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FACSIMILE AND MAIL

Mark C. DiVincenzo
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Re: Objections to DMCA subpoena from RIAA

Dear Mr. DiVincenzo:

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

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

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

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

Attachment A

possible so that they can stop and obtain redress for the ongoing infringement that is irreparably harming their interests.

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

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

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

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

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

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

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

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

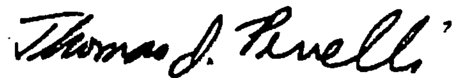
In any case, the university's obligations under FERPA do not in any way conflict with its obligations under the DMCA. FERPA applies only to "personally identifiable information in education records *other than directory information*." 20 U.S.C. § 1232g(b)(2) (emphasis added). Under the statute, "directory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

4. You claim that the word "information" is vague and does not identify the "documents" sought under the subpoena. That objection misconceives the nature of a DMCA

subpoena. RIAA does not seek documents from the university. Rather, pursuant to express statutory authority, RIAA seeks "information sufficient to identify the alleged infringer." 17 U.S.C. § 512(h)(3). In the ordinary case, we believe that name, address(es), phone number(s), and e-mail address(es) should be sufficient to identify the infringer. That is all that we are asking MIT to provide at this time, and thus the claim that the request is overbroad or vague is simply incorrect.

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

Sincerely,



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