

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA**

HUNTINGTON DIVISION

ARISTA RECORDS LLC, a Delaware limited liability company; BMG MUSIC, a New York general partnership; CAPITOL RECORDS, INC., a Delaware corporation ; ELEKTRA ENTERTAINMENT GROUP INC., a Delaware corporation; INTERSCOPE RECORDS, a California general partnership; MOTOWN RECORD COMPANY, L.P., a California limited partnership; a California limited liability company; SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; UMG RECORDINGS, INC., a Delaware corporation; VIRGIN RECORDS AMERICA, INC., a California corporation; and ZOMBA RECORDING LLC, a Delaware limited liability company,

Plaintiffs,

v.

CIVIL ACTION NO.: 3:07-0649

DOES 1-7,

Defendants.

**MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA
PURSUANT TO FRCP 45(c)(3)(A) BY MARSHALL UNIVERSITY**

I. Introduction

On October 17, 2007, Plaintiffs filed this copyright infringement suit against seven unnamed individuals allegedly associated with Marshall University (“Marshall”). The same day, Plaintiffs also filed an *ex parte* application to take early discovery to determine the identities of the individuals, whom they believe to have illegally downloaded or transferred copyrighted material using, at least in part, Marshall’s computer network. On October 22, 2007, the court granted Plaintiffs’ request to take early discovery. On February 15, 2008, Plaintiffs served Marshall with a subpoena under Rule 45 of the Federal Rules of Civil Procedure, commanding Marshall to produce

“[i]nformation, including names, current and permanent addresses, telephone numbers, e-mail addresses and Media Access Control (“MAC”) addresses, sufficient to identify the alleged infringers of copyrighted sound recordings” for the seven IP addresses attached to the subpoena as *Exhibit A*.

Marshall moves the Court to quash that subpoena on the grounds that; 1) the information that Plaintiffs seek has been and will continue to be preserved by Marshall; 2) the subpoena imposes an undue burden on Marshall as a number of the Does are not readily identifiable with a high degree of reliability from existing records¹, 3) the language of the subpoena is overbroad; 4) the information sought is protected from disclosure under the Family Educational and Privacy Rights Act (“FERPA”); and 5) because the Digital Millennium Copyright Act (“DMCA”) is the sole mechanism for Plaintiffs to subpoena the information they seek from Marshall.

Marshall in no way condones copyright infringement. Marshall itself is a producer and owner of valuable intellectual property and devotes significant resources to preventing and deterring the infringement of intellectual property rights. Marshall, however, is subject to the conditions of FERPA concerning student records and has both a legal and an ethical obligation to ensure that its students’ right to privacy is protected under the law and defended against intrusion.

II. ARGUMENT

A. Plaintiffs Misrepresented Information to Obtain the Ex Parte Order

Plaintiffs obtained the *ex parte* order allowing them to take early discovery in this case without notice to Marshall. While Marshall is not a party to the case, the order directly affects the

¹Marshall acknowledges that in the case of *Arista Records, LLC, et al. v. Does 1-12*, Civil Action No. 03:04-EV-00232 that it previously complied with a similar subpoena. However, it has become evident that Plaintiffs or others who are similarly situated to them are and continue to be seeking this information from Marshall as evidenced by *Exhibit C* - Preservation Notices regarding other potential Does.

rights and obligations of Marshall and was obtained in part on representations made by the Plaintiffs that there existed a “very real danger the ISP will not long preserve the information that Plaintiffs seek.” *Memorandum of law in Support of Ex Parte Application*, p. 7. Marshall disputes Plaintiffs’ representation to the Court regarding the potential for spoliation of evidence in this case. In making the representation that evidence might be destroyed, Marshall has been and will continue to preserve this evidence. See *Exhibit B*. In fact, although Plaintiffs expressed to the court their concern that the evidence would be destroyed without immediate intervention, they waited nearly four (4) months before serving Marshall with their subpoena. Plaintiffs obtained an *ex parte* order based on the erroneous representation that the evidence they seek might be destroyed without immediate Court intervention. To the extent that the order was based on that representation, the order should be reconsidered.

B. Plaintiffs’ Subpoena Imposes an Undue Burden on Marshall

Plaintiffs’ subpoena imposes an undue burden on Marshall because it requires Marshall to affirmatively investigate potential copyright infringement by its users. Under Rule 45(c)(3)(A)(iv) of the Federal Rules of Civil Procedure, a court shall quash or modify a subpoena if it “subjects a person to undue burden.” Plaintiffs assert that the names of the individuals responsible for the alleged infringement can be “quickly and easily” identified by Marshall from the IP addresses furnished by Plaintiffs. *Memorandum of Law in Support of Ex Parte Application*, p. 2. Of the seven IP addresses furnished by Plaintiffs, Marshall is able to identify none of the John Does with a high degree of reliability.

Four of the seven Does reside in dormitory rooms with at least one other roommate. A computer in a shared room at Marshall can be used by any of the occupants, all of the occupants, or visitors. While Marshall can determine which individuals are assigned to a given dorm room where

an IP address is used, IP addresses are not assigned to individual students and Marshall cannot determine who in the room is using a given computer at a given time from its existing electronic records. In order to accurately determine the identities of the John Does associated with IP addresses in shared rooms, Marshall would have to undertake an investigation of all of the individuals who were or may have been present in the shared rooms in question at the time of the alleged acts of copyright infringement. In order to perform such an investigation, Marshall would have to allocate resources to conduct interviews and conduct a forensic investigation of privately-owned computers used in the dormitory rooms associated with the IP addresses – the latter undertaking is something Marshall has no right to do. Even after undertaking the expense and inconvenience of an investigation, Marshall may not be able to conclusively determine the identity of the individuals responsible for downloading material with a specific IP address on the date and time identified by Plaintiffs in the attachment to their subpoena.

Two of the seven John Does accessed the content in question from single-occupancy dorm rooms. With regard to the IP addresses associated with single-occupant dorm rooms, Marshall is presently only able to identify the registered occupant of the room, not the identity of the user engaged in the alleged copyright infringement. The alleged infringement could have been committed by a visitor just as easily as the occupant him or herself. Again, Marshall would be forced to conduct an investigation in order to both comply with the specifications of the subpoena and the requirements of the FERPA, which prohibits disclosure of records held by educational institutions unless certain stringent conditions are met.

One of the seven John Does accessed the content in question from a wireless network or other similar system. While Marshall can identify a registered username associated with the use, it would not be able to identify the actual infringer without conducting an investigation to determine

if the individual assigned that username accessed the content or whether someone else borrowed the username to do it.

In short, the subpoena requires Marshall to create discoverable material to assist Plaintiffs in their litigation rather than merely disclose existing documents. “As a general rule, non-parties are not required to create documents that do not exist, simply for the purposes of discovery.” *Gonzales v. Google*, 234 F.R.D. 675, 683 (N.D. Cal 2006) citing *Instituform Tech., Inc. v. Cat Contracting, Inc.*, 168 F.R.D. 630, 633 (N.D. Ill. 1996). Plaintiffs’ subpoena should be quashed because it effectively requires a non-party to go beyond the production of documents to the initiation of an inconvenient and potentially expensive investigation.

C. Plaintiffs’ Subpoena is Overbroad

Plaintiffs’ subpoena is additionally burdensome because it is overbroad. Plaintiffs seek “[i]nformation including names, current and permanent addresses, telephone numbers, e-mail addresses and Media Access Control (“MAC”) addresses, sufficient to identify the alleged infringers of copyrighted sound recordings” for the seven IP addresses attached to the subpoena as *Exhibit A*. Plaintiffs request contact information for individuals “sufficient to identify the alleged infringers,” unqualified by date, time and location. This request would appear to encompass the contact information of witnesses not engaged in the alleged infringement, and could include employees of Marshall’s information technology department. It could also include data stored on the computers associated with the IP addresses in question. Again, complying with such a request would require Marshall to undertake an investigation to identify all individuals who might have information relevant to Plaintiffs’ claims and possibly compromise the privacy and property rights of its students.

D. Plaintiffs Seek Disclosure of Information Protected by FERPA.

Plaintiffs' subpoena should also be quashed because it seeks disclosure of protected information. Under F.R.C.P. 45(c)(3)(A)(iii), the court shall quash or modify a subpoena if it "requires disclosure of privileged or other protected matter and no exception or waiver applies." Complying with Plaintiffs' subpoena would force Marshall to disclose information contained in records protected by FERPA.

Congress enacted FERPA "to assure parents of students ... access to their educational records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." *Rim of the World Unified School Dist. v. Superior Court*, 104 Cal. App. 4th 1393, 1399 (2002) *citing* 120 Cong. Rec. 39, 862 (1974) (joint statements of Sens. Pell and Buckley explaining major amendments to FERPA). It also passed the Act to "deter schools from indiscriminately releasing student records" and to place "a heavy burden on a party seeking access to student records to demonstrate a genuine need which outweighs the student's privacy interest." *Smith v. Duquesne University*, 612 F. Supp. 72, 80 (W.D. Pa. 1985) *quoting* 123 Cong. Rec. S39858 (daily ed. Dec. 13, 1974) (joint remarks of Sen. Buckley and Sen. Pell). The Sixth Circuit has noted that the privacy interests protected by FERPA may "find protection in the Constitution." *U.S.A. v. Miami University, et al.*, 294 F.3rd 797, 818 n. 18 (2002).

Under FERPA, Marshall University is prohibited from releasing any "personally identifiable information in education records" unless "such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that the students are notified of all such orders or subpoenas in advance of compliance therewith by the educational institution or agency." 20 U.S.C § 1232g(b)(2)(B). "Educational records" are defined as "those records, files, documents and other materials which (i) contain information directly related to a student; and (ii)

are maintained by an educational agency or institution or by a person acting for such agency.” 20 U.S.C §1232g(a)(4)(i) and (ii). No students whose protected records are within the scope of Plaintiffs’ subpoena request have been notified by Marshall that their records are subject to disclosure under the subpoena. Marshall’s obligation to notify the affected students and to disclose FERPA-protected records pursuant to Plaintiffs’ subpoena has not been triggered because Plaintiffs’ subpoena is unduly burdensome, overbroad, and is invalid in light of the subpoena provisions of the DMCA. And, as previously stated, Marshall is not able to comply with the notice requirements of FERPA because it is not able to accurately identify the alleged infringers. As such, FERPA prohibits the disclosure of educational records within the scope of the Plaintiffs’ subpoena.

E. The DMCA Contains the Sole Subpoena Provision Available to Plaintiffs

Plaintiffs’ Rule 45 subpoena is invalidated by the DMCA, a statutory scheme enacted by Congress in 1998 to extend the reach of federal copyright laws in the era of the World Wide Web. The DMCA contains a specific subpoena provision that allows copyright holders to determine the identities of suspected infringers through an *ex parte* subpoena process. 17 U.S.C. 512(h). The DMCA subpoena is the exclusive subpoena provision available to Plaintiffs to obtain the information they seek in this case. In 2007, in an infringement lawsuit filed by many of the same Plaintiffs against John Does associated with the College of William and Mary, a U.S. District Court in the Eastern District of Virginia denied the Plaintiffs’ motion for early discovery, holding that the Court was unaware of any other authority that authorized the *ex parte* subpoena requested. *Interscope et al. v. Does 1-7*, 494 F.Supp.2d 388, 391 (E.D. Va. 2007). By enacting the DMCA, Congress intended to create a comprehensive scheme to allow copyright holders to seek the identities of alleged infringers from ISPs apart from Rule 45. And, as stated by the District Court for the District of Columbia, “there is absolutely nothing in the DMCA or its history to indicate that

Congress contemplated copyright owners utilizing John Doe actions in federal court to obtain the identity of apparent infringers, rather than employing the subsection (h) process specifically designed by Congress to address that need.” *Recording Indus. Ass’n of Am. v. Verizon Internet Servs.*, 240 F.Supp. 2d 24, 46 (2003).

III. Conclusion

Plaintiffs’ subpoena is unduly burdensome and overbroad. It seeks information that Marshall does not readily possess. In order to attempt to comply with the subpoena, Marshall would be forced to undertake an investigation to create discovery for Plaintiffs – an obligation not imposed by Rule 45. As Marshall is unable to identify the alleged infringers with any accuracy, it cannot comply with its federal obligation to notify students potentially affected by the subpoena. Plaintiffs’ subpoena is additionally invalid because Congress intended Plaintiffs to use the DMCA subpoena process to obtain the information they seek, not Rule 45. For the forgoing reason, Plaintiffs’ subpoena should be quashed.

Dated this 28th of February, 2008.

Respectfully submitted,

MARSHALL UNIVERSITY BOARD OF
GOVERNORS/MARSHALL UNIVERSITY,

By Counsel,

DARRELL V. McGRAW, JR.
Attorney General

s/Jendonnae L. Houdyschell

Jendonnae L. Houdyschell Bar Number: 5809
Senior Assistant Attorney General
Attorney for Marshall University Board of Governors
West Virginia Higher Education Policy Commission
Legal Division - 8th Floor
1018 Kanawha Blvd., East
Charleston, West Virginia 25301
Telephone: (304) 558-2102
Fax: (304) 558-4820 (facsimile)
E-mail: houdyschell@hepc.wvnet.edu

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Plaintiffs,

v.

**CIVIL ACTION NO.: 3:07-0649
CERTIFICATE OF SERVICE**

DOES 1-7,

Defendants.

I hereby certify that on February 28, 2008, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

Ramonda C. Lyons
Counsel for Plaintiff
DINSMORE & SHOHL
P.O. Box 11887
Charleston, WV 25339-1887
Email: ramonda.lyons@dinslaw.com

Mychal Sommer Schulz
Counsel fo Plaintiff
DINSMORE & SHOHL
P.O. Box 11887
Charleston, WV 25339-1887
E-mail: mschulz@dinslaw.com

I hereby certify that there were not any non-CM/ECF participants to be served.

MARSHALL UNIVERSITY BOARD OF
GOVERNORS/MARSHALL UNIVERSITY,

By Counsel,

DARRELL V. McGRAW, JR.
Attorney General

s/Jendonnae L. Houdyschell

Jendonnae L. Houdyschell Bar Number: 5809
Senior Assistant Attorney General
Attorney for Marshall University Board of Governors
West Virginia Higher Education Policy Commission
Legal Division - 8th Floor
1018 Kanawha Blvd., East
Charleston, West Virginia 25301
Telephone: (304) 558-2102
Fax: (304) 558-4820 (facsimile)
E-mail: houdyschell@hepc.wvnet.edu