

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ARISTA RECORDS, LLC, et al.)
)
)
 Plaintiffs,)
)
 v.) **CIVIL NO. 1:07-cv-00162-JAW**
)
 DOES 1-27,)
)
 Defendants.)
_____)

**DEFENDANT DOES #16 and #18's MOTION FOR SANCTIONS PURSUANT TO
RULE 11 WITH INCORPORATED MEMORANDUM OF LAW**

MOTION

Defendant Does #16 and #18, through their undersigned counsel, file this Motion seeking sanctions against Plaintiffs Arista Records, LLC et al. pursuant to Rule 11 of the Federal Rules of Civil Procedure. As set forth in the Memorandum of Law incorporated herein, Plaintiffs' Complaint for Copyright Infringement violates Rule 11(b) in two ways. First, it violates Rule 11(b)(1) because Plaintiffs have filed the Complaint solely for the improper purpose of obtaining discovery of confidential educational records. Second, the Complaint violates Rule 11(b)(3) because Plaintiffs have no good faith evidentiary support for why all Plaintiffs and all Defendants should be joined under Rule 20 of the Federal Rules of Civil Procedure. As a result of these violations, Defendant Does #16 and #18 seek sanctions against Plaintiffs and their attorneys, including dismissal of the Complaint with prejudice, an injunction enjoining Plaintiffs from filing additional identical actions, and monetary sanctions including an award of counsel

fees and expenses along with any additional amount that the court deems necessary to deter repetition of the same improper conduct.

MEMORANDUM OF LAW

A. Plaintiffs Filed The Complaint for the Improper Purpose of Obtaining Discovery As Opposed to the Only Proper Purpose of Vindicating Their Rights.

Rule 11 imposes a duty on attorneys who sign complaints or other filings “to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and ‘not interposed for any improper purpose.’”

Cooter & Gell v. Harmarx Corp., 496 U.S. 384, 393 (1990) (quoting Fed. R. Civ. P. 11(b)(1)).

To enforce this duty, the rule permits a court to impose sanctions on a party or lawyer for advocating a frivolous position, pursuing an unfounded claim, or filing a lawsuit for an improper purpose. Lichtenstein v. Consol. Servs. Group Inc., 173 F.3d 17, 22 (1st Cir. 1999) (citing to Fed. R. Civ. P. 11(b)). Rule 11 defines the term “improper purpose” to include “to harass or to cause unnecessary delay or needless increase in the costs of litigation.” Fed. R. Civ. P. 11(b)(1). However, such purposes are not the exclusive improper purposes prohibited by the rule. If a complaint is not filed to vindicate a plaintiff’s rights in court, its purpose is improper per se, and sanctions under Rule 11(c) are warranted. *See In re Kunstler*, 914 F.2d 505, 518 (4th Cir. 1990) (holding that “the purpose to vindicate rights in court must be central and sincere” in order to avoid a finding of improper purpose).

Plaintiffs here have filed a Complaint that makes broad, general allegations of copyright infringement against 27 unnamed Defendants whose only connection is the alleged use of the same Internet Service Provider. (Compl. ¶¶ 2, 19.) Plaintiffs do not explain in their Complaint

how the alleged conduct of Defendants amounts to copyright infringement. They merely allege that all Defendants “used an online media distribution system to download and/or distribute to the public certain Copyrighted Sound Recordings.” (Compl. ¶ 24.) In a document filed with the Complaint, Plaintiffs refer to something called a “P2P Network,” and they name two different types, “Gnutella” and “AresWarez.” (Exhibit A to AO Form 121.) However, they do not explain what these networks are or how they work.

Plaintiffs’ sole purpose in filing this action, based merely on conclusory allegations, is to obtain an *ex parte* order to seek immediate discovery that would otherwise be protected by the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g(b)(2)(B) (“FERPA”). Once Plaintiffs are successful in obtaining federally-protected, private information about Defendants, they will voluntarily dismiss the Complaint, and then use that information to demand settlement amounts from the individual student-defendants far in excess of Plaintiffs’ actual damages. *See* Memorandum in Support of Motion to Dismiss of Various Does at 4-5. Plaintiffs make no secret of their scheme. In a recent filing with this Court, they defended their deliberate misuse of the judicial system by arguing:

In hundreds of cases that are virtually identical to this one, Plaintiffs have filed a copyright infringement lawsuit against Doe Defendants and sought leave to take immediate discovery so that they can learn their real identities. After Plaintiffs learn the identity of the Doe Defendants, many of the cases settle for amounts well below the minimum statutory damages.

Plaintiffs’ Response in Opposition to Defendant Does #16 and #18’s Objection to Recommended Dec. on Motion to Dismiss at 2. Plaintiffs’ deliberate misuse of the judicial system by using a Complaint, containing nothing but blanket assertions, to gain access to otherwise shielded information wastes judicial time and resources and supports a finding of improper purpose. *See In re Kunstler*, 914 F.2d at 519.

In Kunstler, the plaintiffs sued various government officials alleging improper state criminal prosecution and harassment. Id. at 510. The plaintiffs, like Plaintiffs in the present action, sought expedited discovery to obtain information about the state criminal proceeding to which they otherwise would not have access. Id. at 512. Nearly three months after filing the complaint and after receiving the discovery, the plaintiffs voluntarily dismissed the complaint after supposedly “reevaluating [the complaint’s] viability.” Id. The defendants subsequently filed a Rule 11 motion seeking sanctions on various grounds, including improper purpose. Id. The United States Court of Appeals for the Fourth Circuit upheld a finding of improper purpose noting that the plaintiffs’ attorneys never intended to litigate the action, but were using the complaint for other purposes, including to gain publicity, embarrass state and county officials and obtain discovery for use in criminal proceedings. Id. at 519. The Fourth Circuit concluded that a finding that the plaintiffs’ counsel never intended to litigate the action “is the one which most clearly supports sanctions based on a finding of improper purpose.” Id.

Plaintiffs in the present action have similar motives to those in Kunstler, including obtaining discovery and gaining publicity. Additionally, instead of seeking to embarrass defendants as was done in Kunstler, Plaintiffs here are using the Complaint as a vehicle to obtain information that will allow them to intimidate Defendants into paying excessive (in light of Plaintiffs’ actual damages) settlement amounts. Since 2003, Plaintiffs have engaged in a nationwide, systematic and coordinated campaign of copyright infringement litigation and settlement collection. Like the dozens of nearly identical complaints filed across the country, the central purpose of the present Complaint against 27 unnamed college students, about whom Plaintiffs know nothing but a set of numbers allegedly assigned to computers somehow linked to

the University of Maine, is to subpoena the University to obtain confidential education records held by the University.

Under FERPA, the University is prohibited from releasing any “personally identifiable information records” about students unless “such information is furnished in compliance with a judicial order, or pursuant to any lawfully issued subpoena.” 20 U.S.C. §1232g(b)(2)(B). The central aim of FERPA is “the protection of privacy of parents and students.” 34 C.F.R. § 99.2 (2006). Plaintiffs acknowledge in their *Ex Parte* Motion that colleges and universities are “concern[ed] about their obligations under FERPA,” although they do not concede that the information sought is protected by the law. *See* Plaintiffs’ *Ex Parte* Motion for Leave to Take Immediate Discovery at 9. Rather, as they argue in their Response in Opposition to Defendant Does #16 and #18’s Objection to Recommended Decision on Motion to Dismiss (Response to Objection), they claim to seek merely “directory information,” the disclosure of which does not require a subpoena under FERPA. *See* Response to Objection at 6-7.

However, Plaintiffs’ “directory information” argument is misplaced and is based on a reading of FERPA that thwarts the statute’s central aims. “Directory information” may include a student’s name, address, telephone listing and e-mail address, 20 U.S.C §1232g(a)(5)(A), or other information that would “generally be considered harmful or an invasion of privacy if disclosed.” 34 C.F.R. § 99.3 (2006). Plaintiffs’ subpoena requires the University to provide the “name, address, telephone number, e-mail address, and media access control addresses” of students whose Internet Protocol (IP) address are listed. *See* Order Re: Expedited Discovery. Compelling the University to link a specific student with a specific IP (or Media Access Control (MAC)) address is no different from obtaining the IP and/or MAC addresses associated with a list of names. Courts must consider what other information will become available by the release

of the requested information. If “directory information” is linked to non-directory information, as is the case here, a University may not disclose it without a judicial order or lawfully issued subpoena. IP and MAC addresses can be used to discover a great deal of information about an individual, including her e-mail uses, credit transactions, website history and her whereabouts at a particular time.¹ Therefore, the information sought by Plaintiffs would “generally be considered harmful or an invasion of privacy if disclosed” and clearly does not fall into the category of “directory information.”

Further, the reference to “names” in the definition of “directory information” does not mean that a University may turn over the otherwise unknown *identities* of students. For example, in a case decided by the U.S. District Court for the Middle District of Pennsylvania, a former student of Pennsylvania State University filed an action against the University and served it with interrogatories. Naglak v. Penn. State. Univ., 133 F.R.D. 18, 22 (M.D. Pa. 1900). The University refused to answer one of the interrogatories because it requested the names and addresses of students who transferred in and out of the University from 1981 to 1989, along with the name of the school from which the students transferred, the exams the students took to transfer and the school that sponsored them for the exam. Id. The University argued that the requested information was confidential and protected by FERPA. Id. The Court agreed and ruled that the University only had to release the information in statistical, summary form, providing everything *but* the students’ names and addresses. Id. at 24. In another case, St. Joseph’s University sought a protective order under FERPA to prohibit the plaintiff from acquiring the names, addresses, social security numbers and dates of birth of students believed to have

¹ The U.S. Court of Appeals for the Seventh Circuit has noted the difference between an IP address and a MAC address, explaining that a MAC address is a “unique number assigned to the hardware of a particular computer,” and an IP address is a number that “identifies a computer or device attached to a network.” U.S. v. Schuster, 467 F.3d 614, 618 nn.1-2 (7th Cir. 2006).

witnessed an accident involving the Plaintiff. Victory Outreach Ctr. v. Philadelphia, 233 F.R.D. 419, 420 (E.D. Pa. 2005). The court ruled that pursuant to FERPA the University could release the “personally identifiable information,” but only because it had been subpoenaed. Id. Such measures would not have been required if the identities were merely directory information.

Plaintiffs, therefore, need to subpoena the University of Maine to identify Defendants, and that is the only reason they filed the present action. Once Plaintiffs gain access to the identities of the individuals whose computers are attached to these addresses, they will simply dismiss the Complaint, as they have done repeatedly and consistently in cases against university students across the country, including cases in this Court on three prior occasions. *See, e.g.*, Arista Records, et al. v. Does 1-3, 2:07-CV-210-GZS (D. Me. Nov. 28, 2007); Maverick Records, et al. v. Does 1-5, 2:07-CV-91-DBH (D. Me. May 17, 2007); and Atlantic Recording Corp., et al. v. Does 1-22, 1:07-cv-057-JAW (D. Me. May 7, 2007); *see also* Exhibit A to Plaintiffs’ Response in Opposition to Defendant Does #16 and #18’s Objection to Recommended Dec. on Motion to Dismiss.

Since the purpose of sanctions under Rule 11 is to deter future violations, it is appropriate for the Court to take notice of Plaintiffs’ conduct in other proceedings in determining whether and what types of sanctions should be imposed. *See, e.g.*, Kramer v. Tribe, 52 F.3d 1351 (3d Cir. 1998); White v. General Motors Corp., 977 F.2d 499, 502 (10th Cir. 1992). At least one other District Court has noted, Plaintiffs have repeatedly and consistently used the federal courts not as a venue to litigate their cases but as a “hammer...to pound settlements out of unrepresented defendants.” Elektra v. O’Brien, No. 2:06-cv-05289-SJO (C.D. Cal. March 2, 2007).² They also have improperly used the lawsuits—and the publicity surrounding them—to send a message to

² This decision is available at www.ilrweb.com/viewILRPDF.asp?filename=elektra_obrien_070302Decision (last visited March 6, 2008).

the public. In 2005 the Recording Industry Association of America (RIAA), the trade organization directing this campaign of litigation, announced its plans to “expand the scope” of the lawsuits, and RIAA’s president, Cary Sherman, stated, “[t]hese lawsuits have had a significant educational impact on the public and have helped to arrest the staggering growth of digital music theft. We will continue to aggressively pursue them.” Press Release, RIAA, RIAA Expands Scope of Illegal File-Sharing Lawsuits Against Student Abusers of Internet (May 26, 2005).³ Plaintiffs’ repeated and continued misuse of the federal courts to obtain confidential information, coerce settlements and gain publicity is a clear violation of Rule 11. Sanctions are necessary to stop Plaintiffs from continuing to use spurious complaints for these improper purposes.

B. Plaintiffs Lack Evidentiary Support to Justify Joinder of Plaintiffs and Defendants.

In addition to violating Rule 11(b)(1) by filing a Complaint for improper purpose, Plaintiffs have violated Rule 11(b)(3) by joining Plaintiffs and Defendants without any good faith evidentiary support for why they should be allowed to do so under Federal Rule of Civil Procedure 20. Multiple plaintiffs can join in one action if “they assert any right to relief jointly, severally, or in the alternative with respect or arising out of the same transaction, occurrence, or series of transactions or occurrences...and any question of law or fact common to all plaintiffs will arise in the action.” Fed. R. Civ. P. 20(a). Similarly, a plaintiff can join multiple defendants in one action if “any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transaction or

³ This press release is available at http://www.riaa.com/newsitem.php?news_year_filter=2005&resultpage=8&id=22BFO4EC-6EF3-27C2-3B63-FE429B8D43F4 (last visited March 6, 2008).

occurrences . . . and any question of law or fact common to all defendants will arise in the action.” Id.

The allegation that 25 of the 27 Doe Defendants used a network called “Gnutella” to somehow infringe Plaintiffs’ copyrights does not meet these requirements. Mere allegations of similar acts violating the same law do not create the common nexus of facts required to meet the transaction test set forth in Rule 20. The Complaint does not set forth any specific factual allegations that Defendants acted in concert in conducting the offending actions or that the infringing actions themselves are related in any way. Plaintiffs have improperly joined Defendants, not because they sincerely believe that all of the claims arise from the same series of transactions or occurrences, but because their overall scheme involves a calculated effort to limit their filing fees and make their discovery work (consisting entirely of subpoenaing the University of Maine System to gain access to Defendants’ confidential information) more manageable for them.

Additionally, Plaintiffs assert no allegations to explain why they, a group of eighteen recording companies incorporated and doing business in various different states, meet the “same transaction [or] occurrence” test. In fact, the only reason Plaintiffs are joined is because at least one of the 27 Defendants have allegedly infringed at least one copyright allegedly owned by each Plaintiff. As an example, Plaintiffs allege that Doe #16 possesses 192 audio files, and provides a list of seven specific files that were allegedly downloaded and/or distributed illegally. (Compl. Exhibit A.) Plaintiffs identify the copyright owners of those seven files as BMG Music, Arista Records, Warner Bros. Records and Atlantic Recording Corp. Id. The Complaint makes no specific allegations as to how Doe #16 infringed the copyrights of the other fourteen Plaintiffs.

The fact that Plaintiffs are all owners of copyrighted sound recordings is insufficient for permissive joinder.

This flagrant disregard of the joinder rules has been the common practice of Plaintiffs, despite rulings from several district courts that have dismissed the claims against all but the first “Does” and, in at least one case, ordered them to show cause why certain Plaintiffs should not be dismissed for improper joinder. *See, e.g., LaFace Records v. Does 1-38*, 5:07-CV-298-BR, 2008 U.S. Dist. LEXIS 14544 (E.D.N.C. Feb. 27, 2008); *BMG Music v. Does 1-4*, 3:06-cv-01579-MHP, 2006 U.S. Dist. LEXIS 53237 (N.D. Calif. July 31, 2006); *BMG Music v. Does 1-203*, 04-CV-650, 2004 WL 953888 (E.D. Pa. April 2, 2004); *Interscope Records v. Does 1-25*, 06:04-cv-197-Orl-22DAB, 2004 U.S. Dist. LEXIS 27782 (M.D. Fla. April 1, 2004); and *Sony BMG Music Entm’t v. Does 1-5*, No. 2:07-cv-02434 (C.D. Cal. Aug. 2, 2007) (dismissing all but first defendant and ordering plaintiffs to show cause why certain plaintiffs should not be dismissed as improperly joined).

Despite unambiguous directives from the federal courts, Plaintiffs continue to disregard the rules of joinder. Recently, the same Plaintiffs represented by the same counsel filed an *identical* Complaint and Motion for *Ex Parte* Order against *another* fourteen individuals who are allegedly University of Maine students. *Atlantic Recording Corp., et al. v. Does 1-14*, 1:08-cv-00028-JAW (D. Me. Jan. 30, 2008). This is precisely why this Court must do more than simply order Plaintiffs to sever Defendants. The Court can and should find Plaintiffs’ actions to be in violation of Rule 11 and impose sanctions that are certain to put an end to their tactics.

C. Appropriate Sanctions Include Dismissal with Prejudice; An Injunction Enjoining Plaintiffs from Filing Future Identical Actions; and Fines.

Rule 11 dictates that “a sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly

situated.” Fed. R. Civ. P. 11(c)(2). It further states that “[t]he sanction may consist of, or include, directives of a nonmonetary nature.” *Id.* This Court has ruled that “any sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.” Gorman v. Coogan, 03-173-P-H, 204 WL 2713095, at *28 (D. Me. Nov. 24, 2004). However, in choosing the appropriate sanction, the U.S. Supreme Court has given lower courts broad discretion. Cooter & Gell, 496 U.S. at 400 (quoting Fed. R. Civ. Pro. 11 advisory committee’s notes). The U.S. Court of Appeals for the First Circuit has ruled that courts confronted by sanctionable conduct should consider the purpose to be achieved by a given sanction and then craft a sanction adequate to serve that purpose. Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir.), *cert. denied*, 498 U.S. 891, 112 L. Ed. 2d 193, 111 S. Ct. 233 (1990). In the present action, a combination of sanctions are appropriate, and in fact necessary, to prevent Plaintiffs (eighteen major recording companies with vast financial resources) from thwarting the privacy rights of the student-Defendants; to compensate Defendants for the litigation abuse; and, most importantly, to deter Plaintiffs from committing future violations.

1. Dismissal with Prejudice

It is well within the district court’s discretion to dismiss a complaint with prejudice as a sanction for Rule 11 violations. *See* Sevigny v. Bush, 2004 U.S. District Lexis 2933, at *6 (D. Me. Feb. 26, 2004) (recommending dismissal as an appropriate sanction for a Rule 11 violation); *see also* Green v. Dorrell, 969 F.2d 915, 917 (10th Cir. 1992); Carman v. Treat, 7 F.3d 1379, 1382 (8th Cir. 1993). In fact, in this case, dismissal with prejudice is the most appropriate remedy for two reasons.⁴

⁴ On November 14, 2007, Defendant Does #16 and #18 filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted under the standards set

First, anything short of dismissal will allow Plaintiffs to proceed with their plan to use complaints, containing nothing but general, bald assertions, to thwart the privacy rights for college students established by Congress and enforced by the United States Department of Education. Once the subpoena on the University is enforced, and Plaintiffs obtain the information that they need, they will voluntarily dismiss the Complaint. Although, in some cases, voluntary dismissal can prevent a Rule 11 violation, this case is different. *See* Fed. R. Civ. P. 11(c)(1)(A) (requiring the movant to wait twenty-one days after serving a motion for sanctions on opposing counsel in order to give opposing counsel time to withdraw or appropriately correct their error). In this case, the voluntary dismissal is essentially evidence of the Rule 11 violation itself. The object of the improper filing will have been fulfilled by the time of dismissal.

Second, Plaintiffs have proven a steadfast determination to continue with their campaign as planned despite warnings from other courts about improper conduct, including improper joinder. Plaintiffs' litigation—or better yet, lack of litigation—history is proof that their entire scheme is designed to maneuver and manipulate the court system in order to achieve their goals as efficiently and inexpensively as possible. Considering Plaintiffs' past conduct in Maine and other districts, dismissal with prejudice is the sanction that will achieve Rule 11's primary goal of deterrence.

2. An Injunction Enjoining the Plaintiffs from Filing Future Identical Actions

In addition to requesting that the Complaint be dismissed with prejudice, Defendants ask that the Court order Plaintiffs to refrain from filing additional copyright infringement complaints against other unnamed and unconnected defendants for the sole purpose of obtaining expedited discovery. Nothing in Rule 11 limits the number or type of sanctions that may be appropriate, as

forth in Bell Atlantic v. Twombly, 127 S.Ct. 1995 (2007). That Motion is pending in this Court. Rule 11 provides an additional, alternative basis to dismiss Plaintiffs' Complaint with prejudice.

long as “the punishment [is] reasonably suited to the crime.” Anderson, 900 F.2d at 395.

Injunctions against future filings are permitted as long as they are tailored to protect the courts and innocent parties, while preserving the legitimate rights of the litigants. *See, e.g., Ferguson v. MBank Houston*, 808 F.2d 358, 360 (5th Cir. 1986) (holding that the “court's power to enter such orders flows not only from various statutes and rules relating to sanctions, but the inherent power of the court to protect its jurisdiction and judgments and to control its docket.”).

Considering that the primary purpose of Rule 11 is to deter future violations, the Court can and should view the present Complaint in light of the hundreds of other identical ones filed before and after it by the same Plaintiffs. An appropriate sanction should not only dismiss the present Complaint but it also should chill the type of “litigation” involved. An injunction barring Plaintiffs from filing Complaints against unconnected defendants and/or for the sole purpose of obtaining an *ex parte* order to take immediate discovery will achieve this objective.

3. Monetary Sanctions

Lastly, Defendants ask the Court to impose monetary sanctions against Plaintiffs and their counsel in order to compensate Defendants for their attorneys’ fees and costs and punish Plaintiffs for their abusive tactics. While Rule 11 authorizes courts “to assess attorney's fees against a party and/or his attorney who irresponsibly initiates and/or litigates a cause of action,” Ballard’s Serv. Ctr. v. Transue, 865 F.2d 447, 449 (1st Cir. 1989), it also permits “imposition of additional fines designed to discourage dilatory and abusive tactics,” Cheek v. Doe, 828 F.2d 395, 397 (7th Cir. 1987). Given that all Defendants named in this action are college students with limited financial resources compared to those of the Plaintiffs, a sanction consisting of attorney’s fees is warranted. Additionally, Defendants request the imposition of any additional fine that the Court deem necessary to serve Rule 11’s punitive and deterrent purposes.

CONCLUSION

For all of the reasons discussed above, Defendant Does #16 and #18 ask the Court to find Plaintiffs in violation of Rule 11 for improper purpose and improper joinder. As sanctions for these violations, Defendant Does #16 and #18 ask the Court to dismiss the Complaint with prejudice, order Plaintiffs to refrain from filing future identical actions and impose monetary sanctions sufficient to compensate Defendants for their attorney's fees and costs and to serve the other goals of Rule 11.

Respectfully submitted,

Dated: March 31, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2008, I served, electronically and via regular mail, James S. LaMontagne, Esq. with Defendant Does #16 and #18's Motion for Sanctions Pursuant to Rule 11 with Incorporated Memorandum of Law. Pursuant to Rule 11(c)(1)(A) of the Federal Rules of Civil Procedure, Defendants gave Plaintiffs 21 days to withdraw the Complaint. Plaintiffs have not withdrawn the Complaint. I now hereby certify that on March 31, 2008, I electronically filed Defendant Does #16 and #18's Motion for Sanctions Pursuant to Rule 11 with Incorporated Memorandum of Law using the CM/ECF system which will send notification of each filing to the following: James S. LaMontagne, Esq., Robert E. Mittel, Esq., Paul Chaiken, Esq.

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