

**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.

**MARSHALL UNIVERSITY'S REPLY
IN SUPPORT OF ITS MOTION TO QUASH**

Now comes, the Marshall University Board of Governors on behalf of Marshall University ("Marshall") by its counsel and does hereby submit its reply in further support of its Motion to Quash.

INTRODUCTION

As previously stated in its Memorandum in Support of its Motion to Quash Subpoena Pursuant to FRCP 45(c)(3)(A) by Marshall University, Marshall in no way condones or supports copyright infringement. *Supporting Brief, p. 2.* In fact, Marshall is almost constantly engaged in educating its students regarding copyright law and making them aware of the ramifications of

violating the same. Marshall's education and awareness programs include video announcements, daily reminders in the myMU plus email, posters, newspaper articles, and network reminders. Marshall has reduced available bandwidths to students to prevent them from being able to download music from the Internet. In addition, Marshall diligently complies with takedown notices it receives. Marshall agrees with Plaintiffs that this is a serious problem and should not be taken lightly.

Marshall further agrees that it is important that "true name and locations of the infringers" be identified. *Opposition*, p. 6. Marshall believes that it not only has a duty to its students to be especially cautious about releasing their information in the context of these subpoenas, which will have the ultimate effect of identifying them as a defendant in a lawsuit, but that it has a duty to the Plaintiffs and this Court to respond to these subpoenas with accurate information. In order to truly provide accurate information as requested in the subpoena, Marshall would need to conduct an affirmative investigation.

**THE SUBPOENA REQUIRES AFFIRMATIVE INVESTIGATION
BY MARSHALL AND THUS PLACES AN UNDUE BURDEN ON MARSHALL**

Plaintiffs allege that the prior response by Marshall to a previous subpoena somehow "belies Marshall's current assertions of undue burden." *Opposition*, p. 10. However, Marshall contends that it is not estopped to object to this subpoena simply because it previously complied. At the time, Marshall previously complied, the subpoena appeared to be an isolated event. However, Marshall has now received a second subpoena, and based upon the additional preservation notices it has received, anticipates additional subpoenas being issued in the future. *Motion to Quash*, Exhibit C.

Marshall believes that Plaintiffs' subpoena imposes an undue burden on its limited resources. In order to comply with Plaintiffs' subpoena in its current form, Marshall must do more than produce an existing record. It must affirmatively investigate to determine whether the computer at

issue is in fact connected to Marshall's network. It must then locate the user names associated with the computer or account, if possible. If not possible, it must identify the location where the connection was made. It must then identify the names of the students who resided at the location and may have visited the location, and produce the names, addresses, telephone numbers, and MAC addresses of the residents. *See Exhibit 1*, which outlines the cost associated with responding to a subpoena per IP address. This does not include the cost which has already been incurred if a takedown notice and/or preservation notice has been received. Marshall has an obligation to produce existing documents to comply with narrowly-tailored third-party subpoenas: it does not have an obligation to investigate Plaintiffs' case or to create discoverable material through such an investigation.

PLAINTIFFS' SUBPOENA IS OVERBROAD

Plaintiffs now insist that they seek only information "sufficient to identify the individual or individuals assigned to the IP addresses listed in the subpoena at the date and time of infringement." *Opposition*, p. 8. If this indeed is the only information that Plaintiffs seek, they should subpoena this information. What they have asked for in fact is much broader: "[i]nformation, including names, current and permanent addresses, telephone numbers, and MAC addresses sufficient to identify the alleged infringers" *Motion to Quash*, Exhibit A, p. 1. Such a request requires that Marshall go beyond identifying the individuals assigned to live in a particular dormitory room or the owner of a computer associated with a particular IP address. Plaintiffs submit their subpoena does not require Marshall to identify the alleged infringers, but Marshall effectively must identify the infringer to gauge whether it is providing information "sufficient" to identify the alleged infringer. Marshall agrees with Plaintiffs' assertion that the subpoena is clear on its face. Marshall is not engaging in

an “effort to concoct burdens” as the Plaintiffs are quick to allege. Rather, it is relying on the plain language of the subpoena to assess whether the Plaintiffs’ request is reasonable — and finds that it is not.

THE SUBPOENA RAISES SUBSTANTIAL ISSUES UNDER THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974, 20 U.S.C. 1232g

Plaintiffs mislead the court by stating that the information they seek concerning the John Does is “directory information” and thus available under FERPA even in the absence of a subpoena. Plaintiffs seek the name, address and telephone number of students who were allegedly engaged in specific conduct at a specific time. Such information, however, under the present circumstances, is in fact “personally identifiable information” as defined in 34 C.F.R. Sec. 99.3 (definition of “personally identifiable information.”) Under that regulation, personally identifiable information is defined as:

- (a) The student’s name;
- (b) The name of the student’s parent or other family member;
- (c) The address of the student or the student’s family;
- (d) A personal identifier, such as the student’s social security number or student number;
- (e) A list of personal characteristics that would make the student’s identity easily traceable; or
- (f) Other information that would make the student’s identity easily traceable.

Clearly, when Plaintiffs seek the names of individuals with access to an IP address associated with a specific computer or a specific residence at a specific point in time, the information sought

is personally identifiable information. The alleged directory information sought by Plaintiffs (names, addresses, phone numbers, and MAC address) is clearly linked to non-directory information (computer habits, an individual's physical presence at a specific location at a particular point in time) and thus cannot be released absent appropriate legal process.

FERPA requires that Marshall notify students before disclosing personally identifiable information pursuant to a valid subpoena. This is designed to protect students from improper disclosure of personally identifiable information. However, nothing in FERPA precludes Marshall from contesting the validity of such a subpoena. See 34 C.F.R. 99.31(a)(9) (“An educational agency or institution **may** disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions: (9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena ... (ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action”)

Typically, civil litigants have already identified the student about whom they seek personally identifiable information pursuant to a subpoena. Here, Plaintiffs would obtain information not just about the John Doe defendants, but also about individuals who may have no involvement in the alleged infringement activity giving rise to Plaintiffs' lawsuit. Marshall must be overly sensitive to information it supplies in response to the subpoena. If it is not extremely careful it could subject an innocent party to unnecessary legal fees and emotional distress. Indeed, Marshall would need to conduct an investigation to determine whom to notify, an investigation not required by FERPA or

any other law. As Congress has enacted special legislation to protect students' privacy rights in their educational records and charged Marshall with protection of those rights, it is imperative that Marshall examine the burdens imposed by subpoenas for educational records closely and to challenge them where appropriate. Marshall has chosen to challenge Plaintiffs' overbroad and burdensome subpoena as allowed by the Federal Rules of Civil Procedure: this position is in no way inconsistent with its obligations under FERPA.

MARSHALL MADE A GOOD FAITH ATTEMPT TO RESOLVE

Plaintiffs incorrectly assert that Counsel for Marshall University ("Marshall") failed to sufficiently confer before the filing of Marshall's Motion to Quash on February 28, 2008, ("Had Marshall been willing to engage in a meaningful dialogue prior to filing its motion to quash...") *Opposition*, p. 8. Counsel for Marshall did confer with Katheryn Coggon, national counsel for Plaintiffs, in advance of filing the motion. Exhibit 1. Indeed, Ms. Coggon's own Declaration in support of Plaintiffs' "*Opposition to Motion to Quash Subpoena Pursuant to FRCP 45(B)(3)(a) by Marshall University*" clearly states that she spoke with Counsel for Marshall by phone on November 8, 2007, upon learning that "the University was planning on objecting to Plaintiffs' subpoena." *Opposition*, Exhibit D, p 2. However, Ms. Coggon's characterizations of those conversations revolved around Marshall voluntarily providing the documents and its reimbursement for the costs associated therewith. *See Exhibit 2*. Ultimately, in light of the litigation that was taking place across the country with regard to similar subpoenas, it was Marshall's determination that it could not agree to voluntarily disclose the information under any set of circumstances. Therefore, Ms Coggon was advised that Plaintiffs would be required to subpoena the information with Marshall reserving its right to object thereto.

CONCLUSION

Marshall respectfully requests that this Court quash the subpoena or, in the alternative, that it order that the subpoena be reissued to require Marshall only “to identify the individual that is assigned a network identity that was used to access the network that allows the machine to request an internal IP address of the network.”

Further, Marshall would request that it be given sufficient time to give the identified students thirty (30) days’ notice pursuant to the FERPA requirements before disclosing the same.

Dated this 24th day of March, 2008.

Respectfully submitted,

MARSHALL UNIVERSITY BOARD OF
GOVERNORS/MARSHALL UNIVERSITY,

By Counsel,

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Plaintiffs,

v.

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

DOES 1-7,

Defendants.

I hereby certify that on March 25, 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:

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

MARSHALL UNIVERSITY BOARD OF
GOVERNORS/MARSHALL UNIVERSITY,

By Counsel,

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