UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

IN RE SUBPOENA TO VERIZON INTERNET SERVICES, INC.	Misc. Act. No. 03-MC-804-HHK/JMF
RECORDING INDUSTRY ASSOCIATION OF AMERICA, Plaintiff, v. VERIZON INTERNET SERVICES, INC., Defendant.	

REPLY OF RECORDING INDUSTRY ASSOCIATION OF AMERICA TO VERIZON INTERNET SERVICES INC.'S OPPOSITION TO MOTION TO ENFORCE SUBPOENA

The Recording Industry Association of America ("RIAA")[1] hereby files this reply to Verizon Internet Services, Inc.'s (Verizon) Opposition to RIAA's Motion to Enforce Subpoena.

Verizon spends the vast majority of its brief arguing a moot point. Verizon opposes the motion to enforce primarily because, it suggests, RIAA has objected to the subscriber in this case being heard. Nothing could be further from the truth. RIAA has *consented* to nycfashiongirl's intervention in this case, and has only objected to attempts by nycfashiongirl to stay the proceedings in this case while she brings a new and separate motion to quash. As shown in RIAA's Opposition to Intervenor's Motion for a Stay, filed August 26, 2003, weeks have past since nycfashiongirl's counsel announced that she intended to seek judicial relief, and there is no

[1] RIAA is acting in this case as agent of its members, Universal Music Group, EMI Recorded Music, Sony Music Entertainment, BMG Music Group, and Univision Music, Inc.

basis for granting her even more time to file a motion to quash, which would be wholly redundant of filing an opposition to RIAA's motion to enforce. More importantly, such a stay would directly contravene Congress's "express and repeated direction to make the subpoena process 'expeditious.'" *In re: Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 34 (D.D.C. 2003) ("*Verizon I*").

Verizon has no other basis for refusing to respond to the subpoena. Verizon does not (because it cannot) re-raise the statutory and constitutional arguments that were foreclosed by prior rulings in this Court in *Verizon I* and *In re: Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003) ("*Verizon II*"). The only other argument is Verizon's claim that it is entitled to partial non-compliance because it should not have to provide RIAA with nycfashiongirl's e-mail address. That argument is similarly meritless. In a case such as this, in which all of the illegal conduct occurred in cyberspace, an ISP subscriber's e-mail address is plainly a key piece of information "to identify the alleged infringer." 17 U.S.C. § 512(h)(3). Given that Congress has mandated that the DMCA subpoena process be expeditious, and that an Internet pirate can cause thousands of infringing copies to be distributed in a single day, it is eminently reasonable to require an ISP to provide a subscriber's e-mail address in response to a DMCA subpoena. An e-mail address may provide a copyright owner with the quickest means of contacting a copyright infringer to halt the illegal conduct.

For the reasons stated below and in its Opposition to Intervenor's Motion to Stay, RIAA respectfully requests that this Court deny Intervenor's motion to stay and order Intervenor to file her opposition, if any, to RIAA's motion to enforce immediately. If Intervenor files nothing, the Court should order Verizon to respond to the subpoena with the information requested, including the subscriber's e-mail address. If Intervenor does file an opposition, RIAA requests that the

Court reject those arguments (which have been previewed in the motion to intervene and provide no basis for denying RIAA's motion to enforce) and order Verizon to comply with the subpoena in full (including the subscriber's e-mail address) as soon as possible thereafter.

ARGUMENT

I. Verizon's Argument That nycfashiongirl Should be Permitted to Intervene is Irrelevant Because RIAA Has Consented to nycfashiongirl's Intervention.

Verizon argues at length that the subscriber whose identifying information is at issue in this case, nycfashiongirl, should be provided the opportunity to intervene in these proceedings. *See* Verizon Opp. at 9-17. Verizon's argument is misplaced, however, because RIAA has consented to nycfashiongirl's request to intervene in this case. *See* Decl. of Daniel N. Ballard in Support of Mot. to Intervene, ¶ 5. RIAA does not object to nycfashiongirl's intervention, and Verizon's arguments about why she should be entitled to intervene therefore are moot.

RIAA's objection is not to nycfashiongirl seeking to participate in this proceeding, but rather to her strategy of delay in the face of a clear statutory mandate that DMCA subpoenas be complied with expeditiously. *See* 17 U.S.C. § 512(h)(5). Federal Rule of Civil Procedure 24(b) establishes that intervention must not "unduly delay" the proceedings. *See, e.g., Seminole Nation of Oklahoma v. Norton*, 206 F.R.D. 1, 11 (D.D.C. 2001) (denying motion to intervene where permitting intervention "would delay the adjudication of the discrete issues presented to the Court by the original parties"). As set forth more fully in RIAA's Opposition to Motion of Intervenor to Stay Motion to Enforce Subpoena, nycfashiongirl has had well over a month to file a motion to quash and has already had more time than the local rules allow to formulate and file an opposition to RIAA's motion to enforce. That is more than enough time to file a pleading in this Court, particularly given the fact that, as is now obvious from nycfashiongirl's motion to intervene, she intends only to (1) recycle arguments that Verizon is foreclosed from making, and

(2) make highly misleading arguments about her own liability for copyright infringement which are not properly before this Court in a subpoena enforcement proceeding. *See* RIAA Opp. to Mot. of Intervenor to Stay Mot. to Enforce Subpoena, at 7-8. Nonetheless, nycfashiongirl seeks to stay the proceedings until September 10, 2003 – a date that is more than two months after RIAA obtained the subpoena, seven weeks after counsel for nycfashiongirl announced to Verizon and the *New York Times* that she would file a motion to quash, and five weeks after RIAA filed its motion to enforce.

This case is not about whether nycfashiongirl can participate, but how long she can delay disclosure. The DMCA answers that question. Delay is the antithesis of the process that Congress created in the DMCA, and nycfashiongirl's motion to stay is in clear contravention of Congress's "express and repeated direction to make the subpoena process 'expeditious.'" *Verizon I,* 240 F. Supp. 2d at 34. In the DMCA, Congress intended copyright owners to obtain information expeditiously because "it is critical to curtail infringement as quickly as possible." *Verizon II,* 257 F. Supp. 2d at 273; *Verizon I,* 240 F. Supp. 2d at 35. Thus, DMCA subpoenas should proceed far more quickly – not less quickly – than other subpoenas. Congress's repeated demand for expedition merely recognizes that delay substantially prejudices the copyright owners because the longer an alleged infringer is able to delay disclosure of her identity, the more irreparable harm will befall the copyright owners. *See Verizon I,* 240 F. Supp. 2d at 35 ("there is an important reason why Congress required service providers to act promptly upon receipt of a subpoena to prevent further infringement – 'the ease with which digital works can be copied and distributed worldwide virtually instantaneously'") (quoting S. Rep. No. 105-190, at 8). *See also* RIAA Mot. to Enforce, at 10.

Requiring nycfashiongirl to file her opposition immediately in no way unfairly prejudices her interests. As Judge Bates explained, the DMCA contains "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 subscribers. *See Verizon II*, 257 F. Supp. 2d at 263 & n.22. Moreover, whatever arguments that a subscriber might have as to his or her liability for copyright infringement, he or she will have a full opportunity to raise them in a subsequent copyright infringement proceeding.

And nycfashiongirl will have a chance to raise her arguments in this proceeding – provided she does it as soon as possible, as the DMCA demands. But neither Verizon nor the subscriber can be permitted to undermine the DMCA's expeditious subpoena process through dilatory tactics.

II. Verizon Must Provide Its Subscriber's E-Mail Address Pursuant to RIAA's DMCA Subpoena.

Verizon advances no other basis for its refusal to comply with RIAA's subpoena.[2] The remainder of its opposition is a re-hash of what it lost in *Verizon I* and *Verizon II* and is now foreclosed from arguing by principles of collateral estoppel. The only other argument that Verizon makes is that the DMCA does not authorize disclosure of e-mail addresses of its subscribers committing infringement. *See* Verizon's Opp. to Mot. to Enforce at 17-19. Verizon

[2] RIAA is not responding to the mischaracterizations of the DMCA that litter Verizon's brief because none of those have anything to do with this motion.

contends that the DMCA requires an ISP to provide "the individual's name, address, and telephone number only." *Id.* at 17. That argument is wrong.

First, Verizon's argument is unmoored from the text of the statute. 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, telephone number, and e-mail address.[3] Given that all of the illegal conduct occurring in this case 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 need for an expeditious process is especially acute "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). The e-mail address will often be the quickest way to notify the infringer and demand that she stop committing copyright piracy.[4]

Nor does Verizon have any explanation why a physical address is identifying information and an e-mail address is not. E-mail addresses are regularly provided as the most expeditious

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[3] Although an e-mail address is a necessary component of information "sufficient to identify the alleged infringer," it is by no means sufficient. Verizon concedes that ISPs must also provide at least the name, address, and telephone number.

[4] Verizon's claim that RIAA has in the past "conceded" that e-mail addresses do not constitute information that may be sought pursuant to a DMCA subpoena is frivolous. The pleading that Verizon cites, which said ISPs must provide information "*such as* name, address, and phone number" does not, on its face, or in any other way, preclude e-mail addresses. After Judge Bates compelled Verizon to comply with the earlier subpoenas, Verizon and RIAA agreed to disagree about whether e-mail addresses were to be provided, leaving that issue for another day. That day is now here.

way to contact individuals. *See, e.g.*, 36 C.F.R. § 1250.20 (stating that email address "will allow [National Archives and Records Administration] to reach you faster if we have any questions about your request"). Government agencies frequently request e-mail addresses from those who are seeking government services or attempting to assert a right before the government. *See, e.g.*, 4 C.F.R. § 21.21 (stating that parties filing GAO bid protests should include e-mail addresses). Indeed, the Department of Education has made clear that e-mail addresses are "directory information" that universities may freely provide without special authorization from students or their parents pursuant to the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. *See* 34 C.F.R. § 99.3 (including "electronic mail address" in the definition of "directory information"). Verizon itself asks customers for e-mail addresses when they sign up on-line for DSL service. https://www22.verizon.com/ForHomeDSL/channels/orderdsl/olo_custdetails.asp.[5] We are simply past the time when a party – particularly an ISP – can plausibly claim that an e-mail address is different in a relevant way from a telephone number or physical address.[6]

Verizon's citation to a statute protecting the privacy of e-mail communications is simply inapposite here. Verizon Mot. at 18 (citing 18 U.S.C. § 2701). That statutory provision protects only the content of e-mail communications, *not* e-mail addresses. Nor can Verizon plausibly claim that the subscriber's conduct in this case is deserving of any expectation of privacy.

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[5] Other businesses similarly require customers to provide e-mail addresses. *See, e.g.*, http://www.nytimes.com/auth/login (New York Times web site requiring e-mail address as part of registration form); https://partner.getconnected.com/direcway/cart/order_information.asp (Direcway web site requiring e-mail address to sign up for satellite service).

[6] Other ISPs regularly have provided e-mail addresses in response to DMCA subpoenas. In another case before Judge Bates raising this identical issue, RIAA has submitted a declaration detailing another ISP's routine disclosure of e-mail addresses in response to DMCA subpoenas. *See* Declaration of Jonathan Whitehead ¶ 21, filed in *In re: Subpoena to SBC Internet Communications, Inc.*, Misc. Act. No. 1:03-MC-1220 (Aug. 8, 2003). Moreover, there is little doubt that Verizon provides e-mail addresses in response to other subpoenas, such as those issued by law enforcement authorities. Other than its tenuous statutory argument, Verizon has no basis for refusing to provide an e-mail address here.

Opening one's computer to anyone in the world who wants access is about the least private thing a person can do. As Judge Bates found, subscribers have little expectation of privacy when they are engaging in such conduct – and Verizon's own policies inform subscribers that this is the case. *Verizon II*, 257 F. Supp. 2d at 267-68.

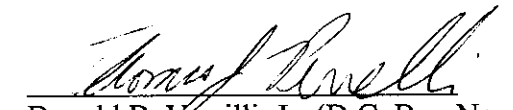
Finally, RIAA has not waived its right to seek nycfashiongirl's e-mail address. Verizon's position suggests that RIAA bears the burden of proving the validity of its subpoena. But Verizon has it backwards. It is the party seeking to quash a subpoena that bears the burden of establishing that the subpoena is unreasonable or improper. *Irons v. Karceski*, 74 F.3d 1262, 1264 (D.C. Cir. 1996). *See also* Charles Alan Wright & Arthur Miller, 9A *Federal Practice and Procedure*, 2459 at 46 (2d ed. 1995) ("Thus, the burden to establish that a subpoena duces tecum is unreasonable or oppressive is on the person who seeks to have it quashed."). The obligation is not on the movant – here RIAA – to respond to arguments that Verizon has not yet even put before the Court.

Regardless, RIAA has demanded the e-mail address at every step in this litigation. The DMCA subpoena that RIAA issued to Verizon expressly required Verizon to produce its subscriber's "name, address, telephone number, and *e-mail address*." *See* Exhibit C to RIAA's Mot. to Enforce (emphasis added). In filing its motion to enforce the subpoena, RIAA made clear on the very first page of its motion that it continued to "seek[] to have Verizon identify the name, address, telephone number and *e-mail address* for one of its users." Mot. to Enforce at 1 (emphasis added). RIAA therefore has made plain at every opportunity that it seeks the e-mail address of Verizon's subscriber. Having sought the disclosure of that information at every turn, RIAA is entitled to respond to the arguments raised in Verizon's opposition.

CONCLUSION

For the foregoing reasons, RIAA respectfully requests that this Court grant its motion to enforce the subpoena and compel Verizon to comply with the subpoena as soon as possible.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply of Recording Industry Association of America to Verizon Internet Services Inc.'s Opposition to Motion to Enforce Subpoena were served on August 28, 2003 by First Class Mail and email upon the individuals listed below:

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