

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' SURREPLY IN OPPOSITION TO MARSHALL UNIVERSITY'S  
MOTION TO QUASH PLAINTIFFS' SUBPOENA**

Pursuant to this Court's March 18, 2008 Order, Plaintiffs respectfully submit this surreply in opposition to Marshall University's Motion to Quash.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

In its Reply to Plaintiffs' Opposition to the University's Motion to Quash, Marshall University (the "University") continues to argue that Plaintiffs' subpoena is overbroad and

unduly burdensome, based on the University's repeated, albeit unfounded, contention that Plaintiffs are asking the University to conduct an investigation. (*See* Doc. No. 21, the "University's Reply," pp. 2-4.) In addition, the University now argues, for the first time, that the requested information is not "directory information" under FERPA. (*See id.* at p. 4.) Both of the University's arguments fail.

First, with respect to the University's ongoing claim of undue burden, Plaintiffs have made abundantly and repeatedly clear, both in their Opposition to the University's Motion to Quash and again at the March 18, 2008 hearing, that they are in no way asking the University to undertake any factual investigation to comply with the subpoena. (*See* Doc. No. 18, Plaintiffs' "Opposition," p. 12.) Rather, Plaintiffs are asking the University to provide identifying information *that the University admits it already has*. In light of the foregoing, the University's continued insistence that the subpoena is overbroad and unduly burdensome, based upon the false premise that a factual investigation is required, is baseless.

Second, the University's new argument that the contact information that Plaintiffs seek is not "directory information" and, thus, is protected under FERPA likewise fails. The simple fact is that the information that Plaintiffs are seeking is "directory information" under the express language of FERPA. As such, FERPA specifically allows the University to disclose such information, particularly where, as here, it is requested by a lawfully issued subpoena. *See* 20 U.S.C. 1232g(a)(5)(A). The University's novel argument to the contrary is, not surprisingly, unsupported by any authority of which Plaintiffs are aware. To the contrary, every court that has addressed a FERPA challenge in circumstances like those present here has found the information sought to be discoverable under FERPA.

For all of these reasons and as more fully set forth below, the University's Motion should be denied.

### ARGUMENT

#### **I. THE SUBPOENA DOES NOT PLACE AN UNDUE BURDEN ON THE UNIVERSITY AND IS NOT OVERBROAD.**

The University's argument that Plaintiffs' subpoena is unduly burdensome, based on the continued false premise that Plaintiffs are asking the University to conduct a factual investigation, is frivolous. Plaintiffs have repeatedly stated, on the record, that they are not asking the University to conduct any such investigation. (*See* Opposition, p. 8.) Instead, Plaintiffs are merely seeking information that the University concedes it already has, namely, the names, telephone numbers, addresses, e-mail addresses and MAC addresses of the individuals that the University's records show as the holders of the seven IP addresses listed in Plaintiffs' subpoena. (*See* Doc. No. 15, "University's Supporting Brief," pp. 3-4.) Contrary to the University's position, this requires nothing more than looking up information in the University's computer database. Moreover, to the extent that the University remains confused as what Plaintiffs are seeking here, Plaintiffs have repeatedly offered to serve an amended subpoena to alleviate such confusion. (*See* Opposition, p. 12 (stating that to the extent the language of the subpoena 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.")); *see also* Proposed Amended Subpoena, attached as *Exhibit A*. In light of Plaintiffs' clear, unequivocal, and oft-reaffirmed position as to the limited information sought here, the University's persistence in arguing that a factual investigation is required is truly inexplicable.

Perhaps recognizing that its principal argument as to undue burden is baseless, the University now contends that the subpoena is unduly burdensome because: (1) Plaintiffs may

issue additional subpoenas in the future, and (2) the cost of complying with the subpoena would allegedly be high. These arguments, too, are without merit.

First, the University cites no authority, and Plaintiffs are aware of none, to support the University's claim that the subpoena at issue is somehow unduly burdensome because the University "anticipates additional subpoenas being issued in the future."<sup>1</sup> (University's Reply, p. 2.) The Federal Rules of Civil Procedure make clear that burden is determined by looking at the subpoena or discovery request at issue, and not by speculation as to future discovery. *See* Fed. R. Civ. P. 45(c)(3)(A). When the analysis is confined to the request at issue, as it must be, the University cannot dispute that Plaintiffs' subpoena is not unduly burdensome. As noted above, the University admits that it already has the information requested. Moreover, it is undisputed that the University responded to a virtually identical subpoena less than a year ago, with no cries of undue burden. (*See* Exhibit A to Plaintiffs' Opposition.)

Second, the University's claim that the cost of complying with Plaintiffs' subpoena would be high likewise fails, because this argument, too, is based on the repeated false premise that the University must "affirmatively investigate" the users of the requested IP addresses. (*See* University's Reply, pp. 2-3.) Contrary to the University's position, however, Plaintiffs are neither seeking the names of individuals "with access" to particular IP addresses nor requiring the University to identify students "who may have visited the location" at which a particular computer accessed the University's network. (*See* University's Reply, pp. 3-4.) As the University well knows, Plaintiffs are merely asking the University to look up limited identifying information in its computer system and to provide that information to Plaintiffs. Plaintiffs

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<sup>1</sup> As an aside, the University would not likely receive further subpoenas from record company plaintiffs regarding infringing activity over peer-to-peer networks if it would install appropriate filters for copyrighted content.

respectfully submit that such a request cannot be deemed overbroad or unduly burdensome by any measure. Indeed, given the limited effort required to comply with subpoenas like that at issue, most universities that have responded to such subpoenas have not claimed *any* costs for their effort.

For all of these reasons, the University's Motion should be denied.

## **II. FERPA DOES NOT PROHIBIT DISCLOSURE OF THE INFORMATION SOUGHT BY THE SUBPOENA.**

As Plaintiffs demonstrated in their opposition brief, FERPA does not prohibit the disclosure of Defendants' identifying information because the information sought falls squarely within the definition of "directory information" and is being sought subject to a court order. *See* 20 U.S.C. §§ 1232g(a)(5)(A), 1232g(b)(1), 1232g(b)(2); 34 C.F.R. § 99.31(a)(9)(i).

Notwithstanding the unambiguous language in the applicable statutes and regulations, the University argues that the information sought is not "directory information," but rather is protected "personally identifiable information," apparently because Plaintiffs know that Defendants were "engaged in specific conduct at specific times" and could tie Defendants to that conduct by obtaining their identifying information. (University's Reply, p. 4.) Notably, the University cites no authority whatsoever in support of this novel position, and Plaintiffs are aware of none. Indeed, those courts that have addressed the FERPA issue have uniformly found that FERPA explicitly authorizes a university to disclose the very types of information sought in the subpoena at issue.

For example, in *Arista Records, LLC v. Doe 9*, Case No. 07-cv-641-BBC (W.D. Wisc. Mar. 19, 2008) (attached as *Exhibit B*), the court denied a defendant's motion to quash the record company plaintiffs' virtually identical subpoena. The defendant in that case argued, as the

University does here, that FERPA bars the release of the information at issue. The court squarely rejected the defendant's argument, holding:

[A] university may release so-called "directory information," which consists of name, address, telephone listing, date and place of birth . . . . It may also release fuller details in response to a judicial order or lawfully issued subpoena, so long as the student and parents (if the student is a dependant) are notified of all such orders or subpoenas in advance of the university's compliance. (citation omitted). Plaintiffs' subpoena to the University of Wisconsin-Milwaukee is proper under either exception to the general rule prohibiting the release of student information. The subpoena seeks only defendant's true name, current and permanent addresses and telephone numbers, emails addresses and [MAC] addresses, *all of which are items an educational institution may disclose . . . .*

*Id.* at 3 (emphasis added).

Similarly, in *Warner Bros. Records, Inc. v. Does 1-6*, Case No. 2:07-cv-001878-EGS (D.D.C. Nov. 26, 2007) (attached as *Exhibit C*), the court granted the record company plaintiffs' motion for leave to take expedited discovery and to serve Georgetown University with a subpoena identical to the one that Plaintiffs served here. In its order, the court held that the information that the plaintiffs sought was "not only relevant but crucial to the prosecution of plaintiffs' claims." *Id.* at 3. The court further held that Georgetown's disclosure of the requested information would be "consistent with Georgetown University's obligations under the Family Educational Rights and Privacy Act (FERPA)." *Id.* at 4. In so holding, the court specifically recognized that, "[t]hough 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." *Id.*

Finally, in *Arista Records, LLC v. Does 1-11*, No. Civ-07-568-R (W.D. Okla. Nov. 14, 2007) (attached as *Exhibit D*), several Doe defendants filed a motion to quash a subpoena that was served on Oklahoma State University and that was identical to that at issue here. The Doe defendants raised many of the same issues that the University now raises in its Reply Brief, but

the court denied their motion. In so holding, the Court found that FERPA “does not prohibit but *expressly authorizes* disclosure of a student’s ‘directory information’ (name, address, telephone listing, email address, date and place of birth) without the student’s prior consent . . . provided annual notice is given to the student . . . or in compliance with a lawfully issued subpoena as long as the school makes a ‘reasonable effort’ to notify the student of the subpoena in advance of compliance.” *Id.* (emphasis added).

These cases apply with equal force here and demonstrate that the University’s tortured reading of FERPA, which finds no support in the statutes, regulations, or case law, is baseless. Simply stated, both the express language of FERPA and the uniform holdings of courts that have interpreted FERPA in similar contexts show that FERPA expressly permits the disclosure of the information sought by the subpoena at issue here.

### CONCLUSION

For all of the foregoing reasons, as well as those stated in Plaintiffs’ Opposition Brief, Plaintiffs respectfully request that this Court deny the University’s Motion to Quash or, in the alternative, allow Plaintiffs to serve an amended subpoena in the form attached as Exhibit A.

Dated: March 31, 2008

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 31, 2008, I electronically filed the foregoing with the Clerk of the Court using 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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