UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In Re Subpoenas to Boston College	Civil Action No. 03- -MBD (United States District Court for the District of Columbia Nos. 1:03MS00259, 1:03MS00278, and 1:03MC00872))

MOTION OF BOSTON COLLEGE
TO QUASH SUBPOENAS AND FOR A PROTECTIVE ORDER
PURSUANT TO FED. R. CIV. P. 45(c)(3)(A)

Pursuant to Fed. R. Civ. P. 45(c)(3)(A), Boston College moves to quash subpoenas duces tecum served upon it by Recording Industry Association of America, Inc., under provisions of the Digital Millennium Copyright Act, on the ground that the subpoenas are invalid because:

- they were issued by the United States District Court for the District of Columbia pursuant to 17 U.S.C. § 512(h)(6), for production of documents in Washington, D.C.
- 17 U.S.C. § 512(h)(6) requires that the procedure for delivery of subpoenas issued pursuant to 17 U.S.C. § 512(h) be governed "to the greatest extent practicable" by the provisions of the Federal Rules of Civil Procedure governing service of a subpoena duces tecum

- the subpoenas violate Fed. R. Civ. P. 45(a)(2) and (b)(2) because they were served on Boston College in Chestnut Hill, Massachusetts, outside the district of the District Court for the District of Columbia, from which the subpoena was issued, and more than 100 miles from Washington, D.C., the place designated for production.

Boston College moves, in addition, for a protective order that, if and when it is required to produce documents pursuant to valid subpoenas, it be allowed reasonable time to notify any student whose documents are responsive to the subpoenas, to the extent that the documents sought by the subpoenas are ones that may constitute "education records" within the meaning of the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g(b)(2), which Boston College may not produce without providing prior written notice of the subpoena to the individual or individuals to whom such documents relate.

REQUEST FOR ORAL ARGUMENT

Boston College requests oral argument on this Motion because it believes such argument may assist the Court.

By its attorney,

Jeffrey Swope
Palmer & Dodge LLP
111 Huntington Avenue
Boston, Massachusetts 02199
BBO No. 490760

Dated: July 21, 2003

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FOR THE DISTRICT OF MASSACHUSETTS

In Re Subpoenas to Boston College	Civil Action No. 03- -MBD (United States District Court for the District of Columbia Nos. 1:03MS00259, 1:03MS00278, and 1:03MC00872)

MEMORANDUM OF BOSTON COLLEGE IN SUPPORT OF ITS MOTION TO QUASH SUBPOENAS AND FOR A PROTECTIVE ORDER PURSUANT TO FED. R. CIV. P. 45(c)(3)(A)

Boston College moves to quash, and for a protective order regarding, three subpoenas duces tecum served upon it by Recording Industry Association of America, Inc. (RIAA) under provisions of the Digital Millennium Copyright Act (DMCA). The subpoenas were issued to Boston College as part of what the recording industry has publicly announced is a nationwide initiative against copyright infringement committed by individuals who, without authority, offer copies of sound recordings for download over the Internet. Under that initiative, the RIAA is issuing subpoenas to providers of Internet services to discover the identities of individuals alleged to have infringed the copyrights of RIAA-member record companies. Once the individuals have been identified, the RIAA or its members plan to file claims for damages against them. College students have been identified by the RIAA as prime suspects in such alleged infringement.

Boston College emphasizes at the outset that its motion is not intended to prevent the RIAA from obtaining information to which it is entitled under the DMCA, or to shield the disclosure of the identities of any individuals who are the subjects of the subpoenas. The motion is instead filed solely for the purposes of:

- assuring that the subpoenas are validly issued, because to the extent that the subpoenas seek information about Boston College students that constitutes an "education record" pursuant to the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, Boston College may disclose such information only in response to a "lawfully issued subpoena";
- assuring that the subpoenas are issued from a nearby United States District Court, as required by Fed. R. Civ. P. 45(a)(2) and (b)(2), so that Boston College has a convenient forum in which to seek judicial assistance regarding such subpoenas, which is a principal purpose of Fed. R. Civ. P. 45; and
- assuring that subpoenas, when validly issued, allow Boston College time to provide reasonable prior notice to any students whose education records may be produced in response to the subpoenas, as required by FERPA.

If the RIAA issues subpoenas to Boston College that satisfy these requirements of the Federal Rules of Civil Procedure and of federal law, Boston College will of course provide the information that the subpoenas rightfully require it to produce, to the extent that such information is found, after a reasonably diligent search, to be in the university's possession, custody, or control.

Statement of Facts

The RIAA has served three subpoenas upon Boston College pursuant to the DMCA, 17 U.S.C. § 512(h), seeking information, including names, addresses, telephone numbers, and email addresses, sufficient to identify the alleged infringers of copyrighted sound recordings who have the specific Internet Protocol addresses identified in the subpoenas. Each subpoena required production "on the 7th calendar day after the *issuance date* of Subpoena" (italics added), but was not served until several days after the issuance date, leaving Boston College insufficient time to issue prior notices to any students whose education records would be produced in response to the subpoena.

Boston College sent the RIAA objections pursuant to Fed. R. Civ. P. 45(c)(2)(B), because the subpoenas had not been lawfully issued and served in compliance with Fed. R. Civ. P. 45(b)(2), and because they required a response too soon to allow Boston College to give the notices required by FERPA. By letter dated July 15, 2003, a copy of which is annexed to this memorandum as Attachment A, counsel for the RIAA rejected the objections of Boston College and demanded compliance with the subpoenas.

ARGUMENT

Boston College has no objection to providing information responsive to the RIAA's request as long as that request is embodied in lawfully issued subpoenas, which is the only basis on which Boston College can be required to respond, and which is also a requirement of FERPA. The subpoenas must also allow Boston College reasonable time to comply with its FERPA obligation to notify students if their education records will be produced in response to the subpoenas.

I. BOSTON COLLEGE IS REQUIRED BY FEDERAL LAW NOT TO DISCLOSE STUDENT RECORDS IN RESPONSE TO SUBPOENAS UNLESS THOSE SUBPOENAS HAVE BEEN "LAWFULLY ISSUED."

FERPA defines an "education record" as records, files, documents, and other materials that "(i) contain information directly related to a student; and (ii) are maintained by an educational . . . institution" (20 U.S.C. § 1232g(a)(4)(a)). Educational institutions may not disclose personally identifiable information about a student from an "education record" except in limited circumstances (20 U.S.C. § 1232g(b)(2)). One such circumstance is when "such information is furnished . . . pursuant to any *lawfully* issued subpoena," as long as the educational institution provides the student notice in advance of complying with the subpoena (20 U.S.C. § 1232g(b)(2)(B)) (italics added).

As a result, Boston College is obligated by federal law to assure that the RIAA subpoenas that would require it to disclose student records were lawfully issued. (Of course, to the extent that information responsive to the RIAA subpoenas was not an education record concerning a Boston College student, the FERPA requirements would not apply. But without a lawfully issued subpoena, Boston College would not be required to produce that information, either.)

II. THE RIAA SUBPOENAS WERE NOT LAWFULLY ISSUED AND SERVED, IN VIOLATION OF FED. R. CIV. P. 45(a)(2) AND (b)(2)

The DMCA requires that "the procedure for issuance and delivery" of any subpoena issued pursuant to the DMCA "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)). The Federal Rules of Civil Procedure prescribe from which District Courts subpoenas to nonparties that require production of records may be issued, and where they may be

served, unless a statute of the United States authorizes service at any other place. Fed. R. Civ. P. 45(a)(2) and (b)(2). The RIAA subpoenas violate those requirements of the Federal Rules of Civil Procedure because they were issued from the United States District Court for the District of Columbia and were served on Boston College in Massachusetts to produce documents in Washington, D.C. Nothing in the DMCA permits service at any other places than those authorized by the Federal Rules of Civil Procedure.

1. Fed. R. Civ. P. 45(a)(2) and (b)(2) require that subpoenas duces tecum be issued from a convenient United States District Court, so that a third-party like Boston College may seek judicial assistance without the burden of travelling to a distant district.

The Federal Rules of Civil Procedure provide protection to a third-party, like Boston College, that receives a subpoena duces tecum, so that the recipient may avoid undue burden by having to litigate the validity of the subpoena in an inconvenient forum. The Rules accomplish this end by:

- first, providing that a subpoena for production of documents must issue from the court for the district in which the production is to be made (Fed. R. Civ. P. 45(a)(2)), and
- second, providing that subpoenas may only be served outside the district from which they issue if that place of service is "within 100 miles of the place of the . . . production specified in the subpoena" (Fed. R. Civ. P. 45(b)(2)).[1]

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[1] In addition, service may be made "at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the . . . production . . . specified in the subpoena" (*id.*), in effect expanding the 100-mile rule to allow service anywhere in the Commonwealth for a subpoena that requires production in Massachusetts.

"[T]erritorial limitations on service of subpoenas are meant to prevent 'undue inconvenience' to witnesses" (9 James Wm. Moore et al., Moore's Federal Practice § 45.03[4][c] (3d ed. 2003)).

Boston College does not contend that production of records responsive to the RIAA's subpoenas would itself be inconvenient or burdensome. The university acknowledges that it could readily deliver the requested identification information to the RIAA's counsel in Washington, D.C.

But it is a completely different kind of undue inconvenience and burden that is at issue in this matter for Boston College: whether Boston College must go to the District Court for the District of Columbia to obtain protection from subpoenas, like the RIAA's in this case, that have been issued in violation of the Federal Rules of Civil Procedure and of FERPA. It is obviously significantly more inconvenient and burdensome for Boston College to retain counsel to appear for it in the District of Columbia than to use local counsel routinely retained by it to represent it in courts located in Massachusetts.[2]

There can be no doubt that the RIAA subpoenas were not issued and served in accordance with the territorial constraints of Fed. R. Civ. P. 45(a)(2) and (b)(2). *See, e.g.*,

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[2] Boston College filed its Motion to Quash Subpoenas and for a Protective Order in the United States District Court for Massachusetts, from which the subpoenas should have issued, rather than in the United States District Court for the District of Columbia, from which the subpoenas were wrongly issued. This Court should take jurisdiction of this matter despite the fact that Fed. R. Civ. P. 45(c)(3)(A) provides that motions should be made to "the court by which a subpoena was issued," because the RIAA issued the subpoenas from the wrong court. A rule that relies on not imposing undue burdens to third parties should not require third parties to travel to an inconvenient forum to contest a subpoena that was not lawfully issued. As the Court said in *Echostar Communications Corp.* v. *The News Corporation, Ltd.*, 180 F.R.D. 391, 397 (D. Colo. 1998), "it is burdensome to expect . . . [the nonparties subpoenaed to produce documents in Georgia and New Jersey] either *to litigate the validity of the subpoena* here in Colorado, or to produce the documents here in Colorado" (italics added). *See also Kupritz* v. *Savannah College of Art and Design*, 155 F.R.D. 84, 88 (E.D. Pa. 1994) (court from which the subpoena should have issued

Kupritz v. *Savannah College of Art and Design*, 155 F.R.D. 84, 88 (E.D. Pa. 1994) (where subpoena was issued from the Southern District of Georgia for discovery in Pennsylvania, "[i]t was simply wrong"). The RIAA did not contend otherwise in its counsel's letter to Boston College (Att. A).

2. The DMCA provides no exception to these requirements of Fed. R. Civ. P. 45(b)(2), and on the contrary requires that those rules be followed "to the greatest extent practicable."

The RIAA's contention that the subpoenas were lawfully issued, as stated in its letter to Boston College, is based upon the exception in Fed. R. Civ. P. 45(b)(2) that allows service in another place if a statute of the United States authorizes such service (Att. A, p. 1). The DMCA provides in 17 U.S.C. § 512(h)(1) that the representative of a copyright owner "may request the clerk of *any* United States district court to issue a subpoena" (italics added) for the identification of an alleged copyright infringer. Based upon this language, the RIAA contends that the DMCA permits nationwide service.

In fact, all that the phrase "any United States district court" signifies, by its plain meaning, is that a copyright holder need not go to any particular court to issue a DMCA subpoena, but may instead have it issued from any district in the federal court system that has authority to issue such a subpoena. Moreover, other language in the DMCA expressly refutes the RIAA's claim that the phrase "any United States district court" should be read to override the rules that normally limit which District Courts may issue subpoenas in particular cases. The DMCA expressly provides that "the procedure for *issuance* and *delivery* of the subpoena . . . shall be governed *to the greatest extent*

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finds subpoena issued from wrong court invalid).

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)).

The United States Supreme Court long ago rejected the contention made by the RIAA. In *Robertson* v. *Railroad Labor Board*, 268 U.S. 619, 627 (1925) (Brandeis, J.), the Court held that the phrase "any District Court of the United States" means only a court that has jurisdiction under otherwise applicable rules to issue the subpoena. While that decision was issued before the Federal Rules of Civil Procedure existed, it is no less a determinative precedent. The statute at issue in the *Robertson* case gave an administrative board subpoena powers, and allowed that board "to invoke the aid of any United States district court" to enforce its subpoenas. Judicial procedure at that time was governed by the Judicial Code, which provided the rules for where such actions could be maintained based on the locations of the parties subpoenaed. The Court's holding in *Robertson* that the phrase "any United States district court" does not override otherwise applicable rules governing which court may issue a subpoena is therefore just as applicable in the context of the Federal Rules of Civil Procedure and the DMCA today.

The cases that the RIAA cited in its letter to Boston College arguing that the DMCA authorizes nationwide service of process (Att. A, p. 2) are readily distinguishable. They arose under the Federal Trade Commission Act, which authorizes subpoenas to be enforced by "[a]ny of the district courts of the United States *within the jurisdiction of which such inquiry is carried on*" (15 U.S.C. § 49 (italics added)), and the Federal Election Campaign Act, which authorizes (in nearly identical language) subpoenas to be enforced by "[a]ny of the district courts of the United States *within the jurisdiction of which any inquiry is carried on*" (2 U.S.C. § 437d(b) (punctuation from the statute as it

read when interpreted by the court in the case cited in the RIAA letter, italics added)). The language in the DMCA that authorizes the issuance of subpoenas lacks the essential language, italicized in the previous quotes, that allows for nationwide service.

As this Court said in *Federal Deposit Insurance Corporation* v. *Abrams*, 893 F. Supp. 4, 5 (D. Mass. 1995) (internal quotations and citations omitted), "Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress failed to do so . . . argues forcefully that such an authorization was not its intention."

III. BECAUSE BOSTON COLLEGE IS REQUIRED BY FERPA TO PROVIDE PRIOR NOTICE TO A STUDENT BEFORE DISCLOSING THE STUDENT'S EDUCATION RECORD IN RESPONSE TO A SUBPOENA, A LAWFULLY ISSUED RIAA SUBPOENA MUST ALLOW BOSTON COLLEGE REASONABLE TIME TO PROVIDE SUCH NOTICE.

The letter from the RIAA also disputed a second ground of objection filed by Boston College, which was that the time the subpoenas permitted for production was too short to allow Boston College to satisfy its obligation under FERPA to provide students prior notice if their education records would be provided in response to the subpoenas (*see* p. 3, above). (Boston College emphasizes that it does not content that FERPA prevents the disclosure of information about any student in response to a lawfully-issued subpoena, but merely that FERPA requires Boston College to give such a student advance notice that his or her education records have been subpoenaed, so that the student has the opportunity to seek protection from that subpoena if he or she wishes to do so.)

While the DMCA provides (17 U.S.C. § 512(h)(5)) that, "notwithstanding any other provision of law," service providers that receive DMCA subpoenas must

"expeditiously disclose" the information sought in the subpoena, those provisions cannot be read to override a Boston College's FERPA obligation to notify students when a subpoena requires disclosure of its students' education records. As the Supreme Court said in *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974):

> "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."

Nothing in the DMCA establishes the time boundaries for an "expeditious" disclosure. Permitting Boston College to take the few days needed to provide students reasonable FERPA notice would not conflict with Boston College's DMCA obligation to supply information in a timely manner in response to a lawfully issued RIAA subpoena.[3]

The RIAA pointed out in its letter that FERPA excepts "directory information" from the definition of an "education record," and claimed that all its subpoenas seek is directory information (Att. A, p. 3). The RIAA is correct that, for students who have not opted out of the provision,[4] colleges may disclose their names, addresses, and other such information that is typical of student directories (20 U.S.C. § 1232g(a)(5)). But the RIAA subpoenas require disclosure not merely of students' names and addresses. They

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[3] The RIAA letter conceded that the delay between the issuance of the subpoenas by the United States District Court for the District of Columbia (which subpoenas state that responses are due within seven calendar days) and the RIAA's service on Boston College left the university only two days in which to respond (Att. A, p. 3). The letter offered no explanation for the delay. The letter went on to suggest that Boston College could satisfy its duties under FERPA by simultaneously notifying the student and producing the information (*id.*) That suggestion overlooks the FERPA mandate that such notice be "in advance" of disclosure of the education records (20 U.S.C. § 1232g(b)(2)(B)).

[4] Of course, RIAA's argument fails at the threshold for any student who has exercised his or her FERPA right to refuse permission for release even of directory information. But as explained in the remainder of this section, the more fundamental reason the argument of the RIAA fails is that it wrongly characterizes the information sought as "directory."

instead require the disclosure of the names and addresses of students who allegedly used campus computers for copyright infringement. By coupling the names with the alleged activities, the information is no longer simply "directory," but is precisely the kind of information to which FERPA applies. If the position of the RIAA were correct, colleges and universities could be required to disclose "just the names and addresses" of students who received certain grades, who used campus counseling services, or who were subject to campus disciplinary proceedings. In each case, it is the question as well as the answer that would make any information provided more than mere "directory information."

CONCLUSION

For the reasons stated in this memorandum, Boston College requests that the Court quash the subpoenas served upon it (United States District Court for the District of Columbia Nos. 1:03MS00259, 1:03MS00278, and 1:03MC00872), and further that the Court issue a protective order stating that, if and when the RIAA serves Boston College with lawfully issued subpoenas, those subpoenas must permit Boston College sufficient time before the date set for production to give reasonable prior notice to any student whose education record may be produced in response to such subpoenas, as required by FERPA.

Respectfully submitted,

Jeffrey Swope
Palmer & Dodge LLP
111 Huntington Avenue
Boston, Massachusetts 02199
BBO No. 490760

Dated: July 21, 2003

JENNER&BLOCK

July 15, 2003

Jenner & Block, LLC
601 Thirteenth Street, NW
Suite 1200 South
Washington, DC 20005-3823
Tel 202 639-6000
www.jenner.com

Chicago
Dallas
Washington, DC

Thomas J. Perrelli
Tel 202 639-6004
Fax 202 636-6066
tperrelli@jenner.com

BY FACSIMILE AND MAIL

Joseph M. Herlihy
General Counsel
Boston College
140 Commonwealth Avenue
Chestnut Hill, MA 02467

Re: Objections to DMCA subpoena from RIAA

Dear Mr. Herlihy:

I am writing on behalf of the Recording Industry Association of America in response to your objection to the subpoena served by RIAA pursuant to the Digital Millennium Copyright Act. For the reasons discussed below, your objections are not well-taken. We request that you withdraw them and comply with the subpoena as soon as possible.

As you are aware, Section 512(h) of the DMCA requires service providers, including universities providing internet access and other computer services to their students, to respond to subpoenas issued by "the clerk of any United States district court." 17 U.S.C. § 512(h)(1). Congress was crystal clear that this obligation on service providers was non-discretionary; indeed, Congress required service providers to comply with the subpoena "notwithstanding any other provision of law." 17 U.S.C. § 512(h)(5). This broad mandate was part of Congress's express intention to make the DMCA subpoena process as "expeditious" as possible – with the explicit goal of avoiding unnecessary conflict between copyright owners and service providers.

You have raised three objections to the subpoena served on you, none of which are consistent with the text or purpose of the DMCA. For the reasons explained below, we request that you withdraw your objections. If you do not, we will have no choice but to move to compel a response to the subpoena.

1. You claim that the subpoena is invalid because it violates Fed. R. Civ. P. 45(b)(2). That argument fails for multiple reasons. In the DMCA, Congress authorized "the clerk of any United States district court" to issue a subpoena. 17 U.S.C. § 512(h)(1). Through that language, Congress has expressly provided for issuance of subpoenas by any district court and nationwide service. In so doing, Congress recognized two things: 1) the non-physical nature of the Internet where infringing material, as well as the records that may pertain to such infringement, may reside anywhere and where infringing conduct necessarily occurs on a nationwide (indeed, international) scale and 2) the critical need for copyright owners to obtain information as soon as possible so that they can stop and obtain redress for the ongoing infringement that is irreparably harming their interests.

Attachment A

The DMCA's reference to Rule 45 is not to the contrary. Section 512(h) does not incorporate all aspects of Rule 45; rather, pursuant to 17 U.S.C. § 512(h)(6), the provisions of Rule 45 are incorporated only "to the greatest extent practicable." Thus, where the DMCA itself extends authority beyond that of Rule 45 or where any requirement of Rule 45 is inconsistent with Congress's intent in enacting the DMCA, Rule 45's limitations must yield. Indeed, Rule 45 itself acknowledges that, where Congress has otherwise provided for service beyond the territorial limitations of the issuing district court, Rule 45(b)(2) simply does not apply. *See* Rule 45(b)(2) (allowing alternative service "[w]hen a statute of the United States provides thereof"). Congress has so provided in the DMCA.

Your argument is not only inconsistent with the text of the DMCA, but also with Congress's intent and the legislative history. As the D.C. Circuit has recognized, Congress may authorize nationwide service, either expressly or impliedly. Thus, the D.C. Circuit has held that a statute authorizing subpoenas and enforcement thereof in any district court provides for nationwide service where such service "effectuate[s] the purpose of the regulatory regime." *Federal Trade Commission v. Browning*, 435 F.2d 96, 100 (D.C.Cir. 1970); *Federal Election Commission v. Committee to Elect Lyndon LaRouche*, 613 F. 2d 849, 859 (D.C. Cir. 1980) (same); *Federal Trade Commission v. Cockrell*, 431 F.Supp. 558, 559 (D.D.C. 1977) (where inquiry is "nationwide," service anywhere in the U.S. and enforcement in the District of Columbia are appropriate).

Authorizing service of subpoenas nationwide is a key component of Congress's specific mandate that service providers "expeditiously disclose to the copyright owner . . . the information required by the subpoena." 17 U.S.C. § 512(h)(5). As the District Court for the District of Columbia has already held, the DMCA must be interpreted in light of "Congress's express and repeated direction to make the subpoena process 'expeditious.'" *In re: Verizon Internet Services, Inc. Subpoena Enforcement Matter*, 240 F.Supp. 24, 34 (D.D.C. 2003). "The statute contemplates a rapid subpoena process designed to quickly identify apparent infringers and then curtail infringement." *Id.* To interpret the statute as you suggest would vitiate Congress's fundamental goal in enacting Section 512(h).

Moreover, your argument is inconsistent with the remainder of Section 512. In Section 512, Congress sought to streamline the efforts of copyright owners and service providers in fighting against digital piracy. Congress thus required all service providers to, for example, establish a single point of contact for all DMCA take-down notifications, 17 U.S.C. § 512(c)(2), regardless of where those notifications come from. Congress expressly contemplated that DMCA subpoenas and take-down notices would be served in conjunction with each other. To suggest that Congress intended service providers to disable access to infringing material in response to requests nationwide, but to ignore the subpoenas to identify infringers that accompany those notices makes little sense.

In contrast to the irreparable harm that occurs every day to copyright owners while the infringement at issue in this case is allowed to continue, requiring compliance with a subpoena issued in the District of Columbia works no hardship on the university or any other service provider. The DMCA does not require witnesses to travel or give testimony; it only requires production of limited, specific information that is easily retrieved from your files. Regardless of where the subpoena is issued, a service provider can easily comply and is subject to virtually no burden.

Your refusal to provide information is also inconsistent with the practice of DMCA subpoenas to date. Since enactment of the DMCA and prior to its most recent enforcement effort, RIAA has obtained and served over 100 subpoenas under the DMCA. Each of those subpoenas was issued by the clerk of the United States District Court for the District of Columbia. No service provider has ever previously objected to those subpoenas on the ground that you now raise. Other ISPs understand the statute as RIAA does – it authorizes issuance of subpoenas by any district court and service wherever the service provider resides.

2. Your complaint that the subpoena requires production of information too quickly is also not well-taken. The DMCA makes clear that a service provider must respond to the subpoena "expeditiously." 17 U.S.C. § 512(h)(5). Given that the computer look-up required to comply cannot take more than a few minutes (as other service providers have conceded), there is no basis to claim two days are insufficient to obtain and disclose the information required. In any case, this objection has clearly been mooted with the passage of time.

3. Your final argument is that the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g(b)(2), somehow prevents the university from complying with its obligations under the DMCA. That argument is also without merit. FERPA does not in any way preclude compliance with the DMCA. As an initial matter, the provisions of FERPA could not trump the university's obligation to respond to a DMCA subpoena. Congress made clear that service providers must comply with DMCA subpoenas "notwithstanding any other provision of law." Such language makes manifest Congress's intent that other legal obligations must give way to the urgent need to stop ongoing violations of law.

In any case, the university's obligations under FERPA do not in any way conflict with its obligations under the DMCA. FERPA applies only to "personally identifiable information in education records *other than directory information*." 20 U.S.C. § 1232g(b)(2) (emphasis added). Under the statute, "directory information" expressly includes the very identifying information that the DMCA requires the university to provide. Thus, FERPA, by its own terms, does not even apply to the information that the subpoena compels. Moreover, under FERPA, the only obligation on the university would be to notify the student and/or parents of the student. Thus, even if FERPA did apply, the university could easily comply with both statutes by notifying the student, while also expeditiously disclosing the information to the copyright owner. For all of these reasons, FERPA provides no basis for objecting to the subpoena in this case.

For all of these reasons, we request that you withdraw your objections and disclose the information required by the subpoena as soon as possible. Please do not hesitate to contact me (202-639-6004) if you have questions or wish to discuss this matter further.

Sincerely,

Thomas J. Perrelli

Thomas J. Perrelli