook the many other subpoenas issued by the RIAA from this Court – all of which purportedly require Charter to furnish the subpoenaed information in five business days or less. Thus, the present Subpoena does not stand in isolation, but is merely the start of a continued course of conduct by the RIAA in this Court.

Moreover, the RIAA's reliance on the superseded D.C. subpoenas is a red herring. The RIAA's previous issuance of deficient subpoenas, from a Court without jurisdiction over Charter, does not justify the abbreviated compliance period demanded on the face of the present

[13] For example, the RIAA has not alleged that any instances of alleged illegal file-sharing here have involved pre-release music. Nor does the RIAA have any reason to believe that Charter has not conscientiously preserved the requested information. *Cf.* "Whitehead" Declaration, Exh. 1 to Opp., at ¶ 29.

[14] Under Rule 45, service of objections to a subpoena *duces tecum* places the burden on the requesting party to overcome the objections in seeking an order to compel production. FED. R. CIV. P. 45(c)(2)(B).

consolidated Subpoena. Issuing the present Subpoena from this district court was not merely a formality done for the convenience of Charter. [Opp. at 6] To the contrary, the re-issuance was necessary due to the fundamental jurisdictional defect of the 93 D.C. Subpoenas. The fact that Charter diligently saved the information requested in the D.C. Subpoenas does not excuse the RIAA from affording a proper compliance period in this Subpoena and in future subpoenas.

Finally, because Charter obviously could not provide notice of the subpoenas issued out of this Court until they were issued, or notify its subscribers that any challenges to the subpoenas should be directed to this Court, Charter's affected subscribers have only recently learned of the Subpoena. [Lindsey Supp. Decl. at ¶ 3] Thus, the lack of sufficient time to provide notice is far from moot; indeed, the importance of that notice is underscored by the many calls that Charter has received recently from affected subscribers who may wish to challenge the Subpoena or otherwise protect their right to object to disclosure of their identifying information. [*Id*. at ¶ 5]

Unless restrained by this Court, the RIAA will continue to serve subpoenas with truncated compliance dates, depriving Charter and its subscribers of the Rule 45 protections that the *Verizon* court found critical to the constitutionality of the DMCA. Thus, this Court should rule on this objection now, to ensure that all future subpoenas afford Charter a reasonable time to respond, taking into consideration the affected subscriber's rights under, *inter alia*, the CCA.

B. The Subpoena Overreaches Beyond the Limited Authorization of the DMCA

1. Telephone Numbers and E-Mail Addresses Are Contact Information Outside the Scope of "Information Sufficient To Identify" Subscribers

The RIAA asserts that "information sufficient to identify" a subscriber really means all information that would make it more convenient for the DMCA to <u>contact</u> a subscriber. [Opp. at 13] The very language of the DMCA belies the RIAA's argument. The subpoena provision of the DMCA does not require disclosure of all "contact" information; rather, it states that only

"information sufficient to identify" the subscriber may be obtained. 17 U.S.C. § 512(h)(3) (emphasis added). This section contrasts sharply with section 512(c)(3)(A)(iv) of the DMCA, which deals with information that a copyright owner must provide to a service provider, and requires "[i]nformation sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address." (emphasis added). Similarly, still other portions of the DMCA – those setting forth the "counter notification" procedure – explicitly require that a counter-notification from a subscriber provide: "The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located…." 17 U.S.C. § 512(g)(3)(D). Congress' choice not to include either "contact" information, "telephone numbers" or "electronic mail addresses" in the subpoena provision clearly indicates that Congress did not intend to require ISPs to disclose telephone numbers and e-mail addresses in response to subpoenas.[15]

The only reason that copyright holders are permitted to obtain any information from an ISP is simply that the identity of a subscriber cannot be ascertained from the IP address. Conversely, once a copyright holder has obtained a name and address through a proper DMCA subpoena, then the copyright holder may avail itself of ordinary methods to obtain a phone number or e-mail address if it so desires.

The RIAA does not even attempt to argue that information beyond a name and physical address is actually required to "identify" a subscriber – as mandated by the DMCA. Rather, the RIAA indicates that it would be more convenient to obtain this information from Charter because

[15] *Cf. Friends of Earth v. U.S. Envt'l Protection Agency*, 333 F.3d 184, 188-189 (D.C. Cir. 2003) (discussing doctrine of *expressio unius est exclusio alterius*).

its own dispute will "invariably will require contacting the infringer."[16] [Opp. at 13] But the DMCA was never designed to transform ISPs into the RIAA's personal information hotline. The RIAA's proposed interpretation would have this Court tread down a very slippery slope. If the Court permits the RIAA to compel disclosure of "all telephone numbers" – where does the disclosure end? Subscribers often have multiple phone numbers on file, including work numbers, home numbers, unlisted numbers, and private cell phone numbers. Because Charter itself cannot readily determine from its records which telephone numbers are unlisted, Charter, under the CCA, treats all of its subscribers' telephone numbers as private.

The RIAA also attempts to justify its request for e-mail addresses by relying on the fact that the alleged "illegal conduct" occurs "in cyberspace." [Opp. at 13] But this is of no moment, as all conduct addressed by DMCA subpoenas necessarily must occur in cyberspace; yet Congress chose not to include "electronic mail addresses" as part of the identifying information required to be disclosed, even though Congress explicitly required it elsewhere in the Act.

In short, the RIAA's demand for disclosure of this type of "contact" information, solely for its own convenience, is an unwarranted invasion of a subscriber's privacy. The Court should reject the RIAA's post-legislative attempt to broaden the self-help subpoena provision to allow the RIAA to help itself to information beyond a subscriber's name and addresses.

2. Subpoenas for Multiple IP Addresses Are Not Contemplated by the DMCA

The RIAA's chief complaint against serving individual subpoenas seeking information regarding a single IP address is that it will "burden the Clerk of this Court." [Opp. at 12] The RIAA then notes that "courts routinely handle subpoenas which request multiple categories of

[16] In reality, the RIAA's actions contradict this claim, as many subscribers have been sued by the RIAA without any attempt at advance contact – even after certain (non-cable) ISPs actually provided telephone numbers in response to RIAA subpoenas. [*See* Exh. 4.G to Motion for Protective Order (written testimony of Lorraine Sullivan in front of the Senate Committee on Governmental Affairs on September 30, 2003)]

information." [*Id.*] What this argument overlooks – as do most of the RIAA's arguments – is that the RIAA is not seeking just "categories of information" belonging to Charter. Rather, the RIAA is seeking personally identifying information belonging to many individuals. As Charter pointed out in its Memorandum, it will surely burden this Court if it must divvy up a subpoena in response to multiple challenges by different individuals subject to the same subpoena.

The Dictionary Act, cited by the RIAA in challenging Charter's reading of the DMCA as referring to an infringer in the singular, does not aid the RIAA's cause. That Act allows the single context to import the plural only "unless the context indicates otherwise." 1 U.S.C. § 1. In the case of the DMCA, the context certainly indicates otherwise. As the *Verizon* court noted, subscribers are afforded opportunities to challenge subpoenas issued under the DMCA.[17] But, as noted above, such a process would surely become tangled and burdensome if the RIAA continued issuing consolidated subpoenas implicating countless different individuals.

While the RIAA claims that the DMCA allows consolidated subpoenas, its actions speak much louder than its words: All prior subpoenas, and all subsequent subpoenas issued from this Court, have been single-IP-address subpoenas. [Whitehead Decl., Exh. 1 to RIAA Opp., at ¶ 25 ("The other subpoenas that the RIAA has obtained from the Eastern District of Missouri Court each pertain to only one Charter subscriber.")]

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

Finally, the RIAA flagrantly mischaracterizes Charter's reasonable request for compensation, made pursuant to a clear mandate under Federal Rule 45, as a "ransom" demand. At no point has Charter withheld its subscribers' confidential information as a "hostage" for money. Rather, Charter has properly withheld its subscriber-identifying information in order to

[17] *Verizon II*, 257 F. Supp. 2d at 263-264.

satisfy its obligations under, *inter alia*, the CCA, and pending the Court's decision on this Motion. For the reasons set forth above, the Court should quash the Subpoena. But, in the event that the Court orders Charter to comply with some aspects of the Subpoena, the Court should order the RIAA to pay Charter's expenses necessarily incurred in compliance.

Numerous courts have recognized that protecting third parties like Charter from "significant expense" incurred in response to a subpoena is mandatory under Rule 45.[18] And a party is entitled to seek recovery of its anticipated expenses in advance of compliance.[19] Nothing in the DMCA evidences any intent to depart from the mandatory cost-shifting provisions of Rule 45. The RIAA's argument to the contrary – that the DMCA adopts "only limited parts of Rule 45" – is absurd. The DMCA expressly states that DMCA subpoenas "shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service and enforcement of a subpoena duces tecum." 17 U.S.C. § 512(h)(6) (emphasis added). Such language does not preclude the application of Federal Rule 45, but wholly embraces it.[20] In turn, as the district court noted in *Verizon*,[21] the protections of Rule 45 are critical to the very constitutionality of the DMCA. In particular, Rule 45(c) states that any order compelling production "shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying." FED. R. CIV. P. 45(c) (emphasis added). This provision of Rule 45 is not some special provision applicable in limited

[18] *See, e.g., Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001) (explaining that the cost-shifting provision of Rule 45 is automatically invoked if the subpoena imposes "significant" expenses on the non-party).

[19] *See, e.g., SEC v. Arthur Young & Co.*, 584 F.2d 1018 (D.C. Cir. 1978) (conditioning enforcement of subpoena on obligation to reimburse for the costs of compliance).

[20] *See Whitman v. State Highway Comm'n*, 400 F. Supp. 1050, 1071 (W.D. Mo. 1975) (under federal statute requiring state agency to follow federal policies "to the greatest extent practicable under state law," "total compliance" was required).

[21] *Verizon II*, 257 F. Supp. 2d at 263-264 (explaining that "the DMCA provides that the Federal Rules of Civil Procedure govern the issuance, service, enforcement and compliance of subpoenas") (emphasis added).

circumstances, but instead lies at the heart of the "enforcement" provisions of Rule 45, which are expressly incorporated into the DMCA.

Remarkably, the RIAA admits that it has served more subpoenas on Charter in the past eight weeks than it served on all ISPs in the United States in the five years before it launched its current campaign. [Whitehead Decl., Exh. 1 to Opp., at ¶ 14]. Yet the RIAA asserts that Charter should bear the burden of compliance with this flood of DMCA subpoenas because of the assumption that, absent the DMCA, Charter would somehow be liable to the RIAA for the alleged copyright violations committed by Charter's subscribers who engage in peer-to-peer file sharing.[22] [Opp. at 2, 4] Based on this notion, the RIAA suggests that ISPs such as Charter have already been "compensated" by the "benefits" of the DMCA and do not deserve "further compensation." [Opp. at 14] This argument is premised on a fundamental misapplication of copyright law. The DMCA "did not rewrite copyright law for the on-line world"; rather, it created the safe harbors to insulate ISPs "should they be accused of violating traditional copyright law."[23] Prior to the DMCA, the law was already well-established that a provider who acts as a passive conduit for third parties' copies was not liable for direct infringement.[24] Courts have since rejected contributory and vicarious liability under similar circumstances.[25] Thus, according to traditional principles of copyright law, Charter obtains no additional protection

[22] The RIAA falsely suggests to this Court that the predominant use of peer-to-peer software is for copyright infringement. In fact, such software has legitimate uses, such as the exchange of material in the public domain and the authorized exchange of copyrighted materials. In view of this fact, a federal district court recently rejected the RIAA's argument that distribution of peer-to-peer software itself constituted an act of vicarious or contributory copyright infringement. *MGM Studios v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035-36 (C.D. Cal. 2003).

[23] *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1060 (C.D. Cal. 2002).

[24] *See e.g. Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1372-73 (N.D. Cal. 1995) (holding that operator of a computer bulletin board system that forwarded messages from subscribers to other subscribers was not liable for displaying copyrighted works because it took no role in controlling the content of the information but only acted as passive conduit of the information).

[25] *Grokster*, 259 F. Supp. 2d at 1035-36; *Ellison*, 189 F. Supp. 2d at 1064.

from the safe harbor provisions of the DMCA because, with respect to peer-to-peer file sharing, Charter has no potential liability in the first place. Indeed, it is undisputed that, as a "passive" provider of cable Internet services, Charter has no control over its subscribers' activities in exchanging e-mail, browsing web pages, or engaging in peer-to-peer file sharing.[26] Charter is truly an innocent third party caught in the middle, and should not unilaterally bear the significant expense of compliance with not just one,[27] but thousands of DMCA subpoenas per year.

When viewed in the aggregate of thousands of IP addresses subpoenaed per year, this cost (an average of $60 per IP address) is certainly "significant," as Charter points out in its opening Memorandum.[28] And while Charter's revenues are irrelevant to its entitlement to reimbursement under Rule 45, any comparison to the mega-corporations represented by the RIAA would clearly demonstrate that the RIAA is in a better position to bear the cost of compliance with its own subpoenas.

IV. CONCLUSION: RELIEF REQUESTED

For the foregoing reasons Charter respectfully requests the Court to quash the Subpoena issued by the RIAA, or, alternatively, modify the Subpoena to afford sufficient time for compliance, and order the RIAA to reimburse Charter's cost of compliance.

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[26] *See Grokster*, 259 F. Supp. 2d at 1039-1042 (discussing decentralized nature of current peer-to-peer technology); *see also* Whitehead Decl. [Exh. 1 to Opp.] at ¶ 7.

[27] The RIAA repeatedly notes that Charter allegedly complied "without demanding compensation" with a single DMCA subpoena issued by the RIAA at some undisclosed time in "2000." [Opp. at 5, n.3] A single subpoena served years ago pales in comparison to the thousands the RIAA vows to serve.

[28] The RIAA takes issue with Charter's sworn declarations attesting to the time required and cost associated with compliance, insisting that Charter's cost of $60 per IP address is "wildly inflated." [Opp. at 14-15] As "support" for this challenge, the RIAA represents that non-cable ISPs Verizon and SBC have contended that they can locate the requested information in a shorter amount of time. [Opp. at 15] Not only has the RIAA relied on hearsay, but it has mischaracterized it. SBC stated that the 15-45 minutes needed was only for an "initial search," and the actual process of identifying the subscribers "may lengthen to hours." *In re Subpoena to SBC Internet Communications, Inc.*, No. 03-MC-1220 (JDB) (D.D.C. 2003), Opposition to Motion to Enforce Subpoena. SBC also stated that its cost of identifying a subscriber is $60 per IP address.

Dated: October 20, 2003

Respectfully submitted,

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By: /s/

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VERIFICATION OF SIGNED ORIGINAL DOCUMENT

Pursuant to Local Rule 11-2.11, counsel for Respondent Charter Communications, Inc. hereby attests to the existence of a paper copy of the foregoing document bearing the original signature of Stephen B. Higgins. The document was filed electronically on October 20, 2003 with a blank signature line. Counsel will retain the paper copy bearing the original signature during the pendency of this matter, including all possible appeals.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served on this the 20th day of October 2003, in the manner and upon the persons indicated below.

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