UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION TO ENFORCE SUBPOENA ISSUED TO SBC PURSUANT TO 17 U.S.C. § 512(h)

The Recording Industry Association of America hereby asks this Court to enforce a subpoena issued by the Clerk of this Court pursuant to the Digital Millennium Copyright Act (DMCA). That subpoena, directed to SBC Internet Communications, Inc., was validly issued and has been properly served. SBC has no legitimate basis for refusing to comply.

Rather than filing a motion to quash in this Court, where the crux of its objections have already been resolved in RIAA's favor, SBC has instead chosen to challenge this and other subpoenas issued by the clerk of this Court by filing a declaratory judgment action in the Northern District of California. *See* Attachment K to the Declaration of Jonathan Whitehead (Exhibit 1) (Hereinafter "Whitehead Decl."). In that complaint, SBC, through Pacific Bell Internet Services, argues that 17 U.S.C. § 512(h), which provides statutory authority for

subpoenas to Internet Service Providers (ISPs) to identify people committing copyright infringement over those ISPs' networks, is unconstitutional or should be construed to provide an exception relieving SBC of the obligation of responding to these subpoenas. This Court has already heard and decided issues relating to the proper construction of 17 U.S.C. § 512(h), as well as its constitutionality. *See In re Verizon Internet Services, Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003) ("*Verizon I*") (resolving statutory interpretation questions); *In re Verizon Internet Services, Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003) ("*Verizon II*") (rejecting constitutional challenges). Those decisions reject SBC's primary arguments, and SBC's other objections – venue, reimbursement, demand for a protective order, etc. – fare no better.

RIAA, on behalf of its members, the largest recording companies in the United States, has recently instituted a nationwide enforcement program to identify significant copyright infringers using the facilities of ISPs to commit massive copyright piracy on the Internet. As part of that program, RIAA has obtained subpoenas issued by the Clerk of this Court pursuant to § 512(h) to many of the largest ISPs, most of which have complied with the subpoenas, as the statute requires. Those ISPs have recognized that, by establishing a streamlined process that requires ISPs to respond to subpoenas obtained by copyright owners from the clerk of any United States district court "expeditiously" and "notwithstanding any other provision of law," § 512(h)(5), Congress intended ISPs to provide copyright owners with the limited information they need to enforce their rights "as quickly as possible" and without a great deal of procedural wrangling. *Verizon II*, 257 F. Supp. 2d at 273.

In contrast, SBC has embarked on a strategy of massive resistance. To date, RIAA has obtained more than 200 subpoenas to identify significant copyright infringers using SBC's network to disseminate *almost 250,000 copyrighted works* without authorization of the owners of

those copyrights. RIAA both has served SBC at its office in the District of Columbia and has delivered the subpoenas, as the DMCA permits, to the DMCA agent that SBC is required, by statute, to register with the Copyright Office. Either of those is sufficient to trigger SBC's obligations under the DMCA. Moreover, there is no dispute that the proper individuals at SBC have the subpoenas and could comply at any time.

Rather than comply expeditiously, SBC seeks to forum shop and play a corporate shell game, in a manner inconsistent with the streamlined, efficient mechanism that Congress created in the DMCA. Notably, SBC's strategy is one of recent vintage. At the time of the enactment of the DMCA, SBC and other ISPs strongly supported the DMCA, which also grants ISPs limitations on their liability so long as they cooperate with copyright owners in detecting and dealing with digital piracy. Never once did SBC suggest that the DMCA was unconstitutional. Moreover, since enactment of the DMCA, SBC has complied with DMCA subpoenas exactly like these without objections. Whitehead Decl. ¶ 21. Only recently, upon the announcement of RIAA's piracy enforcement effort, has SBC discovered the host of objections it now claims.

By this motion, RIAA moves to enforce one of those subpoenas, recognizing that the legal issues with respect to all of the subpoenas are identical. Resolution of this matter should resolve all of the outstanding subpoena disputes between RIAA and SBC. RIAA also asks the Court to resolve this matter as expeditiously as possible. Every day that goes by, copyright owners such as RIAA's members are being irreparably harmed by the unlawful conduct occurring on SBC's network.

STATEMENT OF FACTS

Internet Piracy

The technology that has made the Internet possible has also spawned massive illegal copying of copyrighted works. The greatest such threat arises from peer-to-peer (P2P) networks. By downloading P2P software, and logging onto a P2P network, an individual makes music and video files on a home or office computer available to any Internet user worldwide. Until shut down by a federal court injunction, Napster was the most notorious P2P system. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Similar systems have arisen in Napster's wake, such as Kazaa, iMesh, Grokster and Gnutella. Approximately 90% of the content on such P2P networks is copyrighted material disseminated without authorization. *Id.* at 1013. There is no dispute that this uploading and downloading of copyrighted works is illegal. *Id.* at 1014-15; *In re Aimster Copyright Litigation*, No. 02-4125, 2003 WL 21488143 (7th Cir. June 30, 2003). Nonetheless, at any given moment, millions of people are using P2P networks to download copyrighted material or offer such material for others to download. More than 2.6 *billion* infringing music files are downloaded monthly. L. Grossman, *It's All Free*, Time, May 5, 2003, at 60-69.

The propagation of illegal digital copies over the Internet significantly harms copyright owners, and has had a particularly devastating impact on the music industry. *See Verizon II*, 257 F. Supp. 2d at 273. CD sales – the principal revenue source for most companies – declined 7% in 2000, 10% in 2001 and 11% last year. *See* http://www.riaa.com/pdf/2002yrendshipments.pdf. Surveys show that the main reason for this precipitous drop in revenues is that people are downloading music illegally for free, rather than buying it. According to a November 2002

survey by Peter D. Hart Research Associates, by a 2-to-1 margin, consumers report they are downloading more music and purchasing less.

In contrast, Internet Service Providers (ISPs), such as the SBC entities, profit handsomely from this illegal conduct. P2P systems are critical to driving the growth in demand for high-end broadband services that are lucrative for ISPs. Those who download music over P2P systems use large amounts of bandwidth and thus tend to subscribe to services such as SBC's DSL service or cable modem service. Between 50% and 70% of the usage of such networks is by those who are copying files on P2P systems. Whitehead Decl. ¶ 10. SBC claims to be the nation's largest DSL provider. *See* SBC Communications, Inc. 2002 Annual Report at 3 (available at http://www.sbc.com/investor_relations/0,,93,00.html) (claiming over 2.2 million DSL subscribers). Thus, SBC has a financial interest in seeing illegal conduct continue on P2P systems. Indeed, SBC has promoted its DSL services by encouraging consumers to avoid the record store and instead use SBC DSL service to "[d]ownload all the music you like. And all the music you sort of, kind of, maybe even a little bit like . . . Go mp3 crazy." Whitehead Decl. ¶ 11 (Attachment C).

The Digital Millennium Copyright Act

Congress enacted the Digital Millennium Copyright Act to encourage development of the Internet's potential, while at the same time protecting against the "massive piracy" of copyrighted works that Internet technology permits. S. Rep. No. 105-190, at 8 (1998) ("S. Rep."). The DMCA addressed two problems – (1) the threat of massive piracy, which could be committed anonymously over the Internet, and (2) the fear of ISPs that they would be subject to massive liability for facilitating illegal conduct over their computer networks. The DMCA was

the product of extensive negotiations between ISPs and copyright owners. *Verizon I*, 240 F. Supp. 2d at 38 n.11.

In Title II of the DMCA, codified at 17 U.S.C. § 512, Congress addressed both concerns by carving out certain limitations on the liability of ISPs, while at the same time requiring ISPs to act swiftly when they are made aware of copyright infringement. By creating a balanced set of benefits for and obligations on service providers, Congress sought to ensure that copyright owners and ISPs would "cooperate to detect and deal with copyright infringements that take place in the digital networked environment." S. Rep. at 40. Thus, for example, in order to take advantage of the liability limitations, the DMCA requires ISPs to disable access to infringing material available from their networks when notified, *see* § 512(b)-(d), and terminate the accounts of subscribers who are repeat copyright infringers. § 512(i)(1)(A).

Critical to Congress's goals in the DMCA was to stop infringement on the Internet as expeditiously as possible. *See Verizon I*, 240 F. Supp. at 34 (noting "Congress's express and repeated direction to make the subpoena process 'expeditious'"); S. Rep at 45 (when a service provider is notified of infringing activity, the limitation on liability is maintained only if "the service provider acts expeditiously either to remove the infringing material from its system or to prevent further access to the infringing material"). An individual Internet pirate can cause tens of thousands of infringing copies to be distributed in a single day. In the case of sound recordings that have not yet been released publicly, the economic impact of infringement can be devastating. Thus, Congress created streamlined procedures to ensure that the system would operate smoothly and efficiently. For example, Congress required every ISP desiring the limitations on liability to register a DMCA agent with the United States Copyright Office to whom all notices of infringement are to be sent. § 512(c)(2). Congress also formalized a system

for "notice and take down," specifying in detail the information that copyright owners must provide to ISPs (the notice), which would automatically and immediately trigger the ISP's obligation to disable access to infringing material (the take-down).

Congress recognized, however, that, in many circumstances, copyright owners cannot determine the identities of individuals infringing their copyrights over the Internet; only the ISPs that serve such infringers know their identities. Section 512(h) of the DMCA thus places on ISPs the obligation of providing the identity of subscribers who use their networks to infringe. Under § 512(h)(1), a copyright owner or its agent may request that "the clerk of any United States district court" issue a subpoena requiring an ISP to disclose the identity of such infringers when the copyright owner comes forward with good faith claims of infringement. § 512(h)(1). Congress carefully built safeguards into § 512(h) to ensure that it is used only to enforce valid copyright claims. A copyright owner must file with the clerk a notice of the same type as is routinely sent to the ISP's DMCA agent, as well as a sworn declaration that the information obtained in response to a DMCA subpoena "will only be used for the purpose of protecting rights under this title." § 512(h)(2)(A), (C). Once the clerk has issued the subpoena – which Congress intended to be a ministerial function (S. Rep. at 51) – the copyright owner is to provide for "delivery" of both the subpoena and the notice to the ISP. In some, but not all, cases, the subpoena and notice will trigger two different obligations – (1) to identity the infringer and (2) to take down the infringing material. The obligation to identify infringers is, however, broader than the obligation to take down infringing material – an ISP that receives a notice and subpoena must identify the subscriber, but may not need to take down any infringing material if it is providing only "conduit" services, as defined in § 512(a). *See Verizon I.*

Congress made clear that § 512(h) subpoenas were to be issued and complied with expeditiously, using that word three times in the statute itself and repeatedly in the legislative history. *See, e.g.*, § 512(h)(5) (requiring the ISP to "expeditiously disclose" the information sought); S. Rep. at 51 (describing the need for expedition). Congress also specified that this obligation is not discretionary or conditioned on any other duties they might have: an ISP must comply with the subpoena "notwithstanding any other provision of law." § 512(h)(5). In addition, Congress established procedures for enforcing DMCA subpoenas in federal court, providing that

> 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.

§ 512(h)(6).

DMCA Subpoenas Since 1998

Since the enactment of the DMCA, RIAA, on behalf of its members, has sought to identify significant infringers on the Internet through the DMCA subpoena process. Identifying infringers using P2P networks to disseminate copyrighted materials is relatively straightforward. Such infringers are openly offering copyrighted works on the Internet – all one has to do is log onto one of the major P2P networks, and one can find literally millions of people making files on their computers available to anyone who wants them. It is a relatively simple matter to download files from a P2P infringer and then to determine the Internet Protocol (IP) address of the infringer. Whitehead Decl. ¶ 12. That IP address does not specify the infringer's name or location, but can be used, in conjunction with publicly available databases indicating the IP

addresses assigned to different ISPs, to determine, to some extent, what ISP serves that infringer. *Id.* ¶¶ 13-14.

The publicly available databases (such as www.arin.net) do not necessarily specify which *corporate entity* uses what IP address. *Id.* ¶ 14. Those databases provide the names of organizations that may or may not be corporations unto themselves, or divisions of corporations (or something else).[1] Id. The databases do, however, generally provide sufficient information to allow a copyright holder to reference the Copyright Office's registry of DMCA agents. *Id.* ¶ 15. Many related corporate entities use the same DMCA agent, and thus a copyright owner is generally able to determine the DMCA agent to whom a notice, and, if desired, a subpoena, can be sent. This is true for SBC – *all* of the SBC entities in this case share the same DMCA agent in San Antonio, TX. *Id.* ¶ 27.

Since enactment of the DMCA, copyright owners have served hundreds of DMCA subpoenas. Prior to the heightened enforcement effort it began in June of this year, RIAA had obtained approximately 100 subpoenas, all from the District Court for the District of Columbia. *Id.* ¶ 18. In each case, RIAA obtained the subpoenas and delivered them with a DMCA notice to the registered DMCA agent, wherever in the United States that agent resided. *Id.* Prior to July of this year, *no* ISP refused to comply on the grounds that a subpoena was issued from the wrong court or that this Court lacked jurisdiction over the ISP. *Id.* ¶ 19. Indeed, RIAA served four subpoenas on SBC entities, one to the DMCA agent for Southwestern Bell in Texas and three to

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[1]A search of the ARIN database yields IP addresses assigned to literally hundreds of different SBC entities, but the database does not make clear whether those entities are corporations unto themselves, divisions of companies, or something else. *Id.* ¶ 14 (Att. D). Moreover, in many cases, for one range of IP addresses, one entity will be listed as, for example, an administrative contact, and another as a technical contact. *Id.* The publicly available databases are not designed to ferret out the labyrinthian corporate structures of a conglomerate like SBC.

the DMCA agent for then-Pacific Bell in California. All four of those subpoenas were issued to "SBC Internet Services, Inc." Moreover, RIAA spoke with the office of the DMCA agent to determine how to serve SBC and agreed that service of the subpoena issued out of this Court by fax was proper. In each case, SBC complied without objection and, in one case, SBC complied within two days. *Id.* ¶ 21. Each time SBC complied without demanding payment or a protective order, and in each case SBC provided the e-mail, as well as physical, address of the infringer. *Id.*

Subpoenas to SBC in July 2003

In June of 2003, RIAA began a nationwide effort to identify significant infringers using P2P networks to commit copyright piracy worldwide. After announcing that effort on June 26, 2003, RIAA discovered more than two hundred significant copyright infringers who use SBC's network to disseminate copyrighted music without the authorization of the copyright owners. *Id.* ¶ 22. Combined, those individuals were offering *almost 250,000 copyrighted works* without the authorization of the copyrighted owners. *Id.* Included among these files were files of copyrighted sound recordings that have not yet been released. *Id.* RIAA downloaded a representative list of the files being offered by each of the infringers and ascertained that they were indeed illegal copies of copyrighted music. *Id.* ¶ 23. The subpoena at issue in this case concerns an infringer who was making available more than 1100 audio files. *Id.* Att. B (providing list of audio files being offered for download).

In July 2003, pursuant to § 512(h), RIAA obtained from the clerk of this Court subpoenas to SBC to identify the first 32 individuals committing copyright infringement on SBC's network. *Id.* ¶ 24. Given that all of the SBC entities in this case do business as SBC Internet Communications Inc., use the trade name "SBC," and share the same DMCA agent, RIAA

delivered these subpoenas to SBC's DMCA agent. *Id.* ¶ 25. Given that SBC entities had always previously accepted subpoenas delivered to their DMCA agent, RIAA had no reason to believe they would refuse notices and subpoenas this time.

RIAA attempted to deliver those subpoenas to SBC at 300 Convent Street in San Antonio, Texas, which SBC previously had registered as the address of the DMCA agent for various SBC entities. *Id.* ¶ 26. Unbeknownst to RIAA, at some point on or after June 11, 2003, SBC had changed the address of its DMCA agent. *Id.* ¶ 27. When RIAA's messenger arrived at the 300 Convent Street address, he was informed that SBC had moved to 175 East Houston Street in San Antonio. *Id.* ¶ 29. The messenger then attempted to deliver the subpoenas to 175 East Houston Street.[2] At that address, a lawyer from the SBC legal department turned away the subpoenas on the grounds that the subpoenas were issued to "SBC" rather than to a corporate entity and that this Court lacked jurisdiction to issue subpoenas in Texas. *Id.*

Because SBC refused to accept the subpoenas, RIAA temporarily stopped obtaining subpoenas to SBC entities until it could ascertain how most efficiently to ensure that the SBC entities complied with their statutory obligations. RIAA determined that SBC maintains an office at 1401 I Street, N.W., in the District of Columbia that appears to serve all of the entities operating under the name SBC. On July 18, 23, 25, and 29, 2003, RIAA then delivered to that office both the thirty-two subpoenas it had originally attempted to deliver to San Antonio, as well as 180 additional subpoenas that had been issued to SBC. Those subpoenas were issued to "SBC Internet Communications, Inc.," in response to the objection raised by SBC's legal department.

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[2]175 East Houston Street is listed in SBC's U.S. Copyright Office registration forms as the "Address of Service Provider[s]" SBC Internet Communications, Inc., Southwestern Bell Internet Services, Ameritech Interactive Media Services, SNET Diversified Group, and Webhosting.com. *Id.* ¶ 28. SBC's revised designation, however, places its DMCA agent at a different address – 1010 N. St. Mary's, San Antonio, TX. *Id.* ¶ 27.

Id. One of those subpoenas is the subpoena at issue in this motion. *Id.* Att. A (copy of subpoena).

On July 29, 2003, attorneys for RIAA received a letter via facsimile from Michael W. Standard on letterhead containing an "SBC" logo and a return address designated as SBC Internet Services, 1010 N. St. Mary's, San Antonio, TX 78215. *Id.* ¶ 32. (attaching letter at Attachment G) (hereinafter "SBC Letter"). That address is the address of the recently registered and, RIAA believes, current DMCA agent for *all* of the SBC entities involved in this case. *Id.* ¶ 27 Att. F (SBC's various DMCA registration forms). Although SBC had previously complied with virtually identical subpoenas without complaint, the letter narrated at length fifteen different objections to the subpoenas and claimed bad faith by RIAA.[3]

The day after SBC sent its objection letter, Pacific Bell Internet Services – an SBC entity -- sued RIAA and several other defendants in the Northern District of California. *Id.* ¶ 31 & Att. K (PacBell complaint). In that complaint, PacBell seeks a declaratory judgment that the DMCA did not authorize issuance or enforcement of the subpoenas from this Court and that, even if the subpoenas were authorized, Pacific Bell Internet Services was entitled to, among other things, more time to respond to the subpoenas and compensation for costs incurred in responding to the subpoenas. Pacific Bell further seeks a declaratory judgment that it need not provide e-mail addresses in response to the subpoenas issued in this case. In effect, rather than seeking to quash the subpoenas in this court, Pacific Bell has determined to play another federal court off against this one, raising issues that it undoubtedly can raise in this Court.

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[3]In subsequent correspondence, the SBC legal department has indicated that "the proper office" has received all of the subpoenas. See *Id.* Att. I (attaching Aug. 5, 2003 letter from SBC). To remove any doubt, RIAA has now sent copies of all of the subpoenas to the St. Mary's Street address. *Id.* ¶ 32. Thus, as of the time of this motion, all of the subpoenas have been delivered to SBC's D.C. office and to the DMCA agent for each of the SBC entities.

The SBC Entities

As discussed below, SBC's objections manifest a rigid view of its corporate family tree that is wholly inconsistent with the way that SBC portrays itself to the public, regulators, and copyright owners.

SBC markets its products, no matter what corporation may provide the product or perform the service, under a single nationwide brand. In so doing, SBC has sought to end the use of such regional brands as Southwestern Bell, Pacific Bell, Nevada Bell, and Ameritech. *See* SBC Press Release (December 10, 2002) (quoting SBC Communications, Inc.'s chairman and CEO) ("Adopting a single, unified SBC brand underscores our transformation from a collection of regional companies with separate identities into a national telecommunications leader with a single identity."), available at http://www.sbc.com/press_room/1,,31,00.html?query=20370. Thus, while the corporate forms of entities such as Southwestern Bell Internet Services, Pacific Bell Internet Services, and Ameritech Interactive Media Services, may continue to exist in some form, they no longer offer products separate and apart from SBC. When one attempts to go to the former home pages for Southwestern Bell Internet Services (www.swbell.net) and Pacific Bell Internet Services (www.pacbell.net), one is presented with a page entitled "SBC Internet Services" with the "SBC" logo vividly displayed in the top left corner. Indeed, when one attempts to go to the home pages for these entities' former parent companies – www.southwesternbell.com, www.pacificbell.com, and www.ameritech.com, respectively – one is forwarded automatically to the SBC website (www.sbc.com). Each of these SBC websites invites customers to subscribe to "SBC Yahoo" Internet service, which is available nationwide, including to residents of the District of Columbia.

There can be no doubt that SBC holds itself out as a single entity. Indeed, as part of its effort to have the national "Do Not Call Registry" invalidated as unconstitutional, SBC told the FCC that it should not have to pay additional fees for the multiple entities in its corporate family that engage in telemarketing because:

> Importantly, consumers view SBC as one entity. SBC utilizes one sales force to telemarket all of its services, including services provided by affiliated entities, that relies on one company-specific [Do Not Call] list for the SBC family of companies. SBC provides consumers single billing for its services, unified bill resolution for all of its services and, further, customer service support for the family of services. Thus, whether service is provided by an SBC telephone company or SBC internet provider, customers know us as SBC. The SBC family of companies, in their provision of communications-related services, should therefore be treated as one seller for purposes of any DNC regulatory fees assessed.

Reply Comments of SBC Communications, Inc., In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket 92-90 (filed May 19, 2003) (attached as Exhibit 2). SBC publishes a single, combined annual report under the name SBC Communications, Inc. on behalf of all of the entities in the SBC corporate family.[4] *See* SBC 2002 Annual Report, *supra*.

SBC's attempt to hide behind its corporate form is even more suspect because SBC holds all of these entities out to copyright owners as a single, unified entity. SBC's objections claim that RIAA should have served subpoenas on three different corporate entities -- Southwestern Bell Internet Services, Pacific Bell Internet Services, and Ameritech Interactive Media Services – which reside at three different addresses in different states. SBC Letter at 2. But in its registration before the Copyright Office, SBC explains to copyright owners that those entities are one and the same. The registration that SBC filed with the Copyright Office lists the "Full Legal

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[4]The annual report explains "SBC Communications Inc. is referred to as 'we' or 'SBC.' We are a holding company whose subsidiaries and affiliates operate in the communications services industry." SBC 2002 Annual Report, *supra*, at 5.

Name of [its] Service Provider" as "SBC Internet Communications, Inc.", but lists "Southwestern Bell Internet Services," "Pacific Bell Internet Services," and "Ameritech Interactive Media Services" – as *alternative* names of "SBC Internet Communications, Inc." Whitehead Decl. Att. F. Moreover, all of the SBC entities in this case have registered the same DMCA agent with the Copyright Office. *Id.* The registration at the Copyright Office does not make clear what corporation the DMCA contact works in; the contact is listed simply as "General Counsel" with an address. *Id.* That address is in San Antonio, Texas. *Id.*

Indeed, SBC's corporate organization is so incomprehensible that its own attorneys apparently disagree on the role and identity of certain SBC entities.[5] Although SBC registered SBC Internet Communications, Inc. as the "Full Legal Name of [its] Service Provider," SBC's attorneys alleged in the lawsuit filed against RIAA on July 31, 2003, that "SBC Internet Communications, Inc. is not a 'service provider'" and "does not provide Internet access services." *Id.* Att. K at ¶ 41. Moreover, the SBC in-house attorney who objected to these subpoenas 1) purported to object on behalf of Southwestern Bell Internet Services, Pacific Bell Internet Services, and Ameritech Interactive Media Services; 2) sent the letter on the letterhead of a different corporation, "SBC Internet Services," and 3) used a fax cover sheet from yet another, "SBC Advanced Solutions, Inc."; and 4) sent the objections in an envelope labeled "SBC Communications, Inc. and affiliated companies."

[5]SBC is not the only ISP with a complex corporate family. Other ISPs, however, have generally cooperated with RIAA to ensure that subpoenas are directed to appropriate parties and have not raised the types of objections raised by SBC.

ARGUMENT

The subpoena issued in this case, as well as the other over 200 subpoenas issued to SBC, are the first step to addressing massive copyright infringement occurring over SBC's network. The copyright owners – RIAA's members – can do nothing to stop this infringement until SBC complies with the subpoenas issued to it. There is no dispute that the right parties at SBC have received the subpoenas, SBC has the information sought by them, the information is readily available (by means of a series of computer look-ups), and SBC can provide it at any time.

Rather than working with RIAA, as Congress intended (S. Rep. at 40), SBC has determined to make every conceivable objection to the subpoenas. At the same time that it is enjoying the benefits of the liability limitations granted it under the DMCA, SBC is concealing copyright infringers who are using its network. That is doubtless because an enormous percentage of the traffic on SBC's broadband networks consists of subscribers illegally copying copyrighted material on the Internet. SBC's massive resistance has nothing to do with privacy, and everything to do with profit.

To adopt SBC's view of the DMCA and the procedures surrounding it would eviscerate the statute, transforming a tool designed to efficiently allow copyright owners to enforce their rights into a slow and cumbersome process. The Court should reject the objections that SBC raises and that RIAA disposes of below, as well as put an end to SBC's attempt to dramatically increase the burden on copyright owners. For all of these reasons, the Court should compel SBC to comply with this subpoena as soon as possible.

I. SBC'S OBJECTIONS ARE MERITLESS.

The DMCA imposes on SBC the obligation to "expeditiously disclose" the information sought by a subpoena, "notwithstanding any other provision of law." § 512(h)(5). The Clerk of this Court properly issued the subpoenas, RIAA properly served them on agents of SBC, and the array of other roadblocks that SBC raises to avoid compliance are insubstantial. Given that SBC has complied with DMCA subpoenas identical to this one and never discovered such objections in the past demonstrates that SBC's newfound complaints are part of a business strategy, not valid legal positions. This Court should reject SBC's arguments and compel it to comply as soon as possible.

Objection 1: SBC has been given sufficient time to reply

SBC's first objection is that it has not been given sufficient time to respond to the subpoenas issued by RIAA. SBC Letter at 2. That argument is wrong both as a matter of law and as a matter of fact.

As a matter of law, the DMCA permits no delay. Congress specified that ISPs were to respond to DMCA subpoenas quickly, without a lot of procedural maneuvering. *See Verizon I*, 240 F. Supp. at 34 (the DMCA "contemplates a rapid subpoena process designed quickly to identify apparent infringers and then curtail the infringement."). Congress could not have used more clear language -- ISPs are to comply "expeditiously" and "notwithstanding any other provision of law." § 512(h)(5). Congress repeatedly used the words "expeditious" and "expeditiously" because "it is critical to curtail infringement as quickly as possible, given 'the ease with which digital works can be copied and distributed worldwide virtually

instantaneously.'" *Verizon II*, 257 F. Supp. 2d at 273 (quoting S. Rep. No. 105-190, at 8).[6] SBC thus is obliged to respond as quickly as it can.

As a factual matter, identifying a subscriber committing copyright infringement takes only a few minutes. Indeed, Verizon provided sworn testimony in its case challenging the DMCA, which claimed that responding to each subpoena would take no more than 15-25 minutes (an estimate RIAA believes is a significant overstatement). See Declaration of Scott E. Lebredo (filed in *In re Verizon Internet Servs. Inc.*, 02-MS-00323 (D.D.C.). In the past, SBC has had no problem responding to subpoenas in a week or less. Whitehead Decl. ¶ 21. SBC thus has no basis for arguing that it has not had enough time to respond to the subpoenas, much less respond to any one of them.

Finally, whatever its complaint about the time to respond, that complaint is now moot. SBC has now had more than enough time to comply with this and the other subpoenas.

Objection 2: RIAA properly labeled the subpoenas "SBC" and "SBC Internet Communications, Inc."

SBC's second objection is that the subpoenas were not labeled with the proper entity. SBC states that it will not accept subpoenas labeled "SBC" or "SBC Internet Communications, Inc." because those entities are not "service providers" under the DMCA. SBC Letter at 2.

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[6] A quick response is necessary because copyright piracy over the Internet propagates like a virus, and every day that goes by the copyrighted works being made available can be disseminated to literally millions of people. As Judge Bates recognized in denying Verizon's stay pending appeal in a prior DMCA subpoena case, "the apparent infringement of numerous copyrighted works made available over the Internet for universal downloading could continue unabated. The value of these copyrighted works could plummet further, as they are made available (at the push of a button) for the taking." *Verizon II*, 257 F. Supp.2d at 273. *See also* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.06[A], at 14-107 (2002) (copyright infringement is irreparable harm as a matter of law); *see also Health Ins. Ass'n of Am. v. Novelli*, 211 F. Supp. 2d 23, 28 (D.D.C. 2002) (same).

That complaint elevates form over substance. All of the SBC entities in this case do business, among other things, as "SBC" and as "SBC Internet Communications, Inc." Indeed, in its registration with the Copyright Office, SBC has listed "SBC Internet Communications, Inc." as the "Full Legal Name of the Service Provider" and specified that "alternative names" for that entity "including all names under which the service provider is doing business" include Southwestern Bell Internet Services, Pacific Bell Internet Services, and Ameritech Interactive Media. Whitehead Decl. ¶ 28. For SBC to claim that it does not have to respond to the subpoenas because RIAA used the name that SBC identifies as the "full name" of the service provider (or, for that matter, the trade name "SBC" that the SBC entities themselves use) amply demonstrates the lengths that SBC will go to avoid complying.[7]

Objections 3-4: SBC was properly served

SBC's third and fourth objections are actually a single objection – that SBC does not have to respond to subpoenas issued by this Court because SBC was not properly served and this Court does not have jurisdiction over SBC or entities in its corporate family. SBC Letter at 4. That claim is wrong for multiple reasons.

As discussed below, even if one accepts SBC's cramped view of the DMCA, SBC has been properly served. RIAA formally served all of the subpoenas on the SBC office in Washington, D.C. RIAA also has delivered all of the subpoenas to the registered DMCA agent for SBC Internet Communications, Inc. (who is also the DMCA agent for all of the other SBC entities). Despite these efforts and despite the fact that the proper people at SBC have the

[7]Noteworthy in its objections is the fact that SBC never identifies the burden imposed caused by subpoenas titled "SBC" rather than "PacBell" or "Ameritech." That is because there is no additional burden on SBC in complying with a subpoena titled "SBC" given that all of SBC entities share the same DMCA contact. SBC chastises RIAA for not using publicly available databases to identify the correct name, but SBC certainly could do the same and is in a far better position to know its own corporate structure.

subpoenas and could comply if they chose, SBC still insists that it has not been served. Rather, in SBC's view, RIAA would have to travel to three different courts to obtain subpoenas and serve three different entities (all doing business as one entity) – even though all of the notices and subpoenas would likely be sent by SBC to its single DMCA agent. That makes no sense.

And it is also directly contrary to the text and purpose of the DMCA. The purpose of the DMCA's subpoena provision is to provide an efficient and streamlined mechanism so that copyright owners can protect their rights as soon as possible. Thus, Congress authorized copyright owners to obtain subpoenas from the clerk of any district court. § 512(h)(1). Moreover, Congress intended ISPs and copyright owners to cooperate with copyright owners to detect and deal with digital piracy. S. Rep. at 40. Congress further required only "substantial compliance" with the elements of the notice, so that the process of stopping infringement would not be hindered by insubstantial objections. § 512(c)(3)(A); *see* S. Rep. at 47 ("The Committee expects that the parties will comply with the functional requirements of the notification provisions – such as providing sufficient information so that a designated agent or the complaining party submitting a notification may be contacted efficiently").

Copyright owners thus can formally serve ISPs, as RIAA did in this case. Or they can send the subpoena to the DMCA agent that the statute requires every ISP to designate, as RIAA has traditionally done and also did in this case. Either is permissible because the essential thing is that the demand for information reach the correct party so that the copyright owner can protect its rights as quickly as possible.

a. SBC has been formally served in the District of Columbia

SBC argues that, despite the fact that SBC has an office in D.C., service on that office is improper.[8] SBC Letter at 4. Notably, SBC makes no effort to inform RIAA how any of the various SBC corporate entities are related. Given, however, the manner in which SBC operates and holds itself out to the world, service on the SBC office in D.C. undoubtedly satisfies the dictates of Due Process. Moreover, the entities that SBC has identified in its objection letter are doing business in the District of Columbia. Thus, this Court's exercise of jurisdiction over them is fully appropriate.

Although RIAA does not purport to understand all of the relationships among the various SBC entities, it is clear that they operate together and separating them is all but impossible. As noted above, SBC holds itself out as a single entity to the public, copyright owners and the FCC. *See* Exh. 2, at 2. The SBC office in Washington, D.C. acts on behalf of all of SBC Communications, Inc. and all of its affiliates and subsidiaries. *See, e.g.,* Comments of SBC Communications, Inc., In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket 92-90 (filed 2002) (comments filed by the office at 1401 I Street, NW, on behalf of SBC Communications, Inc., and its subsidiaries). *See* Exh. 3. When an SBC entity seeks to enter such a new market, it does so as "SBC Communications, Inc," even though other entities in the corporate family may actually provide the service. *See,*

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[8]SBC also suggests that it does not have to respond to a subpoena in the District if the records are located elsewhere – a wholly incorrect understanding of Rule 45; if a company is properly served, it does not matter whether it keeps the documents in a foreign jurisdiction. *See Ghandi v. Police Department of the City of Detroit*, 74 F.R.D. 115, 119-23 (E.D. Mich. 1977); *Jee v. Michelman*, 104 B.R. 289, 292-94 (Bankr.C.D. Cal. 1989); Advisory Committee Notes to 1991 Amendment to Rule 45 ("the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served").

e.g., SBC Communications, Inc. v. Federal Communications Commission, 138 F.3d 410 (D.C. Cir. 1998).

As discussed above, the SBC entities all market together, use one brand name, share the same website, www.sbc.com, and operate together to provide telecommunications and other services. Thus, a customer that wants to purchase local, long distance, and internet access services writes one check, but the services are provisioned by different entities. Although one SBC entity may provide the Internet access "service," another SBC entity, under the auspices of SBC Communications, Inc., may provide the actual wires over which the service is offered.

Moreover, SBC is undoubtedly doing business in D.C. All of the SBC entities in this case offer Internet access service and market those services as "SBC Yahoo." Those services are offered nationwide, *see* http://sbc.com/sbcyahoo/1,,,00.html, and there can be little doubt that there are residents of the District of Columbia with SBC Yahoo e-mail accounts from each of various SBC entities in this case. Indeed, given the nature of Internet services, a customer can have, for example, an e-mail account with any of the SBC entities and reside anywhere in the United States or the world. SBC also offers an interactive web site that allows residents of the District to, among other things, purchase access to the Internet. If one desires to purchase Internet services from Pacific Bell, Ameritech, or Southwestern Bell on the Internet, one is sent to the SBC website offering SBC Yahoo services nationwide. That strongly counsels in favor of a finding of personal jurisdiction. *See Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506 (D.C. Cir. 2002). In this day and age, SBC cannot plausibly claim that, while it is offering Internet access service nationwide, it does not do business in the District of Columbia or that it is a burden to respond to subpoenas issued from this Court. *Cf. Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997) ("it is only in highly unusual

cases that inconvenience [of having to litigate in a foreign forum] will rise to a level of constitutional concern").

This list likely only scratches the surface of the intermingling of the various entities in SBC's corporate family and is more than enough to satisfy the Due Process Clause, especially where the obligations on SBC are as modest as they are under the DMCA. SBC is not asked to provide witnesses, or produce documents, or defend a lawsuit. It is merely required to provide information that is undoubtedly available to it. Moreover, the conduct at issue – copyright infringement on the Internet -- is necessarily nationwide (indeed international), and the "burden" on SBC does not depend on what court the subpoena is issued from.

In a case such as this, where the entities SBC has identified are selling their services to residents of the District of Columbia and where SBC has an office in the District,[9] there can be little question that service and the exercise of personal jurisdiction are appropriate.

b. The DMCA subpoenas were validly served through delivery to SBC's registered DMCA agent.

If the Court were to conclude that service on SBC's Washington, D.C. office was not sufficient, it would then have to consider whether Congress authorized, as a form of service equivalent to traditional service under Rule 45, delivery of subpoenas issued out of any federal

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[9]SBC does not reveal the relationships among its various corporate entities, but where entities hold themselves out to the public as a single entity, service on an affiliated corporation will satisfy the dictates of due process. *See Diamond Chemical Co. v. Atofina Chemicals, Inc.*, 2003 WL 21464563 (D.D.C. June 5, 2003) (quoting factors listed in *Zenith Radio Corp. v. Matushita Elec. Inc. Co.*, 402 F. Supp. 262 (E.D.Pa. 1975), including "the existence of an integrated sales system," "the presentation of a common marketing image by the related corporations," and "the use by the subsidiary or affiliate of a trademark owned by the parent"). Whether to allow service on an affiliate to satisfy service on another corporate entity is primarily a question of equity, depending on "who should bear the risk of loss and what degree of legitimacy exists for those claiming the limited liability protection of the corporation." *Vuitch v. Furr*, 482 A.2d 811, 815 (D.C. 1984) (interpreting D.C. law).

district court on the agent that the DMCA requires every ISP to register, wherever that agent resides. As discussed below, that was clearly Congress's intent.

In enacting the DMCA and § 512(h), Congress provided a streamlined mechanism for identifying infringers – wherever they may be – as quickly as possible. Congress wanted to ensure that copyright owners did not have to jump through hoops and that ISPs would cooperate with copyright owners in protecting their rights. Thus, § 512(h) talks in terms of "delivery" and "receipt" of subpoenas, not service by process servers. *See* § 512(h)(4) ("[T]he clerk shall expeditiously issue and sign the proposed subpoena and return it to the requestor for *delivery* to the service provider."); § 512(h)(5) ("Upon *receipt* of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose . . . ."); § 512(h)(6) ("Unless otherwise provided by this section or by applicable rules of court, the procedure for issuance and *delivery* of the subpoena . . .").

Congress imposed the obligation to comply with DMCA subpoenas on all ISPs, regardless of whether they are also obliged to take down infringing material.[10] Nonetheless, Congress viewed issuance and delivery of subpoenas as complementary to the process by which copyright owners send notices to the ISP's DMCA designated agent to trigger the ISP's obligation to take down infringing material. § 512(c)(2)-(3). Section 512(h)(5) makes this understanding explicit, providing that "Upon receipt of the issued subpoena, *either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A)*, the service provider shall expeditiously disclose . . . ." Although traditional service is certainly

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[10] In *Verizon I*, an ISP argued that § 512(h) does not apply to ISPs that do not store infringing material or to ISPs that have no obligation to disable access to such material. This Court wholly rejected that argument, finding that § 512(h) applies to all service providers performing all functions. *See Verizon I*, 240 F. Supp. 2d 24.

permissible, the DMCA does not require it; rather, DMCA subpoenas (issued out of any court) need only be sent (by mail or other means) to the DMCA agent that the statute requires the ISP to appoint.

Congress also made clear that legal requirements that might interfere with the expeditious subpoena process established by the DMCA are to be superseded. By using the phrase "notwithstanding any other provision of law," § 512(h)(5), Congress could not have been more clear: Any provision of law that would prevent the DMCA from operating as intended must yield. *See Saco River Cellular, Inc. v. Federal Communications Comm'n*, 133 F.3d 25, 30 (D.C. Cir. 1998); *Liberty Maritime Corp. v. United States OMI Corp.*, 928 F.2d 413, 416 (D.C. Cir. 1991) (The language "notwithstanding any other provision of law" supersedes all other laws and a "clearer statement is difficult to imagine."). Indeed, where a statute commands that something must be done "expeditiously" and "notwithstanding any other provision of law," other statutory provisions that would cause delays or lengthy proceedings simply do not apply. *National Coalition to Save Our Mall v. Norton*, 161 F. Supp. 2d 14, 21 (D.D.C. 2001).

This streamlined process is fully appropriate given the nature of DMCA subpoenas and the problem they seek to address. They are not broad discovery mechanisms, but rather are targeted to ensure that a discrete amount of information – information sufficient to identify infringers – is made available for the limited purpose of enabling a copyright owner to pursue its rights. To require copyright owners to have counsel in every one of the 94 judicial districts, ready at a moment's notice to serve subpoenas, would make the problem DMCA subpoenas seek to address – infringement in cyberspace that causes irreparable harm every moment it is allowed

to continue – far more burdensome to remedy.[11] Moreover, copyright owners would have to engage in extensive research into the many corporate forms that make up conglomerates like SBC in order to properly serve such subpoenas. That also would slow the DMCA subpoena process and place a significant burden on copyright owners, directly contrary to Congress's intent. Indeed, Congress intended to minimize the burden on copyright owners and place some burden – a very modest one in this circumstance – on ISPs, which receive enormous benefits under the DMCA in the form of limitations on their liability.

The language of § 512(h)(6), on which SBC relies, is not to the contrary. In § 512(h)(6), Congress provided that Rule 45 would generally apply, but also made clear that Rule 45 would not apply whenever it would conflict with § 512(h) or when application of Rule 45 would not be practicable, given the goals that § 512(h) advances. Here, rigid imposition of the geographical limitations on venue or the mechanical requirements of service are simply not practicable, given the goals of § 512(h) and the urgent need to obtain information to stop the ongoing infringement. *See also National Coalition*, 161 F. Supp. 2d at 21 (rejecting application of environmental laws where they would delay construction of monument that Congress specified should be completed "expeditiously" "notwithstanding any other provision of law").

Thus, while traditional service is undoubtedly permissible under the DMCA, delivery to the DMCA agent, wherever that individual is located, also fully satisfies the DMCA and triggers the ISP's obligations.

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[11] In tracking down a single infringer, a copyright owner may have to obtain multiple subpoenas to multiple ISPs. Forcing the copyright owner to go to multiple courts to identify one infringer is a burden that would seriously frustrate the goals of the DMCA.

c. The subpoenas were validly served because the DMCA authorizes nationwide service of process

Even if the Court does not determine that Congress intended delivery and receipt (as opposed to service) to trigger DMCA obligations, the DMCA, by its terms, authorizes the issuance of DMCA subpoenas by the "clerk of any United States district court." § 512(h)(1). That provision, as well as the DMCA as a whole and its legislative history, compels the conclusion that Congress intended to authorize nationwide service of process.[12]

"Congressional power to authorize nationwide service of process in cases involving the enforcement of federal law is beyond question." *Mariash v. Morrill*, 496 F.2d 1138, 1143 n.6 (2d Cir. 1974); *United States v. Congress Constr. Co.*, 222 U.S. 199 (1911). Moreover, Congress can authorize nationwide service either expressly or impliedly. *See Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 622 (1925); *First Nat'l Bank of Canton v. Williams*, 252 U.S. 504, 509-10 (1920); *United States v. Bliss*, 108 F.R.D. 127, 135 (E.D. Mo. 1985) (holding that "[t]he doctrine of implicit authorization of nationwide service of process is firmly established in federal case law" and finding such authorization in CERCLA) (citations omitted).

Courts thus have found implied authorizations of nationwide service of process in statutes similar to the DMCA where there is an important regulatory purpose advanced by nationwide service and the burden on the party served is not great. For example, the court in *Bliss* found

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[12]If the Court determines that the DMCA authorizes nationwide delivery or nationwide service, SBC's claim that there is no personal jurisdiction evaporates even if SBC has no contacts with the District of Columbia. Where federal law is at issue and a statute provides for nationwide service of process, the Fifth Amendment requires only "minimum contacts with the United States." *See Burnett v. Al Baraka Investment & Development Corp*, 2003 WL 21730530 (D.D.C. 2003); *Flynn v. Ohio Building Restoration, Inc.*, 260 F. Supp.2d 156, 171 (D.D.C. 2003), *see also Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1258 (5th Cir. 1994); *Medical Mutual of Ohio v. deSoto*, 245 F.3d 561, 567-58 (6th Cir. 2001) ("When . . . a federal court sitting pursuant to federal question jurisdiction exercises personal jurisdiction over a U.S. citizen or resident based on a congressionally authorized nationwide service of process provision, th[e] [defendant's] individual liberty interest is not threatened.").

nationwide service to be authorized under CERCLA. The *Bliss* court rejected both the argument that Congress clearly knows how to authorize nationwide service because it has done so in other statutes and that silence in the text should prohibit such an implication. Rather, the court looked at the policy goals Congress sought to advance and determined that those factors, especially the policies behind CERCLA's goal of providing for comprehensive responses to environmental threats, compelled an implication of nationwide service. Notably, after other courts issued rulings contrary to *Bliss*, Congress itself made clear that it had intended nationwide service of process in CERCLA and explained that such service had been "implicit" in CERCLA's statutory scheme. H.R. Rep. No. 99-253(I), at 79 (1986) (explaining, in the legislative history of the Superfund Amendments of 1986, that nationwide service had been "implicit" in the pre-amendment version of CERCLA). Congress nonetheless amended the statute to "confirm" that such process was available "to avoid future arguments on the issue." *Id.*

Courts have found numerous statutes to authorize nationwide service of process, both expressly and impliedly. The D.C. Circuit has had occasion to consider these issues repeatedly under statutes authorizing the issuance of subpoenas by federal government agencies. In *Browning,* the D.C. Circuit considered subpoenas issued by the FTC pursuant to 15 U.S.C. § 49. Section 49 read, in part, "[a]ny of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, . . . issue an order [compelling compliance with the subpoena]." The court distinguished § 49 from the statute at issue in *Robertson.* Unlike that statute, § 49 was a special grant of jurisdiction "to that court or those courts sitting in the district or districts in which the inquiry is being conducted." *Browning*, 435 F. 2d at 99. But that grant did not ensure that the agency would be able to conduct a nationwide investigation efficiently;

only nationwide service of process of subpoenas enforceable in such courts would do so. For that reason and because to conclude otherwise would sharply limit the investigative authority of the FTC, the court found "an implied grant of authority for extra-territorial service of process in order to effectuate the purpose of the regulatory scheme." *Id.* at 100; *see also FTC v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981) (adopting the *Browning* court's reasoning). The logic of *Browning* has been applied to other contexts involving federal agency subpoenas, including those issued by the Federal Election Commission, *FEC v. Committee to Elect LaRouche*, 613 F. 2d 849, 855 (D.C. Cir. 1979), and by the National Highway Traffic Safety Administration (NHTSA), *United States v. Firestone Tire & Rubber Co.*, 455 F. Supp. 1072 (D.D.C. 1978).

For all of these reasons, the Court should find that Congress intended that DMCA subpoenas be served nationwide.

Objections 10, 12: There is no requirement for reimbursement under the DMCA and minimal burden on SBC in responding

SBC Objections Nos. 10 and 12, which are also incorporated in a number of other objections,[13] are that SBC will be unfairly burdened by these subpoenas unless SBC is paid – in advance – by RIAA for responding to the subpoenas. That objection is meritless, and provides no basis for refusing to respond to DMCA subpoenas.

As noted above, SBC's claim of burden rings hollow. The computer look-up required to respond to a DMCA subpoena takes a matter of minutes. Whitehead Decl.¶ 17. SBC entities have complied with subpoenas obtained by RIAA in years past and have never claimed burden or demanded compensation. *Id.* ¶¶ 20-21.

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[13]RIAA discusses these objections out of order to the extent that SBC's "burden" argument is connected to its claim that it is unfair for SBC to be required to respond to subpoenas issued from this Court.

Moreover, SBC's claim for compensation is foreclosed by the DMCA. There is absolutely no mention in the DMCA of reimbursement for responding to subpoenas. SBC's sole argument that it is entitled to compensation is its reliance on Rule 45, which is partially incorporated by § 512(h)(6). But Rule 45 is adopted by the DMCA only for very limited purposes and only where not otherwise inconsistent with the statute. *See* § 512(h)(6). Other provisions of Rule 45 – including its cost-shifting principles – are *not* incorporated, and thus SBC cannot rely on them on Rule 45 for reimbursement.

Giving SBC additional compensation for complying with its statutory duties is also inconsistent with the remainder of Section 512 and the policy behind it. ISPs are already compensated sufficiently by the liability protections they receive; Congress intended ISPs to cooperate with copyright owners, not to be paid by them to comply with their statutory duty. In enacting the DMCA, Congress created a balanced system, granting benefits to ISPs, while at the same time imposing obligations on them in order to ensure that they assist copyright owners in responding to the massive threat of copyright piracy on the Internet. Subpoena compliance is one of the obligations ISPs must perform. Notably, the DMCA creates no explicit right of reimbursement for ISPs that respond to take-down notices, which occur with far more frequency than information subpoenas and require more time and resources. Given that compliance with take-down notices is considered part and parcel of an ISP's obligations under the DMCA, it makes little sense to treat compliance with information subpoenas any differently. Responding to subpoenas for identification of infringers is merely a cost of doing business that ISPs must undertake with the protections that they receive under the DMCA.

Even if Rule 45 did apply, however, SBC still would not be permitted to keep the identities of infringers hostage while demanding compensation. A subpoenaed party under Rule

45 may seek compensation from the Court if it incurs "significant expense," but litigation over whether a significant expense was incurred does not delay the requirement that a party produce the subpoenaed material. If SBC desires to seek compensation, it can file a motion for it. But withholding response to the subpoena while haggling over compensation is neither authorized by Rule 45 or the DMCA.

Objections 5-6: Section 512(h) applies to all ISPs performing all functions

SBC argues, contrary to the statutory text, that the DMCA should be construed to categorically exclude from the obligation of responding to DMCA subpoenas all ISPs that do not store infringing material on their servers. That objection merely recycles arguments made by Verizon in a prior litigation in this Court and wholly rejected by Judge Bates. *See In re: Verizon Internet Services, Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003) ("*Verizon I*") (rejecting statutory arguments). Those arguments are so weak that Judge Bates held that Verizon had a "minimal" chance of success on appeal, *Verizon II*, 257 F.Supp.2d at 268. They provide no basis for refusing to comply with the subpoenas.

SBC argues, contrary to the plain language of § 512(h), that DMCA subpoenas can never be issued to ISPs that facilitate massive copyright infringement by transmitting the infringing material, but do not store such material. No such limitation appears in § 512(h) -- it applies to *all* service providers, regardless of what function they are performing or where the infringing material is stored.[14] Not surprisingly, Judge Bates rejected the identical statutory interpretation

[14]Other subsections of Section 512 apply only to service providers performing specific functions, but the statute is very clear which subsections apply only to service providers performing particular functions and which subsections apply to *all* service providers. *Compare* 17 U.S.C. § 512(n) ("Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section.") *with* 17 U.S.C. § 512(h) (applying to "any service provider") *and* 17 U.S.C. § 512(i) (requiring all service providers to have a policy for the termination of repeat infringers).

arguments thoroughly and completely, explaining that "[n]othing in the language or structure of the statute . . . suggests Congress intended the DMCA" to be read in the constricted manner SBC proposes. *Verizon I*, 240 F.Supp.2d at 36; *id.* at 32 (describing Verizon and SBC's reading of the statute as "strained"). To the contrary, "[t]here is *simply nothing* in the text of the statute that states, or even suggests, that the subpoena authority in subsection (h) applies only to those service providers" who store infringing material on their own servers. *Id.* at 33 (emphasis added). Judge Bates also found that "[t]he clear purpose of the DMCA, evident in its legislative history, confirms that the scope of the subsection (h) subpoena power extends to service providers [who do not store infringing material] as well as [those who do store infringing material]." *Id.* at 36. SBC's reading, in contrast, "makes little sense from a policy standpoint" because there is "no sound reason why Congress would enable a copyright owner to obtain identifying information from a service provider storing the infringing material on its system, but would not enable a copyright owner to obtain identifying information from a service provider transmitting the material over its system." *Id.* at 35-37.

Objection 7: The DMCA does not violate Article III

SBC also recycles the Article III argument made by Verizon in a prior litigation in this Court and rejected by Judge Bates. *See In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003) ("*Verizon II*") (rejecting constitutional arguments and denying a motion for a stay pending appeal). That argument also provides no basis for refusing to comply with the subpoenas.[15]

[15]In *Verizon II*, the United States of America intervened to support the constitutionality of the statute. If SBC persists in its objection, the United States should be permitted the chance to intervene in this case as well.

Notably, while they were lobbying for the liability limitations that the DMCA provides to ISPs, at no time did SBC or any other ISP argue that the DMCA posed constitutional problems. Moreover, even Verizon did not believe such constitutional problems existed at the outset of that case, discovering constitutional arguments only after Judge Bates had ruled against its statutory claims. *See Verizon II,* 257 F.Supp.2d at 248. SBC's belated constitutional objections – identical to those raised by Verizon – are, not surprisingly, without merit. In imposing on the clerks of district courts the ministerial duty of issuing subpoenas, Congress has not transgressed Article III or the separation of powers. The DMCA authorizes a demand for information, backed by judicial enforcement that is indistinguishable as a constitutional matter from a host of other federal statutes (including some that have existed since the time of the Framers), as well as Rule 27 of the Federal Rules of Civil Procedure, *see Verizon II,* 257 F.Supp.2d at 251-54. As Judge Bates' recognized,

> [T]he fact that Congress has directed an employee of the judicial branch to carry out a specific non-discretionary function neither implicates Article III judicial power nor involves federal judges in an investigation of the sort properly relegated to one of the other branches. In a real-world sense, no Article III judge takes any action with respect to a § 512(h) subpoena until the copyright holder moves to enforce the subpoena or the service provider moves to quash it – at which time there is a concrete controversy sufficient to confer jurisdiction under Article III of the Constitution.

Id. at 250.

Objections 8-9: The DMCA does not violate the First Amendment or the Due Process Clause

The First Amendment and due process objections raised by SBC, SBC Letter at 5-6, are also identical to those raised and rejected in the Verizon litigation. *See Verizon II.* As an initial matter, there is no First Amendment interest in this case because the First Amendment does not protect copyright infringement. *See Harper & Row, Publs. Inc., v. Nation Enters.*, 471 U.S. 539, 555-560 (1985); *Verizon I,* 240 F. Supp. 2d at 42. But even if protected speech were at issue,

there would be no violation of the First Amendment or the Due Process Clause. Section 512(h) neither suppresses nor deters protected speech in any way. *See Verizon II,* 257 F.Supp.2d at 261 ("the DMCA does not regulate protected expression or otherwise permit a prior restraint of protected speech."). It merely requires identification of a speaker where there are good faith allegations of illegal conduct. *See American Fed'n of Gov't Employees v. HUD*, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information.").

The Supreme Court has repeatedly upheld subpoenas and other legal process that reveal otherwise confidential information, holding that such legal process does not violate the First Amendment or any other provision of the Constitution. *See e.g., Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946) (rejecting argument under First and Fourth Amendments that documents of newspaper could not be disclosed absent a warrant); *Reporters Committee for Freedom of the Press v. AT&T Co.,* 593 F.2d 1030, 1050 n.67 (D.C. Cir. 1978) Moreover, even if a First Amendment interest were at stake, Judge Bates held that Congress has adequately protected such interest by establishing "substantial procedural requirements aimed at preventing fraud, abuse, and mistakes, without chilling expressive or associational rights." *Verizon II*, 257 F.Supp.2d at 262-63. Those protections, including requirements that are essentially equivalent to requiring the copyright owner or its agent to assert the elements of a copyright claim, *id.* at 263, and a requirement that the copyright owner or agent file a declaration that the information sought "will only be used for the purpose of protecting rights under this title," § 512(h)(2)(C), are more than adequate to protect the interests of [redacted]

that have considered disclosure of the identity of Internet users in other contexts.[16] *See Verizon II*, 257 F.Supp.2d at 263 & n.22.

Finally, SBC's oblique and repeated references to subscriber privacy provide no basis for refusing to comply with the subpoena here. SBC can point to no statute that protects privacy in this context, precisely because Congress has determined that the identity of infringers must be disclosed "notwithstanding any other provision of law." Moreover, the conduct of the infringers in this case – allowing access to their home or office computers to anyone in the world who wants such access for the purpose of unlawfully disseminating literally hundreds of thousands of copyrighted works is the least private thing one could imagine. Indeed, ISPs regularly warn subscribers not to commit copyright infringement and that their identities will be produced in response to legal process, such as a subpoena. *See Verizon II*, 257 F. Supp.2d at 267. Whatever expectation SBC's subscribers have, it cannot be that SBC will shield them from being called to account for their unlawful conduct. *Id.* (finding that P2P infringers had little expectation of privacy).

Objection 11: The DMCA does not require disclosure of trade secrets, and even if it did, it would nonetheless require SBC to comply

SBC argues that it should not have to respond to any DMCA subpoenas because such subpoenas require disclosure of trade secrets. Whitehead Decl. Att. G, at 7. That claim wholly ignores the entirety of § 512(h) – Congress expressly determined that the precise information that SBC claims is privileged must be disclosed "notwithstanding any other provision of law."[17]

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[16]The cases cited by Judge Bates involved defamation and trademark case. As the Supreme Court has recognized, unlike in the context of a claim of defamation, the First Amendment "bears less heavily when speakers assert the right to make other people's speeches." *Eldred v. Ashcroft*,123 S.Ct. 769, 789 (2003).

[17]RIAA seriously doubts SBC's claims that the identities of a discrete number of customers, out of its 2.2 million customers, qualifies as confidential business information or a

There is no privilege to be asserted here. Moreover, even if traditional trade secret law were to apply, RIAA has undoubtedly demonstrated a substantial need for the information. SBC makes the facetious assertion that "RIAA has made no averment that it is unable to contact the subscriber directly or to ascertain his or her identity through other means." Whitehead Decl. Att. G, at 7. But only SBC knows who the subscriber is. Only through compliance by SBC can RIAA identify the subscribers, and SBC well knows it.

Objection 13: SBC is not entitled to a protective order of any kind

SBC argues that it can hold up production of information while it negotiates a protective order of some kind. Whitehead Decl. Att. G, at 7. There is no basis for such a protective order, nor would conditioning compliance on such an agreement be consistent with the DMCA.

As with the SBC's demand for compensation, its demand for a protective order flies in the face of Congress' injunction that the DMCA subpoena process should be expeditious. If copyright owners are required to haggle over the terms of a protective order – especially one as far-reaching as SBC appears to desire[18] – it will seriously frustrate Congress's goals in the DMCA. Moreover, whatever protection SBC or its subscriber might require is already provided for in the DMCA. Congress expressly required copyright owners to sign a declaration that the information obtained "will only be used for the purpose of protecting rights under this title." 17 U.S.C. § 512(h)(2)(C). Thus, the misuses that SBC purports to raise are simply not likely to occur – unless the signatory of the declaration is willing to run the risk of a perjury prosecution.

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trade secret. Disclosure of such identities, which can only be used for protection of RIAA's member copyrights, poses no threat of competitive harm, and whatever SBC's claim to confidentiality, it must yield to Congress's instruction that ISPs comply with § 512(h) "notwithstanding any other provision of law."

[18]SBC appears to want a protective order that goes so far as to identify which individuals at the copyright owner may handle the information that is disclosed.

Because Congress has expressly addressed this issue and provided for limitations on the use of information, the court should not impose additional restrictions, especially where those restrictions would have the effect of delaying the subpoena process and thereby frustrating Congress's will. Indeed, Congress anticipated that, in many cases, the information disclosed pursuant to a DMCA subpoena would be made public – as part of a future lawsuit for copyright infringement. To impose a web of restrictions on the information is thus wholly inconsistent with the statutory scheme.

Objection 14: The DMCA expressly authorizes agents of copyright owners to send notices and obtain subpoenas

Despite being well aware that RIAA is the trade association for the largest recording companies in America, SBC claims it does not have to respond to the subpoenas because RIAA did not specify, for each of the sound recordings being infringed by SBC's customers, which copyright owner was harmed. Whitehead Decl. Att. G, at 8. The DMCA, however, does not require that. In the DMCA, Congress clearly and expressly allowed a copyright owner's agent to assert its rights under § 512(h). *See* § 512(h)(1). The agent must sign a declaration that he or she is acting on behalf of the copyright owner, *see* § 512(c)(3)(A)(vi), and a declaration that the information is being sought solely for the purpose of protecting rights under the copyright laws. § 512(h)(2)(C). RIAA provided both of these declarations for each of the subpoenas issued to SBC. There is thus no basis for refusing to comply on this ground.

Objection 15: The DMCA requires disclosure of "information sufficient to identify the alleged infringer" and that includes E-mail Addresses

SBC also claims that the DMCA does not authorize disclosure of e-mail addresses, to the extent the ISP has them, of its subscribers committing infringement. SBC concedes that "[o]bviously" name, address, and telephone number are "information sufficient to identify" the

infringer, but that e-mail address is not because an e-mail address "may not relate in any way to the user's identity." Whitehead Decl. Att. G, at 8. That argument is completely wrong.

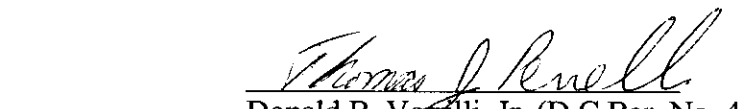
The DMCA requires an ISP to provide "information sufficient to identify the alleged infringer." § 512(h)(3). It neither expressly includes or excludes e-mail addresses. Such information may be different depending on the context, but, at a minimum, in the context of P2P infringement as is occurring here, that information should include name, address, phone number, and e-mail address. Given that all of the illegal conduct occurring in these cases occurs in cyberspace, it is hardly unreasonable to conclude that the e-mail address is one of the key pieces of identifying information required by the statute. Indeed, the entire point of the DMCA subpoena process is to give the copyright owner the opportunity to stop copyright infringement and enforce its rights as quickly as possible. The e-mail address will often be the quickest way to notify the infringer and demand that they stop committing copyright piracy.

In stark contrast to SBC's recently discovered concern about privacy, SBC has not hesitated in the past to disclose e-mail addresses, as well as additional information, such as the number of years that an individual has been a subscriber, in response to prior DMCA subpoenas. Whitehead Decl at ¶ 21. Thus, SBC's newfound objection is simply one more piece of evidence demonstrating that SBC's goal is to resist in every conceivable way, whether it has merit or not.

CONCLUSION

For all of these reasons, the Court should compel SBC to comply with the DMCA subpoena at issue as soon as possible.

Respectfully Submitted,



Donald B. Verrilli, Jr. (D.C Bar. No. 420454)
Steven B. Fabrizio (D.C. Bar No. 436482)
Thomas J. Perrelli (D.C. Bar No. 438929)
Jenner & Block, LLC
601 Thirteenth St., NW, Suite 1200
Washington, D.C. 20005
(202) 639-6000

Attorneys for the Recording Industry Association of America

Matthew J. Oppenheim
Stanley Pierre-Louis
Recording Industry Association of America
1330 Connecticut Ave., NW
Suite 300
Washington, D.C. 20036

August 8, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER RE:
MOTION TO ENFORCE SUBPOENA ISSUED TO SBC
PURSUANT TO 17 U.S.C. § 512(h)

It is hereby ORDERED that SBC shall comply with the subpoena as soon as possible.

_____
District Judge

Dated:

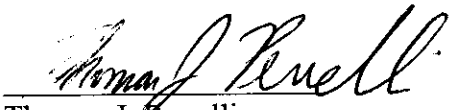
CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2003, I caused copies of the foregoing Motion to Enforce Subpoena Issued Pursuant to 17 U.S.C. § 512(h) to be served via Federal Express to the following:

Ragesh K. Tangri
Keker & Van Nest, LLP
710 Sansome Street
San Francisco, CA 94111-1704

Michael Standard
Legal Dept.
SBC
1010 N. St. Mary - Room 13 - E
San Antonio, TX 78215

SBC
1401 I Street, NW
Washington, DC 20005



Thomas J. Perrelli