

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

2003 JUL 21 P 1:02

In Re Subpoena to  
The Massachusetts Institute of Technology

Civil Action No. 03-10001  
U.S. District Court  
District of Columbia

(United States District Court  
for the District of Columbia  
Nos. 1:03MS00265)

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

The Massachusetts Institute of Technology (MIT) moves to quash, and for a protective order regarding, a subpoena duces tecum served upon it by Recording Industry Association of America, Inc. (RIAA) under provisions of the Digital Millennium Copyright Act (DMCA). The subpoena was issued to MIT 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.

MIT 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 subpoena. The motion is instead filed solely for the purposes of:

- assuring that the subpoena is validly issued, because to the extent that the subpoena seeks information about MIT students that constitutes an “education record” pursuant to the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, MIT may disclose such information only in response to a “lawfully issued subpoena”;
- assuring that the subpoena is issued from a nearby United States District Court, as required by Fed. R. Civ. P. 45(a)(2) and (b)(2), so that MIT 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 subpoena, when validly issued, allows MIT time to provide reasonable prior notice to any student whose education records may be produced in response to the subpoena, as required by FERPA.

If the RIAA issues a subpoena to MIT that satisfies these requirements of the Federal Rules of Civil Procedure and of federal law, MIT will of course provide the information that the subpoena rightfully requires it to produce, to the extent that such information is found, after a reasonably diligent search, to be in the Institute’s possession, custody, or control.

### **Statement of Facts**

The RIAA has served a subpoena upon MIT 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 infringer of copyrighted sound recordings who has the specific Internet Protocol address identified in the subpoena. The subpoena requires 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 MIT insufficient time to issue a prior notice to any student whose education record would be produced in response to the subpoena.

MIT sent the RIAA objections pursuant to Fed. R. Civ. P. 45(c)(2)(B), because the subpoena had not been lawfully issued and served in compliance with Fed. R. Civ. P. 45(b)(2), and because it required a response too soon to allow MIT to give the notice 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 MIT and demanded compliance with the subpoena.

### **ARGUMENT**

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

**I. MIT IS REQUIRED BY FEDERAL LAW NOT TO DISCLOSE STUDENT RECORDS IN RESPONSE TO A SUBPOENA UNLESS THAT SUBPOENA HAS 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, MIT is obligated by federal law to assure that the RIAA subpoena that would require it to disclose student records was lawfully issued. (Of course, to the extent that information responsive to the RIAA subpoena was not an education record concerning a MIT student, the FERPA requirements would not apply. But without a lawfully issued subpoena, MIT would not be required to produce that information, either.)

**II. THE RIAA SUBPOENA WAS 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 subpoena violates those requirements of the Federal Rules of Civil Procedure because it was issued from the United States District Court for the District of Columbia and was served on MIT 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 a subpoena duces tecum be issued from a convenient United States District Court, so that a third-party like MIT 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 MIT, 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)).<sup>1</sup>

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<sup>1</sup> 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)).

MIT does not contend that production of records responsive to the RIAA’s subpoena would itself be inconvenient or burdensome. The Institute 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 MIT: whether MIT must go to the District Court for the District of Columbia to obtain protection from a subpoena, like the RIAA’s in this case, that has been issued in violation of the Federal Rules of Civil Procedure and of FERPA. It is obviously significantly more inconvenient and burdensome for MIT 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.<sup>2</sup>

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

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<sup>2</sup> MIT filed its Motion to Quash Subpoenas and for a Protective Order in the United States District Court for Massachusetts, from which the subpoena should have issued, rather than in the United States District Court for the District of Columbia, from which the subpoena was 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 subpoena 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 MIT (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 subpoena was lawfully issued, as stated in its letter to MIT, is based upon the exception in Fed. R. Civ. P. 45(b)(2) that allows service in another place if a statute of the United States authorizes such service (Att. A, p. 1). The DMCA provides in 17 U.S.C. § 512(h)(1) that the representative of a copyright owner “may request the clerk of *any* United States district court to issue a subpoena” (*italics added*) for the identification of an alleged copyright infringer. Based upon this language, the RIAA contends that the DMCA permits nationwide service.

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

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finds subpoena issued from wrong court invalid).

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

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

The cases that the RIAA cited in its letter to MIT 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 MIT 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 MIT REASONABLE TIME TO PROVIDE SUCH NOTICE.**

The letter from the RIAA also disputed a second ground of objection filed by MIT, which was that the time the subpoena permitted for production was too short to allow MIT to satisfy its obligation under FERPA to provide any student prior notice if his or her education record would be provided in response to the subpoena (*see p. 3, above*). (MIT emphasizes that it does not contend that FERPA prevents the disclosure of information about a student in response to a lawfully issued subpoena, but merely that FERPA requires MIT to give the 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 MIT's FERPA obligation to notify a student when a subpoena requires disclosure of the student's 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 MIT to take the few days needed to provide a student reasonable FERPA notice would not conflict with MIT's DMCA obligation to supply information in a timely manner in response to a lawfully issued RIAA subpoena.<sup>3</sup>

The RIAA pointed out in its letter that FERPA excepts “directory information” from the definition of an “education record,” and claimed that all its subpoena seeks is directory information (Att. A, p. 3). The RIAA is correct that, for a student who has not opted out of the provision,<sup>4</sup> colleges may disclose his or her name, address, and other such information that is typical of student directories (20 U.S.C. § 1232g(a)(5)). But the RIAA subpoena requires disclosure not merely of a student's name and address. It instead requires the disclosure of the name and address of the student who allegedly used a campus computer for copyright infringement. By coupling the name with the alleged

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<sup>3</sup> The RIAA letter conceded that the delay between the issuance of the subpoena by the United States District Court for the District of Columbia (which subpoena states that responses are due within seven calendar days) and the RIAA's service on MIT left the Institute 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 MIT 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)).

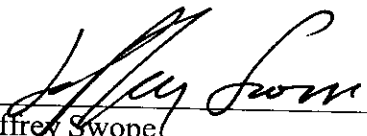
<sup>4</sup> Of course, RIAA's argument fails at the threshold for any student who has exercised his or her FERPA right to refuse permission for release even of directory information. But as explained in

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, MIT requests that the Court quash the subpoena served upon it (United States District Court for the District of Columbia Nos. 1:03MS00265), and further that the Court issue a protective order stating that, if and when the RIAA serves MIT with a lawfully issued subpoena, that subpoena must permit MIT 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 a subpoena, as required by FERPA.

Respectfully submitted,

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

Dated: July 21, 2003

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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."

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.

