

**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; PRIORITY RECORDS LLC, 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,

CIVIL ACTION NO. 3:07-0649

Plaintiffs,

v.

DOES 1 - 7,

Defendants.

**PLAINTIFFS' OPPOSITION TO MOTION TO QUASH SUBPOENA PURSUANT  
TO FRCP 45(c)(3)(A) BY MARSHALL UNIVERSITY**

Plaintiffs, through their undersigned counsel, hereby submit this opposition to the Motion to Quash Subpoena Pursuant to FRCP 45(B)(3)(a) by Marshall University. For the reasons more fully set forth below, the Motion should be denied.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs are facing a problem of piracy that the United States Supreme Court has described as “infringement on a gigantic scale.” See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 940 (2005). This epidemic of piracy on the Internet has spread to Marshall University (the “University”) where the seven Defendants in this case attend school. As noted in the Complaint, these seven Defendants alone have collectively infringed on at least 47 of Plaintiffs’ copyrighted sound recordings (See Exhibit A to the Complaint), unlawfully downloading and distributing those recordings as well as thousands of other recordings to millions of other users. Among the well-known artists whose works were infringed are the Eagles, Dave Matthews Band, Bryan Adams, and Rod Stewart.

In this case, Plaintiffs are seeking to protect and enforce their exclusive rights under the Copyright Act and to seek redress for the theft of their intellectual property. To do that, Plaintiffs need to find out who the Defendants are – their names and addresses, in particular. Thus, Plaintiffs sought leave from this Court to subpoena the University for the identifying information about the Defendants. The discovery sought was narrowly tailored to allow Plaintiffs to proceed with the litigation. Absent the identifications, Plaintiffs cannot serve the Defendants and protect their copyrights. Moreover, there is no indication that the infringement has stopped. By filing its motion to quash the subpoena, the University actually protects the copyright infringers, allowing them to continue unchecked with the unlawful activity. This Court should reject the University’s effort to permit their students to infringe unabated.

The University alleges (1) the subpoena is unduly burdensome and overbroad; (2) the University will preserve the evidence in question; (3) the information sought by the subpoena is protected under the Family Educational Rights and Privacy Act (“FERPA”); and (4) the Digital Millennium Copyright Act (“DMCA”) somehow precludes Plaintiffs from seeking the information through a Rule 45 subpoena. (*See Memorandum in Support of Motion to Quash Subpoena Pursuant to FRCP 45(B)(3)(a) By Marshall University (University’s “Supporting Brief”), Doc. No. 15, p. 2.*) Each of these assertions is without merit.

First, the University’s argument that the subpoena is unduly burdensome and overbroad should be rejected. The University’s interpretation of the subpoena language is wrong (and both the University and the Attorney General’s office know that). In fact, in an almost identical case where Marshall University was the ISP, the West Virginia Attorney General’s office responded to a virtually identical subpoena. *See Subpoena Response dated June 14, 2007, Sony BMG Music Entertainment v. Does 1-12, Civ. Action No. 3:07-cv-00232 (S.D.W.V. 2007) attached as Exhibit A.* Indeed, hundreds of universities and dozens of commercial internet service providers have responded to the exact same subpoena without breadth or burden concerns. As evidenced by the affidavit submitted by the University with its Supporting Brief, it appears the University has already done all of the work necessary to provide a sufficient subpoena response.

Second, the University argues that the subpoena should be quashed because the University supposedly represented to Plaintiffs that the University would preserve the evidence sought by the subpoena. This is a red herring. Even if the University were to preserve the identifying information indefinitely, the fact that the University refuses to

share the identifications with Plaintiffs effectively prevents Plaintiffs from enforcing their copyrights. Meanwhile, Defendants continue to infringe. In any event, Plaintiffs' request for expedited discovery was not based solely on the risk of Defendants' identifying information being destroyed. The Court here found good cause to allow expedited discovery. (Doc. No. 9, p. 1-2.) As this Court correctly recognized, Plaintiffs' *ex parte* request for expedited discovery satisfies the good cause standard in light of (1) the allegations of Plaintiffs' Complaint; (2) the harm to Plaintiffs of having Defendants infringe thousands of Plaintiffs' copyrighted works; (3) Plaintiffs' inability to pursue their claims against Defendants absent expedited discovery; (4) the opportunity that Defendants will have to defend against Plaintiffs' claims at the appropriate time; (5) the low burden on the University of complying with the discovery order; and (6) the limited nature of the information requested. Here, the *only* entity that can identify Defendants is the University. If Plaintiffs do not obtain the discovery they seek from the University, Plaintiffs will be unable to pursue their claims against Defendants in this or any other court, and Defendants will be immunized from liability for their substantial infringing activities. This is simply not the law.

Third, the University argues that Defendants' identifying information is protected under FERPA. This argument fails as well. The information sought by the subpoena is "directory information" as defined in the statute and can lawfully be disclosed provided the University gives notice to Defendants prior to complying with the subpoena. Since the University can easily provide to Defendants the requisite notice, there can be no doubt that disclosure is appropriate here. Moreover, the information is being sought

using a valid subpoena, thereby eliminating any FERPA concerns since FERPA does not prohibit the University from complying with a subpoena.

Finally, the DMCA was not the basis for Plaintiffs' subpoena in this case. Plaintiffs here are seeking discovery under Fed. R. Civ. P. 26 and 45 and the Court's Order granting leave, which explicitly authorized the discovery that Plaintiffs seek in this case. The DMCA does not preempt Fed. R. Civ. P. 45. Thus, the University's argument regarding the requirements for the issuance of a subpoena under the DMCA is irrelevant to any issue before this Court.

### **BACKGROUND**

As Plaintiffs discussed in their *Ex Parte* Application for Expedited Discovery (Doc. No. 3, "Discovery Motion"), every month copyright infringers like the Defendants in this case unlawfully distribute billions of perfect digital copies of Plaintiffs' copyrighted sound recordings over peer-to-peer ("P2P") networks. *See* Lev Grossman, *It's All Free*, Time, May 5, 2003. As a direct result, Plaintiffs have and continue to sustain substantial financial losses.

P2P users who distribute (upload) and copy (download) copyrighted material violate the copyright laws. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. at 918-923 (noting that users of P2P networks share copyrighted music and video files on an enormous scale, and, as such, even the providers of those networks "concede infringement" by the individual users); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003). Despite the clear violation of copyright laws, copyright infringement over P2P networks is widespread because users can conceal their identities by means of an alias. Thus, copyright owners can observe infringement occurring on P2P

networks but cannot (without assistance from the courts) identify the true names and locations of the infringers.

Defendants in this case are all active participants on the same P2P network, AresWarez, distributing copyrighted sound recordings stored on their computers to, and downloading copyrighted sound recordings from, the millions of other users of the P2P network. Plaintiffs discovered each of the Defendants openly distributing sound recordings whose copyrights are owned by Plaintiffs by logging onto the P2P network and viewing the files that Defendants were distributing to other users. The Defendants in this case are significant infringers. They have chosen to distribute from their computers over 4,300 audio files whose copyrights are by and large owned by various of Plaintiffs. (*See Exhibit A to the Complaint.*)<sup>1</sup> In conjunction with the Complaint filed in this case, Plaintiffs listed a sample of the sound recordings that each Defendant was distributing without authorization, collectively 47 sound recordings. (*See id.*)

As previously discussed in the Linares Declaration filed with the original Discovery Motion, upon finding Defendants distributing large numbers of copyrighted works, Plaintiffs gathered substantial evidence of Defendants' illegal conduct. Plaintiffs could not ascertain Defendants' names, addresses, or any other contact information, but they could identify the Internet Protocol ("IP") addresses from which Defendants were unlawfully distributing Plaintiffs' copyrighted works. *See Linares Decl.* ¶ 18. Using the IP addresses, Plaintiffs determined that Defendants were using the University's internet service to distribute copyrighted works unlawfully. *Id.* The University maintains logs

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<sup>1</sup> Exhibit A to the Complaint shows that each of the Defendants in this case is actively distributing 100 or more audio files, most are actively distributing several hundred audio files, and one Defendant is actively distributing more than 1,200 audio files.

that match IP addresses with their users' computer hardware, *id.* at ¶ 12, with a specific dorm room, or with a registered username associated with a given IP address at a certain time. (*See* Supporting Br., pp. 3-5.) Thus, the University can match the IP addresses, dates, and times with the individuals responsible for the internet connection when Plaintiffs' investigators observed the infringements by looking at its IP address logs. It is precisely this information, which the University admittedly has, that Plaintiffs are seeking by way of the subpoena at issue. The fact is, the University—and only the University—can provide this information, which will allow Plaintiffs to identify the Defendants in this case.

### **ARGUMENT**

**I. THE SUBPOENA DOES NOT PLACE AN UNDUE BURDEN ON THE UNIVERSITY, REQUIRES NO INVESTIGATION BEYOND LOOKING UP INFORMATION THAT THE UNIVERSITY ADMITS IT HAS, AND IS NARROWLY TAILORED.**

The University argues that the subpoena is unduly burdensome and should be quashed and that the University should not be required to provide *any* identifying information for any of the Defendants because the University allegedly cannot determine, without further investigation, precisely which user was actually responsible for the infringement alleged in the Complaint. (*See* Supporting Br., pp. 3-5.) The University also argues that the subpoena is overbroad because it “appear[s] to encompass the contact information” of individuals other than the Defendants, including possibly University employees. (*Id.* at p. 5.) These arguments misconstrue the subpoena. Plaintiffs are seeking only information sufficient to identify the person or persons responsible for each IP address at the date and time listed in the subpoena—information that the University

admits it already has. The Court should reject the University's attempt to re-interpret the subpoena language so as to avoid complying with it altogether.

Contrary to the University's assertions, the subpoena does not require the University to "affirmatively investigate potential copyright infringement by its users." (Supporting Br., p. 3.) Nor does the language of the subpoena "encompass the contact information of witnesses not engaged in the alleged infringement," or "include employees of [the University's] information technology department." (*Id.* at p. 5) As discussed in more detail below, the subpoena seeks a limited amount of identifying information for each Defendant sufficient to identify the persons associated with each IP address listed in the subpoena at the date and time of infringement. Moreover, the University concedes that it already has this information. Had the University been willing to engage in a meaningful dialogue prior to filing its Motion to Quash, Plaintiffs would have been able to clarify the University's apparent confusion regarding the subpoena language and save the parties and the Court significant time and expense. Instead, the University chose to file a Motion to Quash based on a narrow, hyper-technical reading of the subpoena that the University knows full well is inaccurate. Nevertheless, Plaintiffs were, and remain, willing to work with the University to clarify the scope of the information that Plaintiffs are seeking and, as discussed below, to modify the subpoena language if necessary to give the University the comfort it seeks.

The University contends that the subpoena is unduly burdensome. In its Supporting Brief, the University claims that four of the seven Defendants reside in dormitory rooms with at least one other roommate, two of the seven IP addresses were assigned to single-occupancy dorm rooms, and one Defendant accessed the University's

network through a wireless network or other similar system. (Supporting Br., pp. 3-4.)

The University claims that, in each of these situations, it cannot identify the person actually responsible for the infringement without undertaking additional investigation. (*Id.*, at pp. 4-5.)

The subpoena contains no such requirement. Nor should the University be permitted to stretch its obligations beyond those actually imposed by the subpoena in an effort to avoid responding at all. The University's argument is particularly troubling here because the Attorney General's office represented the University in a similar situation less than a year ago. In *Sony BMG Music Entertainment v. Does 1-12*, Civ. Action No. 3:07-cv-00232 (S.D.W.V. 2007), many of the same plaintiffs in this case filed a similar "Doe" lawsuit, alleging copyright infringement by users of Marshall University's network. As Plaintiffs did here, the plaintiffs in the *Sony BMG Music Entertainment* case issued a subpoena to the school requesting virtually *identical information* to identify the alleged infringer of copyrighted sound recordings. *Compare* Subpoena, Case No. 3:07-cv-00232, attached as *Exhibit B with* Subpoena, Case No. 3:07-cv-00649, attached as *Exhibit C*. In that case, the school provided a subpoena response that identified the individuals responsible for the IP addresses provided and left it to the plaintiffs to conduct additional discovery to determine the actual infringer. *See* Subpoena Response dated June 14, 2007, p. 1, *Exhibit A*. In Marshall University's response to that subpoena, Senior Assistant Attorney General Jendonnae L. Houdyschell, who is acting on behalf of the University here, explained that, "Marshall University has used the provided IP addresses and made its **best guess** with the information available to it, as to whom each IP address belongs." *Id.* Ms. Houdyschell further advised, "Marshall does not warrant

that the individuals identified are the alleged ‘infringers’ as identified in the subpoena.”

*Id.* The Attorney General’s prior position in an almost identical case belies the University’s current assertions of undue burden or that it misunderstands the scope of the subpoena.<sup>2</sup> There is no reason that the University cannot provide the same information in this case, especially in light of the fact that the plaintiffs in the *Sony BMG Music Entertainment* case accepted it as a full and complete compliance with the subpoena. *See* Declaration of Katheryn J. Coggon (“Coggon Declaration”), ¶ 4, attached as *Exhibit D*. The plaintiffs did not raise any objection to the response and did not demand that the school conduct a further investigation to determine which of the room’s occupants actually engaged in the infringement at issue. *Id.* Nor would Plaintiffs do so here. Accordingly, the University’s contention that the subpoena in this case requires the University to conduct an investigation to “conclusively determine the identity of the individuals responsible for downloading material at a specific IP address on the date and time identified by Plaintiffs” in the subpoena is baseless.<sup>3</sup>

Notwithstanding the University’s effort to concoct burdens for purposes of their Motion, the simple fact is that the University concedes that it has in its possession the very information that Plaintiffs are actually seeking in the subpoena. The University

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<sup>2</sup> Indeed, Plaintiffs’ subpoena here alleviates the University’s concerns on its face by stating, “[i]n the event that Marshall cannot link the IP address to a specific individual, provide all documents and electronically-stored information relating to the assignment of the IP addresses.” *Exhibit C* at p. 1.

<sup>3</sup> Even where only one student is assigned to a room or a single username is affiliated with a particular IP address, Plaintiffs still engage in further discussions and/or discovery. In the hundreds of other cases like this one filed around the country, ISPs, both commercial and educational, identify the individual responsible for the IP address at the date and time specified without engaging in the kind of investigation suggested by the University here. Coggon Declaration at ¶ 5, *Exhibit D*.

admits that “authentication via MUNET account” is required to register a computer on its network. (Affidavit of Jan Fox, Attachment No. 3 to Doc. No. 14, ¶ 9.) As a result, when a computer is accessing the University’s network, “[the University can] tell who is responsible for the account . . . .” (*Id.*) In addition, as to the four Defendants who reside in dormitory rooms with at least one other roommate, the University admits that it “can determine which individuals are assigned to a given dorm room where an IP address is used.” (Supporting Br., pp. 3-4.) Likewise, as to the two Defendants who were assigned to a single occupancy room, the University admits that it is “able to identify the registered occupant of the room.” (*Id.* at 4.) Finally, with respect to the Defendant who accessed the University’s network through a wireless network, the University admits that it “can identify a registered username associated with the use” of the network at the date and time of infringement. (*Id.*) As such, notwithstanding the University’s creative arguments to the contrary, the University concedes that it has the information that Plaintiffs actually requested in the subpoena. Accordingly, no investigation is required, and there is no undue burden here.

Finally, Plaintiffs note that they have attempted to work with the University to identify and/or clarify the information being requested and, to the extent necessary, to work with the University to alleviate any concerns regarding the alleged burden of responding to Plaintiffs’ subpoena. Unfortunately, the University did not engage in good faith efforts to resolve these issues prior to filing its Motion to Quash.

On November 8, 2007, counsel for Plaintiffs attempted to confer with the Attorney General’s office regarding the University’s objections to the subpoena. Coggon Declaration at ¶ 7, *Exhibit D*. During that conversation, counsel for Plaintiffs attempted

to clarify the subpoena. *Id.* Plaintiffs’ counsel attempted to resolve the University’s concerns about the subpoena on at least two more occasions. *Id.* at ¶ 8. The University did not accept Plaintiffs’ offers and, instead, chose to file its Motion without attempting to determine whether its reading of the subpoena was in line with Plaintiffs’ expectations. *See id.* Had the University been willing to engage in a meaningful meet and confer prior to filing its motion to quash,<sup>4</sup> Plaintiffs would have been able to clarify the University’s apparent confusion regarding the scope of the information requested by the subpoena.

Plaintiffs believe that the subpoena is clear on its face. To the extent the language is read to require the University to conduct an investigation, then Plaintiffs are willing – and request leave – to amend the subpoena to obviate the confusion. This will fully address the University’s purported concerns that the subpoena is unduly burdensome and overbroad because the amended subpoena would seek only identifying information that the University already has in its possession, which has been Plaintiffs’ intention all along.

For all of the foregoing reasons, the University’s Motion to Quash should be denied, or, in the alternative, Plaintiffs should be permitted to amend the subpoena to request only the information that the University admits that it has regarding the persons associated with or assigned to each of the IP addresses listed in Exhibit A to the subpoena.

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<sup>4</sup> Local Rule 37.1 requires that “counsel for each party shall make a good faith effort to confer in person or by telephone to narrow the areas of disagreement to the greatest possible extent” before filing any discovery motion. It is the responsibility of the moving party to initiate such a meeting. *Id.*

## **II. PLAINTIFFS PRESENTED MYRIAD REASONS THAT ENABLED THIS COURT TO FIND GOOD CAUSE FOR GRANTING THE EXPEDITED DISCOVERY.**

The University next argues that “Plaintiffs obtained an *ex parte* order based on the erroneous representation that the evidence they seek might be destroyed without immediate court intervention” and that the University “has been and will continue to preserve the evidence.” (Supporting Br., p. 3.) The University’s premise is simply wrong.

First, contrary to the University’s suggestion that a motion for expedited discovery may only be granted where the evidence at issue might be destroyed, as stated in Plaintiffs’ motion for expedited discovery, a court may grant expedited discovery to identify the true identities of Doe defendants when, in light of the facts of a particular case, good cause exists. *See LaFace Records, LLC v. Does 1-5*, 2000 U.S. Dist. LEXIS 13638, \*7-\*8 (W.D. Mich. Feb. 22, 2008) (upholding a subpoena under a finding of good cause); *Interscope Records v. Does 1-14*, 2007 U.S. Dist. LEXIS 73627, \*3 (D. Kan. Oct. 1, 2007) (Rule 26(d) “allows a court to order expedited discovery *upon a showing of good cause*”) (emphasis added); *Energetics Sys. Corp. v. Advanced Cerametrics*, 1996 U.S. Dist. LEXIS 2830 at \*5-6 (E.D. Pa. Mar. 8, 1996) (permitting expedited discovery upon showing of good cause). Indeed, Plaintiffs’ Discovery Motion was based primarily on the fact that Plaintiffs have no way of identifying the Doe defendants and, therefore, no way of proceeding with their copyright infringement claims against those Doe defendants, without first obtaining the Doe defendants’ identifying information from the University. (*See* Doc. No. 3, ¶ 4.) In short, contrary to the University’s assertion, Plaintiffs’ Discovery Motion was not based solely on the possibility that the Doe defendants’ identifying information could be destroyed by the University before Plaintiffs

could obtain it. Indeed, Plaintiffs informed the Court in their Memorandum of Law in Support of their Discovery Motion that, prior to filing a lawsuit, “Plaintiffs alert[ed] the ISP to the existence of the copyright claims shortly after identifying the infringing activity and ask[ed] the ISP to maintain the log files.” (Doc. No. 5, p. 3.)

Second, notwithstanding the University’s assertion to the contrary, the University did not state that it would “continue to preserve” the identifying evidence. *See Coggon Declaration*, ¶ 9, *Exhibit D*. Indeed, in its June 14, 2007 response to an identical subpoena in a different lawsuit, Marshall University indicated that it had overwritten identifying evidence for IP addresses the plaintiffs had obtained six months earlier. *See Subpoena Response dated June 14, 2007, for Does 2, 3, and 4, Exhibit A* (“By the time we received the Notification of Copyright Infringement . . . the NetReg log for this mapping from the internal address to the MAC was overwritten and identification [was] not made at that time and is not available for confirmation now.”). In addition, University’s counsel has stated that going forward the University will not preserve information referenced in a preservation notice for longer than six months. *See Letter re RIAA Alleged Copyright Infringement Preservation Notices*, p. 2, attached as *Exhibit E* (“Marshall University will only be able to preserve this information for six (6) months from the date your preservation notice is received . . .”). Finally, based on Plaintiffs’ experience with other universities in similar cases, most schools do not preserve their user log files indefinitely. *See Coggon Declaration*, ¶ 9, *Exhibit D*. Any vague statement in this case that the University would preserve whatever information it had did nothing to lessen Plaintiffs’ need to file the *ex parte* application for expedited discovery.

Finally, the University's assertion that Plaintiffs waited nearly four months to serve their subpoena "despite [Plaintiffs'] concern that evidence would be destroyed without immediate intervention" is misleading. As stated above, Plaintiffs conferred with the University in good faith in an attempt to resolve the University's objections to the discovery from November of 2007 through January of 2008. Once the University rejected Plaintiffs offers on February 1, 2008, and made clear that it wanted to file an objection with the Court, Plaintiffs promptly served the subpoena. *See Coggon Declaration* at ¶ 8, *Exhibit D*. The University should not be permitted to use Plaintiffs' good faith efforts to meet and confer with the University against Plaintiffs.

For all of these reasons, the University's assertion that Plaintiffs have somehow misled this Court is false, and its argument that the subpoena should be quashed because the University agreed to preserve the information for some unspecified period of time is irrelevant.

### **III. THE SUBPOENA DOES NOT SEEK PROTECTED OR CONFIDENTIAL INFORMATION.**

The University next argues that the subpoena should be quashed because FERPA purportedly prohibits disclosure of Defendants' identifying information. This argument fails as a matter of law because the information sought by the subpoena is not protected from disclosure by FERPA.

FERPA expressly authorizes the disclosure of a student's "directory information" *without the prior consent of the student*, as long as certain conditions are met. FERPA defines "directory information" as "information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed." Such information specifically includes the student's name, address, telephone

listing, email address, and other identifying information. *See* 34 C.F.R. § 99.3; *see also* 20 U.S.C. § 1232g(a)(5)(A) (“For the purposes of this section the term ‘directory information’ relating to a student includes the following: the student’s name, address, telephone listing, [and] date and place of birth . . .”). A school may disclose a student’s directory information without the student’s prior consent if (1) the school provides an annual notice of the types of information designated as directory information and gives the students notice of the right and manner in which the student can make a written refusal of the designation, 34 C.F.R. § 99.37(a)(1)-(3), or (2) the disclosure is made in compliance with a lawfully-issued subpoena and if the institution makes a “reasonable effort” to notify the student of the subpoena in advance of compliance. 34 C.F.R. § 99.31(a)(9)(i). *See Arista Records, LLC, v. Does 1-11*, No. CIV-07-568-R, p. 2 (W.D. Okla. Nov. 14, 2007), attached as *Exhibit F*.

Here, the subpoena seeks the names, current and permanent addresses, e-mail addresses, Media Access Control (“MAC”) addresses, and telephone numbers for each Defendant. The MAC address, which identifies the piece of computer hardware used to connect to the school’s network, is not protected by FERPA at all. Each of the other items is explicitly defined under FERPA as directory information. 20 U.S.C. § 1232g(a)(5)(A). Thus, the University is expressly authorized to disclose the requested information without the Defendants’ consent, as long as the University provides the requisite annual notice or the disclosure is made pursuant to a lawful subpoena and proper notice.

Even if the University has not provided the requisite annual notice, as stated above it is still authorized to disclose the requested information in response to a valid subpoena, provided the University notifies the Defendants of the subpoena prior to complying with it. Here, Plaintiffs have served on the University a lawfully-issued subpoena. Although the University contends that its “obligation to notify the affected students and to disclose FERPA-protected records pursuant to Plaintiffs’ subpoena has not been triggered” because of the University’s contention that the subpoena is overbroad and invalid, (Supp. Br., p. 7), if this Court denies the University’s Motion to Quash, the University can easily provide the requisite notice to the affected students prior to complying with the subpoena.<sup>5</sup> Indeed, Plaintiffs encourage such notice.

In any event, FERPA would not prevent the disclosure of the information in response to a Court Order. *See Arista Records, LLC, v. Does 1-11*, No. CIV-07-568-R, *Exhibit F*; *see also* Memorandum Opinion, *Warner Bros. Records Inc., et al. v Does 1-6*, Civ. Action No. 07-1878 (EGS), p. 4 (D.D.C. Nov. 26, 2007) (“Though FERPA generally prohibits disclosure of certain records by federally-funded educational institutions, it expressly provides that protected information can be disclosed pursuant to a court order.”), attached as *Exhibit G*.

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<sup>5</sup> The University’s argument that it “is not able to comply with the notice requirements of FERPA because it is not able to identify the alleged infringers” is meritless because, as discussed above, the University has conceded that it has identified the network users associated with each IP address listed in the subpoena at the relevant date and time of infringement. *See supra*, pp. 10-11. Thus, the University can easily send the requisite notice to those network users.

For all of these reasons, FERPA does not bar disclosure of the information sought by the subpoena.

#### **IV. THE DMCA IS INAPPLICABLE TO PLAINTIFFS' DISCOVERY MOTION.**

Finally, the University argues that "Plaintiffs' Rule 45 subpoena is invalidated by the DMCA," 17 U.S.C. § 512(h), because "[t]he DMCA subpoena is the exclusive subpoena provision available to Plaintiffs to obtain the information they seek in this case." (Supporting Br. at 7.) This argument is frivolous.

Plaintiffs sought, and the Court granted, leave to take expedited discovery pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure. (See Doc. No. 3, ¶¶ 3-4; Doc. No. 9 at 1-2.) Rule 45 indisputably allows for the issuance of a subpoena to an ISP to obtain evidence regarding the identities of the Defendants. See *LaFace Records, LLC v. Does 1-5*, 2008 U.S. Dist. LEXIS 13638, \*7-\*8 (W.D. Mich. Feb. 22, 2008); *Arista Records LLC v. Does 1-11*, No. CIV-07-568-R, P. 3 (W.D. Okla. Nov. 14, 2007), *Exhibit F*; *Recording Indus. Ass'n of Am. V. Univ. of N.C. at Chapel Hill*, 367 F. Supp. 2d 945, 958 (M.D.N.C. 2005). Section 512(h) of the DMCA applies only when a plaintiff seeks information *under the DMCA* and thus has no application here. See *LaFace Records, LLC v. Does 1-5*, 2008 U.S. Dist. LEXIS 13638 at \*8 (stating the DMCA is not applicable to a subpoena issued pursuant to Rule 45). Nowhere in its Discovery Motion did Plaintiffs cite to the DMCA. Nowhere in its Discovery Opinion does the Court rely on the DMCA. Quite simply, Plaintiffs need not comply with the DMCA's subpoena requirements because Plaintiffs are not seeking a subpoena under the DMCA.

The University does not cite any authority to support its argument that the DMCA subpoena provisions somehow limits the subpoena authority provided under Rule 45. In fact, a federal court recently ruled on this very question in a similar case and held, “[t]he limited authority to issue subpoenas under the . . . DMCA is not a reason to quash [a] subpoena issued . . . under Rule 45.” *LaFace Records, LLC v. Does 1-5*, 2008 U.S. Dist. LEXIS 13638 at \*8. If the University is arguing that the DMCA preempts the Federal Rules of Civil Procedure, it is misguided. Congress did not intend the DMCA to preempt subpoenas granted under the Federal Rules. *Arista Records LLC v. Does 1-11*, No. CIV-07-568-R at 3, *Exhibit F*.

Defendant’s reliance on *Interscope Records, et al. v. Does 1-7*, 494 F. Supp. 2d 388 (E.D. Va. 2007) is misplaced for two reasons.<sup>6</sup> First, Plaintiffs respectfully submit that the *Interscope Records* decision was wrongly decided because that court erroneously believed that the subpoena issued by plaintiffs was sought under the Cable Communications Policy Act (“CCPA”). For that reason, plaintiffs in that case have moved for reconsideration and believe that it will be granted. Because Plaintiffs sought a subpoena under Rule 45, and not under the CCPA, here the *Interscope Records* case is not applicable. Indeed, this was the precise conclusion reached by two cases in the Western District of Michigan involving identical requests for expedited discovery. *See*

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<sup>6</sup> The University also cites *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 40 (D.D.C. 2003) in support of its argument that the DMCA preempts the Federal Rules. (Supporting Br., pp. 7-8, citation corrected by Plaintiffs.) The University is citing bad law. In *In re Verizon Internet Servs.*, the court was justifying its holding that an ISP serving as a mere conduit for the transmission of information sent by others was subject to a subpoena under the DMCA. *See* 240 F. Supp. 2d at 39-40. The case was overruled by *Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1239 (D.C. Cir. 2003) (holding that the DMCA does not authorize the issuance of a subpoena to an ISP acting as a mere conduit), and is inapplicable here.

*Arista Records, LLC v. Does 1-4*, 2007 U.S. Dist. LEXIS 85652, \*6 (W.D. Mich. Nov. 20, 2007) (distinguishing *Interscope Records* and granting the plaintiffs’ *ex parte* application); *LaFace Records, LLC v. Does 1-5*, 2007 U.S. Dist. LEXIS 72225, \*6 (W.D. Mich. Sept. 27, 2007) (same). In both of these published decisions, the court granted the plaintiffs’ motions to take immediate discovery pursuant to Federal Rules of Civil Procedure 26 and 45, and distinguished *Interscope Records* as a case in which the recording industry “sought subpoenas under the [CCPA],” and in which the discovery requests were denied under the CCPA and DMCA. *Id.* Second, the University conveniently ignores the hundreds of similar cases filed across the country in which various courts have allowed similarly situated plaintiffs to obtain precisely the discovery that Plaintiffs seek here by issuing a Rule 45 subpoena, as Plaintiffs have done here. *See, e.g., Exhibit H.* Accordingly, the DMCA does not apply here and does not serve as a basis for quashing Plaintiffs’ subpoena.

### **CONCLUSION**

For all of the foregoing reasons, Plaintiffs respectfully request that this Court deny the University’s Motion to Quash the subpoena, order the University to provide the requisite notice to the affected students immediately, comply with the subpoena within 20 days after said notice is provided, and order such other and further relief as this Court deems just and proper. In the alternative, Plaintiffs respectfully request leave to amend the subpoena to clarify that Plaintiffs are solely seeking information sufficient to identify

the persons associated with or assigned to the IP addresses listed in Exhibit A to the subpoena at the relevant dates and times of infringement.

Dated: March 14, 2008

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## CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participant:

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