UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE SUBPOENA TO SBC INTERNET COMMUNICATIONS, INC.	)	
RECORDING INDUSTRY ASSOCIATION OF AMERICA, Plaintiff	)	03-MC-1220 (JDB)
v.	)	
SBC INTERNET COMMUNICATIONS, INC. d/b/a/ SBC PACIFIC BELL INTERNET SERVICE SOUTHWESTERN BELL INTERNET SERVICES AMERITECH INTERACTIVE MEDIA SERVICES, Defendants	)	

OPPOSITION TO THE RECORDING INDUSTRY ASSOCIATION OF AMERICA'S MOTION TO ENFORCE SUBPOENA ISSUED TO SBC PURSUANT TO 17 U.S.C. § 512(h)

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This Court has already held that "the DMCA provides that the Federal Rules of Civil Procedure govern the issuance, service, enforcement, and compliance of subpoenas." *In re Verizon Internet Services, Inc.*, 257 F. Supp. 2d 244, 263 (D.D.C. 2003) ("*Verizon II*"). In clear disregard of this ruling, the Recording Industry Association of America ("RIAA") has deliberately chosen to ignore the procedures under the Federal Rules and, as a result, has utilized this Court as a subpoena factory and jeopardized important rights of Internet service providers and their customers.

Indeed, RIAA itself previously cited the protections of Fed. R. Civ. P. 45 as support for the validity of the DMCA's subpoena provision. It represented to the D.C. Circuit Court of Appeals that Section 512(h) "provides for case-by-case adjudication through the Rule 45 process so that the subpoena can be challenged prior to enforcement." 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). Nonetheless, because RIAA now finds the Rule 45 process inconvenient, it has forced Pacific Bell Internet Services, Inc. ("PBIS"), a California company, to litigate in Washington, D.C. a subpoena seeking the identity of a subscriber that resides in California – a result contradictory to Congress's intent and to the ruling of this Court.

Indeed, as we explain in more detail below, RIAA already has demonstrated that it knows how and where to find PBIS. Given this fact, RIAA's conduct here – directing the subpoena to an entity that does not have the requested information, and delivering it to a different entity that *also* does not have the requested information – can be viewed as nothing other than a deliberate effort to secure a decision from this Court that RIAA need not follow the rules that apply to subpoenas *duces tecum* when procuring and serving thousands of subpoenas under a contested section of the Digital Millennium Copyright Act ("DMCA"), 15 U.S.C. § 512(h). RIAA's refusal to acknowledge that it must comply with the Federal Rules flies in the face of its own representations, this Court's decision

in *Verizon II*, and two decisions from the District Court for the District of Massachusetts that quash DMCA subpoenas served outside the boundaries set by Rule 45 (see Exs. A & B).

For PBIS, and for any other Internet service provider, RIAA's disregard of Rule 45 has serious consequences. One obvious consequence is the delay, confusion, and needless expense that inevitably occur when large numbers of subpoenas are delivered to the wrong people in the wrong places. Even more troublesome, though, is the prospect that PBIS or its subscribers may be forced on a moment's notice to litigate subpoena issues in *any* district court – from Guam to Maine, from Alaska to the Virgin Islands, and at all points in between, including the District of Columbia – even though the PBIS subscriber whose identity is requested by the subpoena at issue here resides in California, where PBIS is also located. The costs, inconveniences, and potential unfairness of distant litigation are very real dangers if RIAA is permitted to ignore the basic requirements of Rule 45. And if all that weren't enough, RIAA insists that PBIS, not an alleged infringer but a third party, must – as a matter of law – comply with subpoenas issued at the behest of RIAA and its unidentified alleged copyright owner within a week and must bear all of the costs of compliance with subpoenas – hundreds of subpoenas issued by RIAA, alone, in less than two months. Standard Decl. ¶ 10.

STATEMENT OF FACTS

I. The Entities Involved

The subpoena at issue seeks information pertaining to a subscriber of PBIS. PBIS, along with four other Internet service providers (Ameritech Interactive Media Services ("AIMS"), Southwestern Bell Internet Services ("SBIS"), SNET Diversified Group, Inc. ("SNET"), and Prodigy Communications, L.P. ("Prodigy")), does business under the assumed business name "SBC Internet Services." PBIS is a California corporation with offices in San Ramon, California. It is a wholly

owned subsidiary of Pacific Telesis Group, Inc., which in turn is a wholly owned subsidiary of SBC Communications Inc. Standard Decl. ¶ 3. It is a "service provider" within the meaning of 17 U.S.C. § 512(k)(1), *i.e.*, it is "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." *Ibid.* The IP address identified in the subpoena at issue here – 67.117.147.105 – is registered to PBIS, as is easily ascertained on the database maintained by the American Registry for Internet Numbers ("ARIN") and accessible at http://www.arin.net/whois/. *Id.* ¶ 24. PBIS has no operations, offices, employees, or records within the District of Columbia. *Id.* ¶ *6.*

Many (although less than half) of the IP addresses identified in RIAA's subpoenas are registered to AIMS, SBIS, and SNET. AIMS is a Delaware corporation that runs its Internet operations from Hoffman Estates, Illinois. AIMS is a wholly owned subsidiary of Ameritech Corporation, which in turn is a wholly owned subsidiary of SBC Communications Inc. It provides Internet access services in Illinois, Indiana, Michigan, Ohio, and Wisconsin. Standard Decl. ¶¶ 3, 6. SBIS is a Delaware corporation with its principal place of business in Plano, Texas. It is a wholly owned subsidiary of SBC Telecommunications, Inc., which in turn is a wholly owned subsidiary of SBC Communications Inc. SBIS provides Internet access services in Arkansas, Kansas, Missouri, Oklahoma, and Texas. *Ibid.* SNET is a Connecticut corporation with its principal place of business in New Haven, Connecticut. It is a wholly owned subsidiary of Southern New England Telecommunications Corp., which in turn is a wholly owned subsidiary of SBC Communications Inc. SNET provides Internet service in Connecticut. *Ibid.* Neither AIMS, SBIS, nor SNET have any operations, offices, employees, assets, or documents within the District of Columbia. *Id.* ¶ 6.

PBIS, AIMS, SBIS, and SNET are all shareholders in SBC Internet Communications, Inc. ("SBCIC") – the entity to whom the subpoena at issue is directed. SBCIC is a holding company that has no employees, no operations, no customers, and no customer records. Standard Decl. ¶ 4. It owns Prodigy Communications Corp., the general partner of Prodigy. *Ibid.* No IP addresses are registered to SBCIC. *Id.* ¶ 9. It does not have possession, custody or control of the information requested in the subpoena at issue here. *Ibid.* It also has no offices in the District of Columbia. *Ibid.*

To date, every subpoena issued by RIAA seeks information pertaining to an IP address that clearly ties back to PBIS, AIMS, SBIS, or SNET – a fact that is easily ascertained through a simple, quick, and free search on the public website run by ARIN. Conversely, not a single IP address ties back to SBCIC. As we explain below, the subpoena at issue here could have properly been issued only to PBIS. To the extent that other SBC-affiliated service providers are named as defendants here, arguments made on behalf of PBIS apply to these service providers as well.

II. The RIAA Subpoenas

A. *The July 1 Subpoena Directed to PBIS*

On July 1, 2003, RIAA secured the issuance of a subpoena by this Court, directed to PBIS and demanding the identification of a PBIS subscriber using a specified IP address. RIAA delivered this subpoena to a PBIS office in San Jose, California. PBIS objected to this subpoena on a number of grounds, including that Rule 45 does not permit service in California of a subpoena issued from the District Court for the District of Columbia. See Standard Decl. ¶ 11. Further, the subpoena was not even served until *after* the response date required by the subpoena.

The simple and obvious solution under Rule 45 for this defective service would have been for RIAA to request the issuance of that subpoena, as well as any future subpoenas to PBIS, by the

clerk of the District Court for the Northern District of California. Such a subpoena could be properly served on PBIS within that district. RIAA, however, deliberately chose not to follow this course because it seeks to escape all provisions of Rule 45 – in direct conflict with both the DMCA and this Court's clear statement in *Verizon II*.

B. *The Attempted Service on or about July 7, 2003*[1]

On or about July 10, 2003, RIAA attempted to deliver 32 subpoenas directed to "SBC" to a building located at 300 Convent Street, San Antonio, Texas. The process server was informed that no employees of any SBC-affiliated company were at that address, and was directed to a building located at 175 East Houston Street, San Antonio, Texas. Whitehead Decl. ¶ 26; Standard Decl. ¶ 12. At the East Houston Street location, an attorney in the SBC Legal Department informed RIAA's process server that he could not identify an entity based on the subpoenas. The process server was informed that "SBC" is not a legal entity, that there are numerous separate entities with "SBC" in their names, and that subpoenas issued in the District of Columbia could not properly be served in Texas. Whitehead Decl. ¶ 29.

C. *The Subpoenas Delivered On July 18, 2003*

Instead of respecting the clear requirements of Rule 45 and acknowledging that it is improper to issue a subpoena to a brand, RIAA made another attempt at "service" on July 18, 2003, when it dropped off 97 RIAA subpoenas, after normal business hours, with security personnel at 1401 I Street, N.W., Washington, D.C. These subpoenas were issued from the District Court for the District

[1] In its cover letter dated July 18, 2003 (discussed in subsection C, *infra*), RIAA purports to deliver the subpoenas that were refused in San Antonio, and RIAA states in its Motion to Enforce that such "service" was attempted on July 7, 2003. However, every subpoena included with the July 18, 2003, cover letter was issued on July 8 or July 9, 2003. Since it is unlikely that RIAA attempted to serve subpoenas before they had been issued, RIAA is either mistaken as to the date of attempted "service" or mistaken as to which batch of subpoenas it delivered with the July 18, 2003, letter.

of Columbia and were directed to "SBC." Standard Decl. ¶ 13. The subpoenas were dated July 8 and July 9, 2003, but had a cover letter dated July 18, 2003, indicating that responses would be due by 10:00 a.m. in the 7th calendar day after the date of the letter. *Ibid.* The personnel of this Washington, D.C. office, who are employed by SBC Management Services, L.P., represent SBC Communications Inc. in connection with legal and regulatory matters before the Federal Communications Commission and other governmental bodies. They have no involvement with the provision or marketing of any service or product of PBIS or any of the SBC-affiliated service providers. SBC Management Services neither owns nor is owned by PBIS, SBIS, AIMS, SNET, or SBCIC, in whole or in part. *Id.* ¶¶ 30-31. SBC Management Services has no customers, operations, or IP addresses related to the provision of Internet access services. The employees served do not have access to, or custody or control of, the subscriber records sought by the RIAA subpoenas. Indeed, the employee who received the July 18 subpoenas delivered to the security desk at the office building used by SBC Management Services was not familiar with the operations of the SBC-affiliated service providers and had no idea what to do with the subpoenas. *Ibid.* The confusion was compounded by the fact that the subpoenas were merely dropped off by courier in a plain brown envelope, with no addressee, and the subpoenas were not issued to an entity but to a brand. With this insufficient information, the employee sent the subpoenas to an office in Dallas, Texas,[2] whose employees, after some period of time, were able to determine that the subpoenas related to the operations of the service providers doing business as SBC Internet Services. *Ibid.* No one affiliated with the service providers or SBCIC learned of these subpoenas until July 29, 2003 – *4 days after the putative time for compliance had expired. Id.* ¶ 14.

[2] This office processes subpoenas (mainly law enforcement subpoenas) for certain SBC-affiliated entities, but not for SBC-affiliated service providers.

D. *The Subpoenas Delivered on July 23, 24 and July 25, 2003*

Between July 23 and 25, 2003, RIAA delivered a total of 110 additional subpoenas to 1401 I Street, N.W. These subpoenas were issued from the District Court for the District of Columbia. Fifty-three subpoenas – issued on July 2 and July 7 – were issued to"SBC". Fifty-seven subpoenas were issued on July 22 and July 24, these reflecting a new approach on the part of RIAA. Having now been informed that "SBC" is a brand name and not an entity, RIAA directed the newly-issued subpoenas to "SBC Internet Communications, Inc. c/o SBC." These subpoenas were accompanied by cover letters extending the time for compliance until one week after the date of the letter. Standard Decl. ¶ 13. *It is one of these 57 subpoenas that is the subject of RIAA's motion*.[3] The subpoenas were delivered in the same method – bundled in an envelope and merely dropped off in bulk to a building in Washington, D.C. occupied by SBC Management Services personnel.

On July 29, 2003, SBCIC, PBIS, AIMS, and SBIS (at that time, no subpoena identified an IP address registered to SNET) objected to the 207 subpoenas delivered on July 18, 23, 24, and 25. See Whitehead Decl. Ex. G. The letter called RIAA's attention to the ARIN website. As to objections, the letter stated that SBCIC is not a service provider, and identified for RIAA which service provider served each IP address identified in the subpoenas. See Whitehead Decl. Exs. G, I. Moreover, the objection letter identified the address at which each service provider could be served with a subpoena. Whitehead Decl. Ex. G.[4] The objection letter also stated that (1) that the

[3] Although RIAA asserts (Mot. 3) that "the legal issues with respect to all of the subpoenas are identical," that is not so, because they are addressed to different entities (one of which does not exist at all) and were served in a variety of ways (all improper). While we agree that some common issues arise with regard to all of the subpoenas (*e.g.*, whether a subpoena issued from this Court may validly be served upon an entity located elsewhere), we do not concede that all of the issues are identical.

[4] A few days later, defendants made things even *easier* for RIAA, identifying a contact person and that person's address for each service provider. See Whitehead Decl. Ex. J.

subpoenas did not allow a reasonable time for compliance, (2) that RIAA did not include a tender of or agreement to provide compensation to the service providers for compliance, (3) that RIAA must protect the service providers from the risks associated with divulging confidential information, and (4) that the subpoenas demanded information beyond that necessary to identify a subscriber as authorized by statute. *Ibid*. There are other substantive issues, and additional parties, that are the subject of litigation initiated by PBIS prior to this action in the District Court for the Northern District of California. See pp. 10-11, *infra*. These additional objections are not waived here; however, it is clear that extensive litigation of those issues here is unnecessary in light of RIAA's blatant disregard for even the most basic provisions of Rule 45. Further, as well over half of the hundreds of RIAA subpoenas pertain to subscriber information of California residents and customers of PBIS, those issues are properly before the court in California.

Consistent with its strategy of defying Rule 45 at all costs, RIAA responded to the objections to its subpoenas in four ways: it mailed the subpoenas to the address for the service providers' counsel in San Antonio, Texas (Standard Decl. ¶ 19); it delivered the subpoenas to SBCIC's registered agent for service of process in Wilmington, Delaware (*id*. ¶ 21); it continued to deliver subpoenas to a company in Washington, D.C. that is not a service provider (*id*. ¶ 22); and it filed this Motion to Enforce. At no time, however, has RIAA attempted to comply with the instructions provided in the objections to the subpoenas, or follow the clear provisions of Rule 45. It is clear that RIAA is intent on turning this Court into its personal subpoena factory, with no regard to Rule 45.

E. *The Subpoenas Delivered On July 28, August 14, and August 15*

Apparently, 207 subpoenas in a month were not enough. On July 28, 4 subpoenas directed to SBC Internet Communications, Inc. were delivered to 1401 I Street in Washington, D.C. Standard

Decl. ¶ 16. On August 14 and 15, 71 subpoenas directed to SBC Internet Communications, Inc. were delivered to 1401 I Street, to counsel for SBCIC and the service providers in San Antonio, Texas, and to the registered agent for service of process on SBCIC in Wilmington, Delaware. *Id.* ¶ 22. As they had with the prior subpoenas, SBCIC and the service providers objected to these additional subpoenas. Whitehead Decl. Exs. H, I; Standard Decl. Ex. 3.

F. *The Proper Procedure for Identifying and Serving a Service Provider*

With minimal effort, RIAA can easily abide by Rule 45. To procure and properly serve the subpoena it seeks to enforce in this proceeding (as well as the hundreds of other subpoenas it has directed to SBC Internet Communications and "SBC"), RIAA can follow these steps:

- First, it must determine which service provider provides service using the IP address in question. RIAA could enter the IP address from which it believed copyright infringement was occurring into the database maintained ARIN and click on the "Submit Query" button. It would determine in a matter of seconds that the IP address from the subpoena at issue is served by PBIS, one of a handful of SBC-affiliated service providers. See Standard Decl. ¶ 24.

- The identity of all SBC-affiliated service providers is also clearly stated in the very first sentence of our publicly available Terms of Service.[5]

- Pursuant to Rule 45, RIAA could request that a subpoena be issued to PBIS by the clerk of the District Court for the Northern District of California and could serve the subpoena at PBIS's offices in San Ramon, California.

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[5] The "SBC Yahoo!" "Terms of Service" (located at http://sbc.yahoo.com/terms/) clearly provides: "[T]he SBC Internet Services company providing your Internet Access Service (Ameritech Interactive Media Services, Inc., Pacific Bell Internet Services, SNET Diversified Group, Inc., Southwestern Bell Internet Services, Inc., or Prodigy Communication(s) L.P) . . . and Yahoo! Inc." Declaration of Michael Standard ("Standard Decl.") ¶ 8 & Ex. 1.

Indeed – but for requesting that the subpoena be issued from the Northern District of California – *RIAA has already shown that it knows how to do this*, as evidenced by the July 1, 2003, subpoena to PBIS.

G. *Costs of Compliance*

All told, as of the date of the filing of this opposition, RIAA has procured the issuance of 282 subpoenas directed to "SBC" or "SBC Internet Communications." The cost of complying with these subpoenas is substantial. Depending on factors outside the control of the service providers, it takes an average of 15 to 45 minutes, or more, to perform the searches necessary to simply tie an IP address to a particular user I.D. Ford Decl. ¶ 5. It takes another several minutes to tie that user I.D. to a particular subscriber and then to retrieve the relevant information in order to comply with the subpoena. *Ibid.* Finally, it takes another several minutes to put that information into a formal response format and submit back to the subpoenaing party. *Id.* ¶ 6. This search and response process also requires the use of company assets – computers, paper, facsimile machines, programs and search tools, and databases. The cost of this process, without consideration for the process of providing advance notice to the subscriber that a third party is seeking his or her personal information, is over $60 per IP address search. *Id.* ¶ 8. The costs of complying with 282 subpoenas, therefore, is over $16,920, and that is only if the search information is 100 percent correct and there are no systems errors. *Ibid.* Despite the number of subpoenas served, RIAA has refused to allow more than one week for compliance with the subpoenas and has refused to compensate any of the service providers for compliance with the subpoenas. See Mot. 29-31.

III. The Northern District of California Action

RIAA is not the only entity delivering subpoenas to PBIS. Titan Media, a California purveyor of pornographic materials over the Internet, has procured the issuance of a subpoena from the Northern District of California demanding, in a single subpoena, the identity of 59 PBIS subscribers. See Whitehead Decl. Ex. K. And MediaForce, a kind of copyright "bounty hunter," has delivered thousands of notices of alleged infringement on PBIS, and PBIS has reason to believe that MediaForce, and those like it, will soon begin serving subpoenas if the barrage of notices is left unchecked. On July 30, 2003, PBIS therefore filed a declaratory judgment action in the Northern District of California (where PBIS is based, where the majority of subscribers in question reside, and where the Titan subpoena was issued) seeking a determination of many issues relating to DMCA subpoenas. See *ibid*. Again, the records requested by Titan all pertain to PBIS subscribers who are all residents of California, and the vast majority of the records requested by RIAA in its barrage of subpoenas, including the single subpoena at issue here, pertain to PBIS subscribers in California.

ARGUMENT

As *Verizon II* makes clear, "the DMCA provides that the Federal Rules of Civil Procedure govern the issuance, service, enforcement, and compliance of subpoenas." 257 F. Supp. 2d at 263. See also 17 U.S.C. § 512(h)(6) ("Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, 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*."). Nonetheless, RIAA's conduct in procuring the issuance, delivering, and demanding compliance with the subpoena at issue here – as well as the other 281 subpoenas

directed to SBC and SBCIC – violates Rule 45 in numerous ways: (1) the subpoena is issued to an entity that does not have possession, custody, or control of the records that would identify the subscriber using the designated IP address; (2) the subpoena was not properly served; (3) RIAA has not allowed sufficient time to comply with this subpoena (and other subpoenas) or to notify the subscribers that their records are requested by a third party; (4) RIAA has refused to provide compensation for the significant expense that will be incurred in complying with this and other subpoenas; and (5) RIAA has refused to agree to a reasonable protective order governing the use and disclosure of the confidential information the subpoenas seek. Moreover, even if service of a subpoena on a service provider operating as a passive conduit is an acceptable use of the DMCA subpoena provision (an assumption PBIS disputes) RIAA has violated the DMCA by demanding production of the subscriber's electronic mail address and refusing to identify the copyright owner on behalf of whom the subpoena is requested. For each of these independent reasons, this Court should deny RIAA's motion to enforce.[6]

I. SBCIC DOES NOT HAVE POSSESSION, CUSTODY, OR CONTROL OF THE RECORDS IDENTIFYING THE SUBSCRIBER USING THE IP ADDRESS IDENTIFIED IN THE SUBPOENA

RIAA directed the subpoena at issue in this case to a holding company – SBCIC – with no employees and no operations, that does not have, and has never had, the information RIAA seeks, and has never registered a single IP address with ARIN. See Standard Decl. ¶ 4. Extensive

[6] The subpoena at issue here, and the other subpoenas issued to "SBC" and "SBC Internet Communications," are objectionable for other reasons, identified in the objection letter to RIAA, that are not addressed herein. Some of these objections were recently considered in other proceedings in this Court, which ruled in favor of RIAA. See *In re Verizon Internet Services, Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003) (*"Verizon I"*) (resolving statutory interpretation questions); *Verizon II*, 257 F. Supp. 2d 244 (D.D.C. 2003) (resolving constitutional challenges). Those matters are now pending before the Court of Appeals. We do not address those objections at this time, but we respectfully reserve those objections.

argument or debate is not required on the proposition that RIAA may not require information from someone or something that does not have it. See Fed. R. Civ. P. 45(a)(1)(C) (permitting a subpoena to issue for documents or information within an entity's possession, custody, or control).

Where, as here, a subpoena directs the production of information from an entity that factually has neither "possession" nor "custody" of that information – as is the case with SBCIC – the sole remaining question is whether the entity can be said to have "control" of the information. See *Goh v. Baldor Elec. Co.*, No. 3:98-MC-064-T, 1999 WL 20943, at *1 (N.D. Tex. Jan. 13, 1999). And the party seeking the documents bears the burden of proving control. *Id.* at *2 (citing *United States v. International Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989) and *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991)). RIAA has made *no effort* to show that the holding company, SBCIC, has "control" over information held by any of its shareholders — PBIS, SBIS, AIMS, and SNET.

RIAA may argue that SBCIC has "control" over the records identifying the service providers' customers because of its corporate affiliation with the service providers. Although it is true that a parent corporation might be said to have control over information in the possession or custody of its wholly-owned subsidiary where "'the properties and affairs of the two were inextricably confused as to a particular transaction'" (*Gerling Int'l Ins. Co. v. C.I.R.*, 839 F.2d 131, 140 (3d Cir. 1988)), this definition of control does not help RIAA. RIAA seeks information from a corporation – SBCIC – that *itself is* the partially-owned subsidiary of the corporation that possesses the information. Standard Decl. ¶ 4. No basis exists for requiring a *partially-owned subsidiary* to produce information held by its *parent*.[7]

[7] An exception to the rule exists where there is proof of abuse of the corporate form, under the "alter ego" doctrine. See *Gerling Int'l Ins.*, 839 F.2d at 140. As discussed further *infra*, RIAA does

Moreover, any rationale that might be advanced for requiring a subsidiary, sister corporation, or other affiliate to produce documents in another case makes no sense here. Litigants and government agencies often seek discovery from affiliate corporations when the corporation that possesses the information is somehow beyond the reach of compulsory process. See, *e.g.*, *Goh*, 1999 WL 20943, at *1 (subpoena seeking documents from an accounting firm that were in the possession of its overseas affiliate); *Cooper Indus. v. British Aerospace Corp.*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984) (parent was a British corporation and subsidiary was located in the United States). In this case, not only is PBIS located in the United States, but RIAA has previously served a subpoena on PBIS at its offices in California, and RIAA has specifically been told how and where to serve PBIS and the other SBC-affiliated service providers. Standard Decl. ¶¶ 11, 20. It makes no sense that RIAA would choose to push ahead blindly with this enforcement proceeding against the service providers' partially-owned subsidiary, rather than simply seeking and serving subpoenas issued from the proper courts on the correct recipients. RIAA's real agenda in this regard is clear. Having prevailed before this Court in *Verizon I* and *Verizon II*, it wishes to forestall the possibility of any further litigation of those, or any other issues regarding DMCA subpoenas, in any other federal district court. This Court should not countenance RIAA's attempts to circumvent the provisions of Rule 45 in order to avoid scrutiny of these issues by sister district courts and circuits.

RIAA implies that SBCIC must have the information identifying Internet subscribers because SBCIC is identified as a "service provider" on forms filed with the U.S. Copyright Office designating an agent for receipt of notifications of copyright infringement pursuant to DMCA Section 512(c). See Mot. 15, 19. This argument, however, is unavailing. These forms have nothing

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not even argue that the corporate form has been abused, much less produce evidence to that effect.

whatsoever to do with service of a subpoena under Section 512(h), which (unlike delivery of notices of claimed infringement) is governed by Rule 45. Thus, a statement on these forms that SBC Internet Communications is a service provider does not establish that SBCIC has possession, custody, or control over the records that identify the service providers' customers.[8] The forms do not waive an objection to subpoenas based on the ground that SBCIC does not have the information requested; indeed, RIAA does not even claim that they do. Accordingly, RIAA has not established that SBCIC has possession, custody, or control over the records through which PBIS's (or any other service provider's) subscribers could be identified.[9]

What is more, RIAA's newly asserted "confusion" as to the corporate structure of the SBC-affiliated service providers is disingenuous and unpersuasive. RIAA has already demonstrated that it knows the difference between the regional, SBC-affiliated service providers by virtue of its July 1, 2003, subpoena to "Pacific Bell Internet Services," which it personally served at one of PBIS's offices in California (though still improperly serving a Washington, D.C. issued subpoena in California). Standard Decl. ¶ 11.

This abrupt and convenient confusion also demonstrates an alarming lack of even the simplest due diligence on the part of RIAA. As previously noted, an ARIN search will permit RIAA to link an IP address to a specific service provider. The quick and free ARIN search ties the IP from

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[8] Moreover, these forms were prepared by administrative personnel who did not consider, or make a legal determination of, the definition of "service provider" under 17 U.S.C. § 51(k)(1)(A). Standard Decl. ¶ 28.

[9] Even if RIAA were able to establish that SBCIC through its affiliation with the service providers, has possession, custody, or control over the information requested by the subpoenas, the subpoenas directed to "SBC" would nonetheless be invalid. SBC is not an entity at all, but is a trademark. Standard Decl. ¶ 2. A nonentity, of course, cannot have possession, custody, or control of the records required to respond to a subpoena.

the subpoena at issue here directly back to PBIS. Standard Decl. ¶ 24. RIAA's "confusion" is an invention designed solely to allow it to ignore Rule 45.

II. THE SUBPOENA WAS NOT PROPERLY SERVED

By its plain terms, Rule 45 provides that "a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made." Fed. R. Civ. P. 45(a)(2). In other words, a subpoena must issue from the district in which the documents are located (or, at the very least, where a person with control over the documents is located). See *Natural Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406 (5th Cir. 1993) ("[A] federal court sitting in one district cannot issue a subpoena *duces tecum* to a non-party for the production of documents located in another district."); *Medtronic Sofamor Danek, Inc. v. Osteotech*, No. 99-2656-CV, 2002 WL 1482529, at *1 (W.D. Tenn. Jan. 7, 2002).

Compliance with Rule 45's service requirements would be quite simple in this case. RIAA would simply have to request that a subpoena be issued to PBIS (as it did on July 1), make that request to the District Court for the Northern District of California (where PBIS is located), and serve that subpoena at a PBIS office in Northern California (where RIAA delivered the July 1 subpoena). RIAA has flatly refused to do that here, instead delivering a subpoena directed to SBC Internet Communications (which does not have the requested information) to addresses in Washington, D.C. (where SBCIC has no presence), San Antonio, Texas, and Delaware.

A. The Subpoena Was Not Properly Served In The District Of Columbia

1. RIAA delivered the subpoena at issue here to an office in Washington, D.C. The subpoena eventually found its way to an employee of SBC Management Services, L.P. SBC Management Services is a subsidiary of SBC Telecommunications, Inc., and is responsible for

government affairs and lobbying. SBC Management Services is *not* a "service provider" (nor, even, is its parent) to which a DMCA subpoena may be directed. Standard Decl. ¶¶ 30-31. It does not provide or market products or services of any kind and it has no customers for Internet or other services. It is not owned in whole or in part by PBIS, SBIS, AIMS, SNET, or SBCIC. It does not own any interest in any service provider or share any officers or employees with any service provider. In fact, the closest connection SBC Management Services has with an Internet service provider is that its parent corporation is also the parent corporation of SBIS. Standard Decl. ¶ 13. See *supra* p. 6. Cf. *Ariel v. Jones*, 693 F.2d 1058, 1060-61 (11th Cir. 1982) (service on registered agent for service of process improper because agent did not have control over the documents).

The lack of any meaningful connection between SBC Management Services and the service providers – and the importance of the Rule 45 process – is vividly illustrated by the handling of certain of the subpoenas procured by RIAA. The employee who received the first batch of 97 subpoenas (from unaffiliated security personnel, with whom RIAA left the subpoenas after hours) had no affiliation with the proper service providers, was not familiar with the operations of the relevant service providers, and lacked the slightest idea what to do with the subpoenas. Standard Decl. ¶ 13. For want of a better alternative, she sent them to an office in Dallas, Texas, that handles primarily law enforcement subpoenas, and *not* subpoenas issued under the DMCA. *Ibid.* No individual responsible for responding to DMCA subpoenas even learned of these subpoenas until July 29 – eleven days after they were delivered, and four days after the time for compliance had run. *Id.* ¶ 14. This manner of "service" is guaranteed to frustrate, not promote, the interests in expedition that RIAA repeatedly invokes to justify its preferred procedures.

2. Implicitly recognizing that it has failed properly to serve the party whose records are sought, and stubbornly refusing to follow the clear instruction of PBIS, RIAA relies on the concept of "piercing the corporate veil." *See* Mot. 21-23. That theory is inapplicable for many reasons.

First, the doctrine is available only in exceptional cases; ordinarily, corporations and other legal entities are treated as entities separate and distinct from their parents, subsidiaries, and affiliates. See *Gerling Int'l Ins.*, 839 F.2d at 140-41; see also 1 FLETCHER CYCLOPEDIA ON CORPORATIONS §§ 28, 41 (Rev. ed. 1999) ("Courts apply the alter ego rule with great caution and reluctance."). And the party invoking the doctrine bears the burden of establishing specific facts sufficient to justify disregard of the separate legal existence of distinct entities. See *Gerling Int'l Ins.*, 839 F.2d at 141 (reversing finding of alter-ego control by one sister corporation over another because "there was . . . no record to support a finding . . . that their corporate entities had been disregarded").

RIAA virtually concedes that it has failed to meet its burden. Despite its being put on notice that it has failed to draw the necessary distinctions between legally separate corporations (see Whitehead Decl. Exs. G, I), RIAA's motion makes no meaningful effort to address those distinctions. Instead, from the very first paragraph of its Motion, RIAA repeatedly refers to "SBC" as if, through a rhetorical sleight of hand, it could transform the brand name "SBC" into an all-encompassing (though non-existent) legal entity. Indeed, RIAA admits that it "does not purport to understand all of the relationships among the various SBC entities." Mot. 21.[10] It also illustrates the absence of even the most basic, reasonable due diligence by RIAA as demonstrated by the clear identification of the service providers in the publicly posted Terms of Service. See p. 9 n.5, *supra*.

[10] Significantly, as discussed at pp. 3-4, 9, *supra*, the convenient ARIN database makes RIAA's understanding of SBC Communications Inc.'s corporate structure irrelevant to seeking subpoenas under the DMCA.

The arguments RIAA does set forth demonstrate this deficiency. RIAA refers to joint marketing activities, the use of a common brand, the use of a single bill for multiple products, the sharing of "wires," the offering of Internet access services under the name "SBC Yahoo!," the use of a common web site, Copyright Office registrations, and the objection letter sent in response to RIAA's subpoenas. See Mot. 13-15, 21-23. *But none of these activities involve SBC Management Services, the entity upon which the subpoena was served*. In deciding whether SBC Management Services should be regarded as the alter ego of either SBCIC or PBIS, allegations about the relationship between PBIS and Yahoo! are utterly beside the point.

And even if RIAA's claims *did* pertain to SBC Management Services, they would *still* be grossly insufficient. In deciding whether to "pierce the corporate veil," courts ask whether corporate formalities have been disregarded, whether there has been an intermingling of corporate and personal funds, staff, and property, whether there has been fraudulent use of the corporate form, and whether one entity dominates and controls the other. See *Vuitch v. Furr*, 482 A.2d 811, 816 (D.C. 1984); FLETCHER, *supra*, § 41.10. RIAA has not alleged (let alone demonstrated) any of these things with regard to the relationship between PBIS and any other entity. Instead, RIAA's allegations substantially mirror allegations recently determined to be insufficient to pierce the corporate veil in *Diamond Chemical Co., Inc. v. Atofina Chemicals, Inc.*, No. Civ.-02-1018-CKK, 2003 WL 21464563 (D.D.C. June 5, 2003). Like RIAA here, the plaintiff in that case alleged the joint use of trademarks and promotion of a common marketing image, the use of an Internet web site that linked directly to the affiliate's web site, and the use of a logo suggesting a single corporate identity. The Court concluded that (even with allegations of shared executives that are absent here) the plaintiff had not shown that the subsidiary was an alter ego of the parent. *Id*. at *11.

Moreover, "piercing the corporate veil" is an equitable doctrine that is invoked, if at all, only to prevent the misuse of corporate form to "perpetrate fraud or wrong," or "through which the injustice is worked." *Vuitch*, 482 A.2d at 815 & n.4 (citations and quotations omitted). See also FLETCHER, *supra*, § 41.20 ("The alter ego doctrine is applied to avoid the inequity of one corporation using another corporation to shield itself from liability."). There is no such basis for invoking the doctrine here. First, it is hard to imagine a "fraud" so incompetently committed where, as here, the service providers have been clearly identified by name. See Whitehead Decl. Exs. G, J. Indeed, it is simply fanciful to imagine that the SBC Communications Inc. corporate family is structured to avoid the obligation to comply with DMCA subpoenas, as would be required to justify invoking the alter-ego doctrine. See FLETCHER, *supra*, § 41.10 (plaintiff must show that the corporate form is used to commit fraud or wrong or to perpetrate the violation of a positive legal duty). Piercing the corporate veil would not be appropriate here.

Accordingly, because the subpoena at issue was delivered to an entity in Washington, D.C. that is *not* the entity named on the subpoena, and because the entity to whom the subpoena is directed (SBCIC) has no offices or employees in Washington, D.C., the "service" of the subpoena in Washington, D.C. is not valid.

B. The Subpoena Was Not Properly Served In Texas

Since receiving the objection to the subpoena at issue here, RIAA also has mailed the subpoena to San Antonio, Texas. But Rule 45(b)(2) provides that a subpoena *duces tecum* may be served only "within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the . . . production . . . specified in the subpoena." Because RIAA's subpoenas required production in the District of Columbia, the "service" of the subpoenas

in San Antonio, Texas, which is more than 100 miles from the District of Columbia, is invalid.

1. RIAA seeks to avoid this conclusion, by arguing, in blatant disregard of this Court's ruling in *Verizon II*, that subpoenas issued pursuant to the DMCA need not satisfy the requirements for "traditional service under Rule 45" (Mot. 23) and may simply be delivered to a service provider's agent for receipt of take down notices (*id*. 26). But this conclusion is drawn from thin air, or at least not from the text of the DMCA. RIAA points to statutory references to the "delivery" of DMCA subpoenas, which supposedly reflect a distinction between "delivery" and "service." This choice of words is hardly evidence of an intended distinction. Rule 45(b)(1) itself states that "[s]ervice of a subpoena . . . shall be made by *delivering* a copy thereof. . . ." (Emphasis added). And this Circuit has held that "delivering a copy thereof" requires personal service. See *Federal Trade Comm'n v. Compagnie de Saint-Gorbain-Pont-A-Mousson*, 636 F.2d 1300, 1312-13 (D.C. Cir. 1980) (noting that Rule 45(c) does not provide for the alternate methods of service allowed in Rule 4). Moreover, Section 512(h)(6) makes clear that "the procedure for . . . *delivery* . . . shall be governed . . . by those provisions of the Federal Rules of Civil Procedure governing the . . . *service* . . . of a subpoena *duces tecum*." (Emphasis added.)[11]

Likewise, the statute's use of the word "expeditiously" in reference to the issuance of and compliance with subpoenas, see 17 U.S.C. §§ 512(h)(3), 512(h)(4), and 512(h)(5), provides no basis for ignoring this Court's ruling and the specific direction in subsection 512(h)(6) that Rule 45 procedures must be followed. See Mot. 20. The word "expeditiously" is used three times in section 512(h) – twice in reference to a subpoena recipient's disclosure of information, and once in reference

[11] Moreover, as stated in Section I.A, *supra*, delivery of notices of claimed infringement are governed by a different section of the DMCA – Section 512(c) – which, unlike Section 512(h), contains no reference to Rule 45.

to a clerk's issuance of a subpoena. But those subjects are clearly distinguished from the separate subject of the procedures for service or delivery of subpoenas. Indeed, the use of the word "expeditiously" in three other subsections, but *not* in the subsection that specifically and explicitly addresses the required procedures for delivery, indicates that the word "expeditious" does not provide relief from Rule 45's requirement of personal service. Cf. *Friends of Earth v. U.S. Env'tl Protection Agency*, 333 F.3d 184, 188-89 (D.C. Cir. 2003) (discussing the doctrine of "*expressio unius est exclusio alterius*").

2. RIAA's fallback position is that if service pursuant to Rule 45 is required, nationwide service is authorized by the DMCA "by its terms," or by "the DMCA as a whole and its legislative history," or perhaps through an "implied authorization." See Mot. 27.

As a threshold matter, RIAA fails to explain why Congress's explicit and specific direction that the Federal Rules of Civil Procedure govern the delivery of subpoenas should be disregarded because of a contrary "implied" authorization. To do so, of course, would violate one of the basic principles of statutory interpretation and should be dismissed out of hand. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1012 (D.C. Cir. 1999); see generally Antonin Scalia, A MATTER OF INTERPRETATION 14-29 (1997).

Passing over that problem, RIAA provides scant analysis of the actual language of the DMCA, and no wonder. The only provision of the statute that RIAA specifically mentions is subsection 512(h)(1), which authorizes the issuance of DMCA subpoenas by the clerk of "any United States district court." RIAA argues that this provision "compels the conclusion that Congress intended to authorize nationwide service of process." Mot. 27. But that provision goes on to state that the request must be "in accordance with this subsection," 17 U.S.C. § 512(h)(1), which of course

includes the express incorporation of the provisions of Rule 45 in 17 U.S.C. § 512(h)(6). A generic authorization to make a *request* to any district court can only be read in this context to mean a request to any district court otherwise authorized to issue such a subpoena under Rule 45. When Congress wishes to authorize nationwide subpoena power and service of process, it knows how to do so in clear terms, *compare* 15 U.S.C. § 13, and it has not done so here.[12]

In fact, the very cases cited by RIAA belie the conclusion that this statute authorizes nationwide service of process either explicitly or implicitly. In each of those cases, the statute at issue restricted subject matter jurisdiction to specified district courts, and thus nationwide service was necessary to ensure personal jurisdiction over the respondents . See *Federal Trade Comm'n v. Browning*, 435 F.2d 96 (D.C. Cir. 1970) (authority for nationwide service of process implied because otherwise the statute would "restrict the place of suit to a particular district and yet . . . deprive the court in that district of the power to obtain personal jurisdiction of a respondent . . ."); *Federal Trade Comm'n v. Jim Walter*, 651 F.2d 251, 254-55 (5th Cir. 1981); *Federal Election Commission v. Committee to Elect Lyndon LaRouche*, 613 F.2d 849, 862 (D.C. Cir. 1980); *United States v. Bliss*, 108 F.R.D. 127, 135 (E.D. Mo. 1985); see also *United States v. Firestone Tire & Rubber Co.*, 455 F. Supp. 1072, 1078-79 (D.D.C. 1978) (nationwide service required to effectuate the statutory purpose of allowing enforcement proceedings in a particular district).

In contrast to the authorities RIAA cites, an authorization for nationwide service of process should not be read into the DMCA *because* copyright owners are *not* forced to go to a specifically identified district court, but may request a subpoena from *any* district court. Indeed, the DMCA's

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[12] Nor is there any policy reason to relax the strictures of Rule 45 in this situation. Although RIAA may not know the identity of the subscriber, as noted above, it can easily obtain the identity of the particular service provider.

reference to "any United States district court" is remarkably similar to the statute considered in *United States v. Hill*, 694 F.2d 258 (D.C. Cir. 1982). In *Hill*, the Court of Appeals held that a statute authorizing an agency to "invoke the aid of any [district] court of the United States" conferred standing on the agency to seek the assistance of any court, but did not expand the geographic reach of a district court's powers. *Id*. at 264 n.16. The *Hill* Court held that the issue in *Browning* – that a district court would be deprived of authority to compel the attendance of a subpoena recipient who happened to be outside of its district – had "absolutely no force" because the relevant statute did not confer exclusive jurisdiction on any one district court. *Id*. at 263 n.12. The contention that nationwide jurisdiction should be implied from the statute in order to promote "convenient enforcement" – the same argument that RIAA advances here (Mot. 28-29) was "more properly addressed to Congress than to the courts," 694 F.2d at 263 n.12; *see also id*. at 269.

Indeed, a district court in Massachusetts has already quashed two other RIAA subpoenas holding that the Federal Rules of Civil Procedure do not permit a subpoena issued in the District of Columbia to be validly served in Massachusetts. See *Boston College v. RIAA*, No. 03-MC-10210 (JLT) (D. Mass. Aug. 7, 2003); *Massachusetts Inst. of Tech. v. RIAA*, No. 03-MC-10209 (JLT) (D. Mass. Aug. 7, 2003) (Exs. A&B). So too, here: RIAA's motion to enforce should be denied.[13]

C. Proper Service Must Be Required To Protect The Rights Of Subpoena Recipients

There should be no mistake about the real issues in this proceeding. DMCA subpoenas

[13] RIAA has not cured the defect in service by delivering this subpoena (as well as the others) to SBCIC's registered agent for service of process in Wilmington, Delaware. Wilmington is more than 100 miles from Washington, D.C., and therefore outside the service radius set by the Federal Rules. See Fed. R. Civ. P. 45(a)(2). And, the registered agent does not have possession, custody, *or control* of the information requested, and therefore is not the proper recipient of a subpoena. See *Ariel*, 693 F.2d at 1060-61 (service on registered agent for service of process improper because agent did not have control over the documents).

unquestionably *can* be served on PBIS and the other service providers – properly, quickly, and easily – as soon as RIAA chooses to do so. But rather than comply with the straightforward requirements of the DMCA and Rule 45, RIAA has demonstrated a preference, so far, to seek a ruling that it need not comply. PBIS is not attempting to "hide behind" its corporate form, *see* Mot. 14, and RIAA's innuendo that PBIS seeks to profit from the alleged wrongdoing of its subscribers, *id.* at 16, is both outrageous and unsupportable. *See* Standard Decl. ¶ 32. As PBIS's (and the other SBC-affiliated service providers') terms of service explicitly state: "You agree that you will NOT use the Service to: . . . (e) upload any content that infringes any . . . copyright. . . ." *Id*. Ex. 1 at § 9, p. 9 (capitalization in original). Rather, PBIS is seeking compliance with Rule 45, and protection of the important interests of subpoena recipients provided by that Rule.

Moreover, if RIAA is correct that Rule 45 procedures do not apply here, then Internet subscribers, whose identity is sought by DMCA subpoenas and who may have a legitimate interest in protecting their anonymity, will have no ability to challenge a subpoena. This Court, however, relied upon the subscribers' rights to oppose a subpoena in concluding that the DMCA did not improperly infringe First Amendment concerns: "Service providers *or their subscribers* … can employ Fed. R. Civ. P. 45(c) to object to, modify, or move to quash a subpoena." *Verizon II*, 257 F. Supp. 2d at 263 (emphasis added). RIAA itself argued before this Court that Section 512(h) "allows a party with a basis to object to the subpoena a full and fair opportunity to do so." RIAA's Brief in Opposition to Verizon's Motion to Quash February 4, 2003 Subpoena at 15, *In re Verizon Internet Services, Inc.*, No. 1:03MS00040 (JDB) (D.D.C., filed Mar. 27, 2003). But if, as here, RIAA can obtain and serve subpoenas in a distant forum with truncated compliance dates, there is no meaningful opportunity for the service provider or its subscriber to avail themselves of the Rule

45 protections that this Court found were critical to the constitutionality of the statute itself.

RIAA complains repeatedly that if it is forced to comply with Rule 45, it would need to serve three subpoenas in three different districts to secure information from PBIS, SBIS, and AIMS. See, *e.g.*, Mot. 20. But civil litigants have been required to seek and serve Rule 45 subpoenas where the third-party resides for decades, often without the convenience of a ready device to identify the location of the custodian as is the case here. If RIAA is permitted to ignore Rule 45, service providers and their subscribers can be forced to litigate DMCA subpoena issues on a moment's notice in any of the scores of district courts in our federal system, no matter how far removed that court is from the records, activities, and consumers involved. "[T]erritorial limitations on the service of subpoenas are meant to prevent 'undue inconvenience' to witnesses," 9 James W. Moore et al., MOORE'S FEDERAL PRACTICE § 45.03[4][c] (3d ed. 2003). See *EchoStar Communications Corp. v. The News Corporation, Ltd.*, 180 F.R.D. 391, 397 (D.Colo. 1998) ("[I]t is burdensome to expect . . . [nonparty subpoena recipients in Georgia and New Jersey] . . . to litigate the validity of the subpoena here in Colorado."). There is no indication in the text of this statute or its legislative history that Congress intended to eliminate these important protections for Internet service providers or their subscribers. These are the real issues at stake in this proceeding.

RIAA is therefore wrong when it suggests that the Court should attempt to strike its own balance of those competing interests – rather than adhering to the balance that is already embodied in Rule 45 – in order to more fully protect the interests of copyright owners. Congress already decided this question, as this Court recognized, when it directed that the Federal Rules shall govern "to the greatest extent practicable." *See Waters v. Thornburgh*, 888 F.2d 870, 874 (D.C. Cir. 1989); *City of Columbia v. Costle*, 710 F.2d 1009, 1013 (4th Cir. 1983); *Whitman v. State Highway*

Comm'n of Missouri, 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). Here, RIAA can clearly and easily comply with the provisions of Rule 45 and has simply determined not to do so. In essence, RIAA seeks to erect this Court as *the sole forum* for issuance of all DMCA subpoenas, a decision that Congress quite clearly did not make.

III. RIAA MUST PERMIT SUFFICIENT TIME TO COMPLY WITH THE SUBPOENAS AND MUST COMPENSATE PBIS AND OTHER SERVICE PROVIDERS FOR THE COSTS OF COMPLIANCE

Rule 45(c)(1) provides that "[a] party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." Rule 45(c)(2)(B) provides that an order to compel production "shall protect any person who is not a party or an officer of a party from significant expense . . . ." See also Fed. R. Civ. P. 45(c)(3)(A)(iv) (court shall quash or modify subpoena that subjects a person to undue burden). This protection for non-parties is mandatory, not discretionary. *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001).

PBIS (and the other service providers) will undoubtedly expend a great deal of time and incur significant expense in responding to the RIAA subpoenas. In order to determine a subscriber's identity based only on the use of a particular IP address at a particular time, a service provider must employ a software tool to first search its network IP assignment records and then perform a second search process to verify the identity of the subscriber determined in the search process. Ford Decl. ¶ 5. Although the amount of time necessary to accurately identify a subscriber varies, on average it takes between 15 to 45 minutes to perform even the initial search to identify a particular subscriber and verify the subscriber's personal data – assuming that the search parameters provided by the

issuing party are accurate. *Ibid.* Where this search does not produce a log record that identifies the subscriber, the process of identifying the particular subscriber may lengthen to hours. *Ibid.* The cost of identifying one subscriber through reference to an IP address is approximately $60. *Id.* ¶ 8.

If RIAA had served only one subpoena requesting the identity of one PBIS subscriber, the time for compliance (one week) might not be insufficient, and the cost of compliance might not be inordinate. But RIAA's practice has been to serve the subpoenas in batches of 50 to 100 at a time (see pp. 5-9, *supra*). Thus, contrary to RIAA's contention that compliance with a subpoena takes "only a few minutes" (Mot. 18), approximately 100 or more labor hours would be required – *at a minimum* – to comply with the subpoenas requesting the identity of PBIS subscribers. All told, it would take over 200 hours to comply with the subpoenas delivered in the months of July and August that pertain to PBIS, AIMS, SBIS, and SNET subscribers. Given the volume of subpoenas that RIAA has propounded, and the frequency with which they are delivered, the one week RIAA prescribes for compliance is simply not reasonable.

Moreover, the cost of complying with these subpoenas is substantial. At approximately $60 per IP address, it would cost $10,560 to comply with the subpoenas requesting the identity of PBIS subscribers, $6,360 to comply with the subpoenas requesting the identity of the other SBC-affiliated service providers' subscribers – all told $16,920 for the subpoenas delivered by RIAA alone in less than two months. Even if the expense of responding to a single subpoena could be deemed insignificant, the aggregate expense of responding to all DMCA subpoenas certainly would not be insignificant. *See Broussard v. Lemons*, 186 F.R.D. 396, 398 (W.D. La. 1999) (ordering payment of $43.00 copying costs and noting that burden on medical facility of responding to numerous subpoenas would certainly be significant).

RIAA's response, again, is to assert that Rule 45 does not apply. See Mot. 30 (stating that there is "no mention in the DMCA of reimbursement for responding to subpoenas"). Of course, that is wrong. Section 512(h)(6) requires the application of the Federal Rules governing "enforcement" of subpoenas *duces tecum*. Fed. R. Civ. P. 45(c)(1) requires the Court to "enforce" the duty imposed on parties issuing subpoenas to avoid imposing undue burden or expense on subpoena recipients. Fed. R. Civ. P. 45(c)(2)(B), which mandates protection of non-parties from significant expense, states that a subpoena issuer is not entitled to production, over a recipient's objection, unless it has sought, and the Court has granted, a motion "to compel the production" or, as RIAA has styled its own motion here, a "Motion To *Enforce* Subpoena." (Emphasis added.) And this enforcement order, if there is one, is the order that "shall protect" non-parties from significant expense and burden. Thus, service providers must be given a reasonable time to comply with subpoenas, and must be reimbursed for their costs of compliance.[14]

IV. PBIS IS ENTITLED TO A PROTECTIVE ORDER TO PREVENT MISUSE OF ITS CONFIDENTIAL INFORMATION

When confidential and proprietary information is demanded in a subpoena *duces tecum*, courts routinely exercise their powers under Rule 45 to enter orders protecting against the inappropriate use or disclosure of such information. *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *Compaq Computer v. Packard Bell Electronics*, 163 F.R.D. 329, 339-40 (N.D. Cal. 1995). PBIS (and, we believe, all Internet service providers), consider lists of subscribers to be highly confidential. The need for confidentiality arises from two concerns.

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[14] Indeed, this Court recognized as much in *Verizon II*. See 257 F. Supp. at 263-64 (service providers "can employ Fed. R. Civ. P. 45 to object to, modify, or move to quash a subpoena, or even to seek sanctions" and citing specifically, by way of example, the protection in Fed. R. Civ. P. 45(c)(1) against overbroad, burdensome, or vexatious subpoenas.).

First, Internet users are highly sensitive to privacy issues and many would object to the disclosure of their names, addresses, and phone numbers under any circumstances. For example, in a separate proceeding to enforce a subpoena issued to Verizon, which is pending in this Court, a subscriber has filed a Motion to Intervene to assert her rights. See *Motion to Intervene by Jane Doe I*, Case No. 1:03-MC-00804 (D.D.C., filed August 21, 2003). These customer concerns are greatly compounded if the identifying information is associated with a specific email address, as RIAA demands in its subpoenas. Ford Decl. ¶ 9. Thus, both to protect the important privacy interests of its subscribers, and to protect its own reputation with subscribers and potential subscribers as a service provider that is sensitive to privacy concerns, it is critically important to PBIS to ensure that this information is properly safeguarded. If it is not, PBIS will bear the brunt of its customers' ire.

Second, subscriber lists have considerable commercial value in their own right, both to PBIS and to its competitors. Because of this commercial interest, PBIS takes considerable care to ensure that its competitors cannot obtain lists of its subscribers.

RIAA has refused a reasonable protective order that would govern the handling of the confidential information demanded in its subpoenas, contending, as on other issues, that such an order would frustrate the goals of the DMCA, which, in its view, is to turn over volumes of personal subscriber information with no safeguards and to operate on a guilty until proven innocent basis. Once again, however, RIAA cannot point to any provision of the DMCA that either supercedes the provisions of Rule 45 under which protective orders are routinely granted, or renders a protective order "impracticable." Indeed, a single protective order for a bundle of similar subpoenas would likely suffice.

RIAA suggests that a protective order is unnecessary because its subpoena is accompanied

by a declaration (required under 17 U.S.C. § 512(h)(2)(C)) that the information "will only be used for the purpose of protecting rights under this title." Mot. 36. We do not question the integrity or the good faith of the declarant, but such a declaration falls short of providing the necessary level of protection for highly confidential information. It provides no assurance that the information will be maintained in a secure manner, will not be disclosed to or accessible by personnel involved in competitors' business decisions, or will be returned or destroyed upon completion of authorized use. In fact, some members of RIAA compete directly against Internet service providers in the provision of Internet access and Internet content. A properly crafted protective order can reduce the risks that the information may be misused without interfering with legitimate uses by RIAA and without delaying compliance with a subpoena.

V. THE SUBPOENA FAILS TO COMPLY WITH THE REQUIREMENTS OF THE DMCA

A. The DMCA Does Not Permit RIAA To Demand A Subscriber's Email Address

The subpoena at issue here (and all of RIAA's subpoenas) demand "[i]nformation, including name, address, telephone number, and email address, sufficient to identify the alleged infringer" identified by IP address in an attachment. *See* Whitehead Decl. Ex. A. RIAA's demand for subscribers' email addresses is not authorized by the DMCA and should not be enforced.[15]

The DMCA, in Section 512(h)(3), states that such demands may include "information sufficient to identify the alleged infringer." An name and address constitute "information sufficient

[15] In the *Verizon I* subpoena enforcement proceeding, RIAA conceded that the "name, address, and telephone number" constituted information sufficient to identify an alleged infringer. Motion to Enforce July 24, 2002 Subpoena Issued by this Court to Verizon Internet Services, Inc. and Memorandum in Support Thereof at 11, No. 1:02MS0323 (D.D.C., filed Aug. 20, 2002) (observing that subpoena "merely requires that Verizon provide identifying information, such as a name, address, and telephone number").

to identify" an individual. The email address on file may or may not relate in any way to a subscriber's identity, and subscribers may choose to use any email service, including services offered by other companies, such that PBIS would not have the address on file. Indeed, Section 512(g)(3)(D), in which Congress defined the analogous contents of a "put-back" notice (through which a subscriber can deny an allegation of infringement), includes only name, address, and telephone number. Sections 512(g) and 512(h) contrast sharply with Section 512(c)(3)(A)(iv), which deals with information that a copyright owner must provide to a service provider and refers to "[i]nformation reasonably 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). Congress's failure to refer to email addresses in the subpoena provisions, which are designed to *identify* a *subscriber*, in contrast with its explicit reference to them in sections designed to *contact* a *copyright owner*, indicates that Congress did not intend to authorize subpoenas demanding such information. Cf. *Friends of Earth*, 333 F.3d at 188-89.

Moreover, the demand for email addresses is potentially an additional significant intrusion on the privacy of Internet users. Disclosure could permit RIAA or its agents to monitor a subscriber's activities beyond the specific use of peer-to-peer software specified in the notice and the subpoena; even if an email address is not used for such purposes, its disclosure may create a legitimate fear of abuse among subscribers. RIAA's demand for this information should be rejected.

B. A DMCA Subpoena Must Identify The Copyright Owner On Whose Behalf The Subpoena Is Issued

Section 512(h)(1) authorizes requests for subpoenas only from "[a] copyright owner or a person authorized to act on the owner's behalf" and Section 512(h)(5) requires subpoena recipients to disclose information only "to the copyright owner or person authorized by the copyright owner."

RIAA's subpoenas are accompanied by a letter from Mitchell Silberberg & Knupp, LLP stating that "we are authorized to act on behalf of the RIAA and its member companies" and attaching a list of recordings said to be "owned by RIAA member record companies." See Whitehead Decl. Ex. A. But nowhere in the subpoena is there any identification of the owner of the copyright allegedly being infringed. This is a fatal defect in the subpoena, and it may not be enforced unless and until that defect is corrected.

Parties invoking the processes of the federal courts are required to "openly identify themselves in their pleadings to 'protect [ ] the public's legitimate interest in knowing all of the facts involved, including the identities of the parties.'" *United States v. Microsoft Corp.* 56 F.3d 1448, 1463 (D.C. Cir. 1995) (omission in original) (quoting *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992). This requirement is grounded in compelling constitutional and policy considerations: due process concerns arising from the lack of basic fairness to other parties involved in the judicial proceeding, *id*., and the "customary and constitutionally-embedded presumption of openness in judicial proceedings," *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). As the *Microsoft* Court observed, "We are not aware of any case in which a plaintiff was allowed to sue a defendant and still remain anonymous to that defendant." 56 F.3d at 1463. Even a protective order to prevent public disclosure of a party's identity is a "rare dispensation" and a measure that cannot preclude disclosure to the court and opposing parties. *Id*. at 1464.

The identification of the attorney acting on behalf of the real party, which is the only information disclosed in RIAA subpoenas, is not sufficient to satisfy the requirement of fundamental fairness and openness. There is no reason to construe the DMCA as authorizing a departure from this deeply embedded feature of the judicial system. Section 512(h)(1) refers to a request for a

subpoena by a "copyright owner," and there is no reason to suppose that such an owner, acting on his or her own behalf, could request a subpoena on an anonymous basis. Similarly, there is no reason to construe the statute's reference to a request by "a person authorized to act on the owner's behalf" as an authorization to conceal the identity of the party who authorized the agent's or attorney's actions.

RIAA may assert, once more, that adherence to this rule will cause delay and inconvenience. But before requesting subpoenas, RIAA must have a reasonable basis for concluding that the subscriber's activity actually infringes a copyright of one of its members, and to have such a basis, it surely must have identified the owner of the copyright allegedly being infringed. Identifying that owner in the subpoena request cannot be a significant inconvenience, and even if it is, it is an inconvenience that fundamental principles of fairness and openness require them to bear.

Because they have not identified the copyright owners in any of the subpoenas issued to date, those subpoenas should not be enforced.

CONCLUSION

For the reasons stated, RIAA's Motion to Enforce should be denied.

Respectfully Submitted,

____/s/_____
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE SUBPOENA TO SBC INTERNET COMMUNICATIONS, INC.	)	
RECORDING INDUSTRY ASSOCIATION OF AMERICA, Plaintiff	)	Mis. Act. No. 03-MC-1220
v.	)	
SBC INTERNET COMMUNICATIONS, INC. d/b/a/ SBC PACIFIC BELL INTERNET SERVICE SOUTHWESTERN BELL INTERNET SERVICES AMERITECH INTERACTIVE MEDIA SERVICES, Defendants	)	

[PROPOSED] ORDER

Upon consideration of the Motion to Enforce, the Opposition thereto, the Reply in support thereof, and the entire record herein, it is hereby

ORDERED that the Motion to Enforce is denied.

_____
District Judge

Dated: