

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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In Re Subpoenas to
Boston College

Civil Action
No. 03-1101-MBD

03 MBD 10210

(United States District Court
for the District of Columbia
Nos. 1:03MS00259,
1:03MS00278, and
1:03MC00872)

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

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

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

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

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

Statement of Facts

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

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

ARGUMENT

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

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

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

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

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

The DMCA requires that “the procedure for issuance and delivery” of any subpoena issued pursuant to the DMCA “shall be governed *to the greatest extent practicable* by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum” (17 U.S.C. § 512(h)(6)). The Federal Rules of Civil Procedure prescribe from which District Courts subpoenas to nonparties that require production of records may be issued, and where they may be

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

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

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

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

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

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

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

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

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

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

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

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

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

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

finds subpoena issued from wrong court invalid).

practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum” (17 U.S.C. § 512(h)(6)).

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

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

read when interpreted by the court in the case cited in the RIAA letter, italics added)).

The language in the DMCA that authorizes the issuance of subpoenas lacks the essential language, italicized in the previous quotes, that allows for nationwide service.

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

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

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

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

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

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

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

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

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


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

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

CONCLUSION

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

Respectfully submitted,

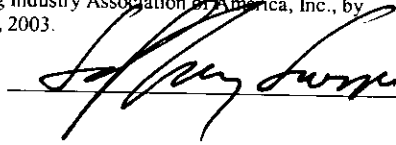


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Dated: July 21, 2003

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon Thomas J. Perrelli, Jenner & Block LLC, attorney of record for the Recording Industry Association of America, Inc., by telefacsimile on July 21, 2003.

A handwritten signature in black ink, appearing to read "Jeffrey S. Lippman", is written over a horizontal line.