UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

IN RE: SUBPOENAS TO BOSTON COLLEGE	
RECORDING INDUSTRY ASSOCIATION OF AMERICA, Plaintiff, v. BOSTON COLLEGE, Defendant.	Misc. Act. Nos. 1:03-MS-00278

MOTION TO ENFORCE SUBPOENAS ISSUED TO BOSTON COLLEGE PURSUANT TO 17 U.S.C. § 512(h)

Pursuant to 17 U.S.C. § 512(h) and the Federal Rules of Civil Procedure, the Recording Industry Association of America (RIAA) hereby files this motion to compel Boston College's compliance with three subpoenas issued by the clerk of this Court. *See Recording Industry Association of America v. Boston College*, Misc. Act. Nos. 1:03-MS-00259, 1:03-MS-00278, and 1:03-MC-00872 (D.D.C.).[1] The subpoenas were validly issued and properly delivered under the Digital Millennium Copyright Act (DMCA), compliance with them is not discretionary, and Boston College has no basis for refusing to comply. Boston College has filed a motion to quash these subpoenas in the United States District Court for the District of Massachusetts. (Attached hereto as Exhibit A). But that court has no jurisdiction to quash a subpoena issued out of this

[1] Because this Court issued the subpoenas under three different case numbers, RIAA is filing an identical motion to enforce the subpoenas in all three cases.

Court. Because Boston College has not complied with the subpoenas and has no valid basis for failing to do so, this Court should compel Boston College's compliance as soon as possible.

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.

A significant portion of this copyright piracy occurs on college campuses. Universities act as Internet Service Providers (ISPs) for their students, providing computing services and access to the Internet. In contrast to slower, dial-up service that some students may have at home, universities offer their students high-speed Internet connections that allow them to download and distribute files quickly and easily. *See Napster Was Nothing Compared with This*

Year's Bandwidth Problems, Chronicle on Higher Education (Sept. 28, 2001). And students take advantage of this benefit: some universities have estimated that *95% of the traffic* on their university computer systems involves copying of files (mostly copyrighted music, video, and pictures) over P2P networks. *See* Internet Bandwidth Management at Kenyon, available at http://lbis.Kenyon.edu/about/test/bandwidth.phml; *see also* Change to Swarthmore's Internet Bandwidth Policy, available at http://www.swarthmore.edu/its/news/eeitems/87 (estimating the percentage of student traffic on P2P networks to be 90%). In response to this serious problem, the recording industry and universities have worked cooperatively to educate students and stop copyright piracy over university computer networks.

The propagation of illegal digital copies over campus networks significantly harms copyright owners, and has had a particularly devastating impact on the music industry. *See In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 273 (D.D.C. 2003) ("*Verizon II*"). CD sales – the principal revenue source for most record 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 (especially teen-agers and college students) are downloading music illegally for free, rather than buying it. *See In re Aimster Copyright Litigation*, 2003 WL 21488143, at *1 ("Teenagers and young adults who have access to the Internet like to swap computer files containing popular music."). 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.

The Digital Millennium Copyright Act

Congress enacted the DMCA 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, including universities, 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, including universities, and copyright owners. *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 38 n.11 (D.D.C. 2003) ("*Verizon I*").

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, including universities, while at the same time requiring ISPs to act swiftly when they are made aware of copyright infringement. *See* S. Rep. at 40 (Congress wanted there to be "strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment."). In order to take advantage of the liability limitations, universities must, for example, disable access to infringing material available from their networks when notified, *see* § 512(b)-(d), and terminate the accounts of students who are repeat copyright infringers. § 512(i)(1)(A). *See also* § 512(e) (special provisions addressing liability of universities arising out of conduct of university employees and students).

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. Congress required every ISP, including universities, to register a single DMCA contact 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).

Section 512(h), the provision at issue in this case, is a critical part of Congress's goal of providing streamlined procedures to stop Internet piracy as quickly as possible. Copyright owners cannot enforce their rights directly unless they can identify the infringers. Section 512(h) places on ISPs the obligation of providing the identity of subscribers who use their networks to infringe. Under § 512(h)(1), a copyright owner may request that "the clerk of any United States district court" issue a subpoena requiring an ISP to disclose the identity of copyright infringers when the copyright owner comes forward with good faith claims of infringement. A copyright owner must file with the clerk a notice of the same type as is routinely sent to the ISP's DMCA contact, as well as a sworn declaration that the information "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.[2]

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). Congress also 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).

The Subpoenas At Issue

Since enactment of the DMCA, copyright owners have served hundreds of DMCA subpoenas. Prior to the nationwide 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. Those subpoenas were delivered to ISPs all across the country. Prior to June of this year, no ISP refused to comply on the ground that the subpoena was issued from the wrong court.

In June of this year, RIAA became aware of three significant copyright infringers using the Boston College network to disseminate copyrighted music without the authorization of the

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[2] Where an ISP is providing only conduit services, as defined in § 512(a), an ISP that receives a notice and subpoena must identify the subscriber, but may not need to take down any infringing material.

copyright owners. RIAA learned of those users as anyone else would – by discovering them offering copyrighted music files to anyone that wanted them over the Internet. The three individuals used aliases ("Prtythug23," "TheLastReal7," and "lil_liz82"), and each was offering hundreds of copyrighted works to the world-at-large over one of the major peer-to-peer networks. RIAA downloaded a sampling of the files being offered and ascertained that they were indeed illegal copies of copyrighted music. RIAA could not, however, determine the physical location of the users or their identities. All RIAA could determine was that they were using the Boston College network to disseminate the copyrighted files. RIAA also could not determine whether the individuals were students or employees of the College.

On July 2, 2003, pursuant to § 512(h), RIAA obtained from the clerk of the District Court for the District of Columbia subpoenas to Boston College to identify the individuals committing the copyright infringement. RIAA delivered those subpoenas to Boston College's DMCA designated agent, Joseph Herlihy, and provided information (in the form of Internet Protocol (IP) addresses and dates and times) sufficient to allow Boston College to identify the infringers. After an exchange of correspondence in which Boston College indicated its refusal to comply with the subpoenas, Boston College filed a motion to quash the subpoenas in the United States District Court for the District of Massachusetts. Because only this Court can hear disputes over subpoenas issued by it, RIAA is filing this motion to enforce the subpoenas; RIAA is also filing (in the District of Massachusetts) an opposition to Boston College's motion to quash, arguing principally that the Massachusetts court has no authority to take any action with respect to subpoenas issued out of this Court.

ARGUMENT

The DMCA requires ISPs such as Boston College to provide information sufficient to identify copyright infringers "notwithstanding any other provision of law." § 512(h)(5). RIAA delivered the subpoenas to the person whom Boston College has identified (as the DMCA requires) to be the contact for notifications of infringement. The DMCA requires nothing more to trigger the non-discretionary duty to disclose to RIAA the names of individuals who have violated and continue to violate the copyrights of RIAA's members over the Internet. Because the subpoenas were properly issued and delivered, this Court should compel Boston College's compliance by requiring Boston College to provide RIAA with the information requested in the subpoenas. Moreover, given the DMCA's emphasis on expedition and the daily irreparable harm caused by the copyright infringement being committed here, RIAA requests that the Court act as expeditiously as possible in resolving this matter.

For its part, Boston College has no substantive objection to the subpoenas at issue in this case. Boston College concedes that it must comply with a validly issued DMCA subpoena. Boston College's sole argument appears to be that it must comply only with DMCA subpoenas issued out of the District of Massachusetts. That argument, however, is inconsistent with the language and purpose of the DMCA and, if accepted, would seriously undermine Congress's goal of ensuring that copyright owners can stop the massive infringement of their rights occurring daily on university and other computer networks. For all of these reasons, the Court should grant RIAA's motion and require Boston College to comply as soon as possible.

I. BOSTON COLLEGE MUST COMPLY WITH DMCA SUBPOENAS, REGARDLESS OF ANY OTHER LEGAL OBLIGATIONS IT HAS

Under the DMCA, the service provider "*shall expeditiously disclose* to the copyright owner or person authorized by the copyright owner the information required by the subpoena,

notwithstanding any other provision of law and *regardless of whether the service provider responds to the notification.*" § 512(h)(5) (emphasis added). The words of the statute could not be more explicit. Thus, regardless of whether Boston College has other obligations under other statutes or contractual agreements, it must nonetheless comply with a DMCA subpoena delivered to it. And it must comply expeditiously.

As Congress determined and as Judge Bates recognized in his two prior opinions on § 512(h), expedition is critical. *See Verizon I*, 240 F. Supp. 2d at 34; *Verizon II*, 257 F. Supp. 2d 244. Section 512(h) makes clear that the District Court clerk shall "expeditiously issue" the requested subpoena if all of the requirements are met and that, upon receipt, the service provider "shall expeditiously disclose" the information required by the subpoena. § 512(h)(5). The legislative history of § 512(h) describes issuance of the subpoena as a "ministerial" act, and emphasizes that it must be "performed quickly for this provision to have its intended effect." S. Rep. at 51. Without expedition, § 512(h) simply will fail to achieve the goals that Congress has for it.

Boston College does not dispute that it has the information that RIAA is seeking, nor does it contend that complying with the subpoenas is burdensome. Boston College makes reference to the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, in the motion to quash filed in Massachusetts, but even that motion makes clear that FERPA provides no basis for refusing to respond to a DMCA subpoena. First, Boston College concedes that FERPA would provide no basis for refusing to comply with a subpoena issued out of the District of Massachusetts. Second, the DMCA's injunction that ISPs comply "notwithstanding any other provision of law" trumps any obligation imposed by FERPA. Third, even under FERPA, the

only obligation on the College is to attempt to notify students of the subpoena – which in no way prevents the College from complying with the subpoenas expeditiously.

Boston College's only reason for refusing to comply is its claim that it will comply only with subpoenas issued out of the District of Massachusetts. As discussed below, that claim is wrong, and the Court should order Boston College to comply with the subpoenas issued from this Court as soon as possible.

II. RIAA's SUBPOENAS WERE VALIDLY ISSUED AND PROPERLY DELIVERED.

Boston College claims that it does not have to respond to subpoenas issued by this Court and delivered to the DMCA agent that the College was statutorily required to designate because such subpoenas were not served within 100 miles of this district. As discussed below, while generally adopting procedures from Federal Rule of Civil Procedure 45, the DMCA does not impose this territorial limitation on subpoenas issued pursuant to the DMCA. Rather, Congress intended the DMCA subpoena process to be streamlined and expeditious to fulfill its functions; to that end, delivery of a subpoena to the ISP's DMCA designated agent must be understood to satisfy the statute's requirements.

A. A DMCA Subpoena Is Validly Delivered if Sent to the DMCA Designated Agent.

Subpoenas issued pursuant to the DMCA are not subpoenas issued pursuant to Rule 45. DMCA subpoenas are not broad discovery mechanisms, and a different set of rules applies to them. They 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. DMCA subpoenas do not raise issues concerning burden on witnesses (because

they do not require testimony of any kind) nor do they impose a burden of copying or compiling documents (because they do not require production of documents). As Boston College concedes, there is no burden on it in *complying* with the subpoenas. BC Mem. at 6. Compliance with the subpoenas is simply a matter of a computer look-up, which takes minutes, but which must be done quickly before the records are destroyed and in such time as to allow the copyright owner quickly to halt the ongoing infringement. The burden of compliance in no way depends, however, on the court from which the subpoenas are issued.

Moreover, the problem of massive copyright infringement on the Internet, to which § 512(h) is addressed, has two key characteristics. It is not limited to a particular state or territory – it is necessarily nationwide (indeed worldwide), to the extent that anything in cyberspace can be said to have a territorial locus. When a copyright owner seeks to track down an infringer, it has no idea where that infringer is and where the copyright owner might ultimately be forced to file suit to obtain an injunction and damages. (This is even true where the ISP is a university, because students may use the university network while away from school.) And, as Congress repeatedly made clear, the infringement must be addressed immediately because each minute that copyrighted files are being made available without authorization, they can potentially be downloaded by anyone in the world. *See Verizon II*, 257 F. Supp. 2d at 273 (absent enforcement, "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.").

In enacting the DMCA and § 512(h), Congress sought to address both of these problems by providing for 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.[3] 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 would certainly be permissible, the DMCA does not require it; rather, DMCA subpoenas need only be sent (by mail or other means) to the DMCA agent that the statute requires the ISP or university to appoint.

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[3] 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.

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, (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).

To interpret the DMCA as Boston College does would seriously undermine Congress's goal of creating an expeditious mechanism for copyright owners. It would force copyright owners – who are being irreparably harmed every moment that the infringing files are being made available to the public at large – to have counsel in every one of the 94 judicial districts, ready at a moment's notice to serve subpoenas.[4] That would slow the DMCA subpoena process and place an enormous 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, who receive enormous benefits under the DMCA in the form of limitations on their liability.

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[4]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.

The language of § 512(h)(6), on which Boston College 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, 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").

Because the DMCA is fully satisfied by delivery of the subpoena and infringement notice to the ISP's DMCA agent, RIAA has fully complied with the statute, and Boston College must disclose the information sought as soon as possible.

B. Even If Traditional Service Is Required, the DMCA Authorizes Nationwide Service of Process.

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, compel the conclusion that Congress intended to authorize nationwide service of process.

"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 the 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 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.*

Just as with CERCLA, nationwide service is necessary here to "effectuate the purpose of the regulatory scheme" Congress created in the DMCA. *FTC v. Browning*, 435 F.2d 96, 100 (D.C. Cir. 1970). *Robertson v. Railroad Labor Board*, 268 U.S. at 622, cited by Boston College, is not to the contrary. That case recognized Congress's power to authorize nationwide service, but decided – in the context of one statute only – that Congress had not intended such service. Cases subsequent to *Robertson* recognize that whether a statute authorizes nationwide service is

a matter of legislative intent. *See, e.g., NLRB v. Gunaca*, 230 F.2d 542 (7th Cir. 1956), *vacated on other grounds*, 353 U.S. 902 (1957). Thus, the courts have found numerous statutes to authorize nationwide service of process, both expressly and impliedly.

For example, the D.C. Circuit has had occasion to consider these issues repeatedly under statutes authorizing the issuance of subpoenas by federal government agencies.[5] 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 extraterritorial 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

[5]In many respects, a DMCA subpoena is similar to an administrative subpoena. Each is issued without the act of a judge and without a pre-existing litigation. Like administrative subpoenas, DMCA subpoenas are enforceable in court, pursuant to provisions established by Congress. *See ICC v. Brimson*, 154 U.S. 447 (1894) (discussing administrative subpoenas).

(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).[6]

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

III. THIS COURT IS THE PROPER FORUM TO LITIGATE ENFORCEMENT OF RIAA'S SUBPOENAS TO BOSTON COLLEGE.

It is well settled that only the court that issued a subpoena can quash that subpoena, and that other courts have no jurisdiction or authority to limit, quash, or, for that matter, enforce a subpoena from another court. *See* Charles Alan Wright & Arthur R. Miller, 9A *Federal Practice and Procedure*, § 2459 at 40-41 (2d ed. 1995) ("The 1991 amendments to Rule 45(c) now make it clear that motions to quash, modify, or condition the subpoena are to be made to the district court of the district from which the subpoena issued."). The D.C. Circuit therefore has held that "only the issuing court has the power to act on its subpoenas" and "nothing in the Rules even hints that any other court may be given the power to quash or enforce them." *In re Sealed Case*, 141 F.3d 337, 341 (D.C. Cir. 1998); *Pilcher v. Direct Equity Lending*, No. 99-1245-JTM, 2000 WL 33170865, at *4 (D. Kan. Dec. 22, 2000) (holding that a motion to quash that is not filed with the issuing court "is fatally flawed because it has been filed with the wrong court," and must

[6]Nothing in the language of 15 U.S.C. § 49 distinguishes it from the statute at issue here. Each statute specifies special rules for venue, but neither makes specific reference to nationwide service of process. Contrary to Boston College's claim, 15 U.S.C. § 49 does not limit venue in any significant way because, like the copyright owner's investigation of infringement here, the FTC's inquiries are frequently, if not usually, nationwide in scope. *Jim Walter Corp.*, 651 F.2d at 254; *FTC v. MacArthur*, 532 F.2d 1135 (7th Cir. 1976); *LaRouche*, 613 F.2d at 855; *Firestone Tire & Rubber Co.*, 455 F. Supp. at 1072; *FTC v. Cockrell*, 431 F. Supp. 558 (D.D.C. 1977). Thus, under either 15 U.S.C. § 49 or the DMCA, venue is proper in any court, but nationwide service is necessary to permit the investigation to proceed expeditiously.

be denied).[1] Rule 45 makes this plain by authorizing motions to quash solely in "the court by which a subpoena was issued." Fed. R. Civ. P. 45(c)(3)(A).

This Court – not the District of Massachusetts – is the arbiter for all objections to subpoenas issued from it. Indeed, Boston College effectively concedes as much in the motion papers it filed in Massachusetts. The cases cited by Boston College in its motion to quash actually prove that this Court has no authority to act on Boston College's motion. BC Mem. at 6-7. Unlike Boston College, the party seeking to quash the subpoenas in *Echostar Communications Corp. v. The News Corp., Ltd.*, 180 F.R.D. 391, 396-97 (D. Col. 1998), filed its motion to quash in the same court that issued the subpoenas. And the court in *Kupritz v. Savannah College of Art & Design*, 155 F.R.D. 84 (E.D. Pa. 1994), refused to enforce a subpoena precisely because it had no jurisdiction to enforce a subpoena issued by another court. *Id.* at 88.

[1] *See In re Digital Equip. Corp.*, 949 F.2d 228, 231 (8th Cir. 1991) (holding that where subpoenas were issued by District of Oregon, District Court in South Dakota "lack[ed] jurisdiction to rule" on objections); *Kearney v. Jandernoa*, 172 F.R.D. 381, 383 n.4 (N.D. Ill. 1997) (stating that "a motion to quash, under Rule 45(c)(3)(A), must be filed and decided in the court from which the subpoena issued"); *Armstrong v. Red River Entm't*, No. 96-50087, 1997 WL 739616, at * 1 (Bankr. E.D. Ark. Nov. 12, 1997) (holding that under Rule 45, "it is the court under whose authority the subpoena is issued which has jurisdiction over a motion to quash the subpoena"); *Lieberman v. American Dietetic Ass'n*, No. 94C5353, 1995 WL 250414, at *1 (N.D. Ill. Apr. 25, 1995) (holding that the court that issued a subpoena may quash it, and that "the case law confirms" that non-issuing court "has no such power").

CONCLUSION

For all of these reasons, this Court should order Boston College to comply with the subpoenas and disclose the information they seek as soon as possible.

JUL 31 2003

Respectfully Submitted,

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