UNITED STATE DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

INTERSCOPE RECORDS, *et al*.
Plaintiffs,

Case No. 8:07-cv-1008-SDM-TGW

v.

JOHN DOES 1 – 40,
Defendants.
_____________________________________/

MOTION BY DEFENDANTS JOHN DOE #21 AND JOHN DOE #37 FOR PROTECTIVE ORDER OR IN THE ALTERNATIVE TO QUASH SUBPONEA

John Doe #21 and John Doe #37, (collectively, the "Does") by and through undersigned counsel, respectfully request this Court to enter a protective order preventing the production of documents under Plaintiffs' secret *ex parte* subpoena to the University of South Florida, or in the alternative, quashing the *ex parte* subpoena, under Rules 26 and 45, Fed. R. Civ. P., and submit this memorandum of law in support of their motion.

BACKGROUND

Plaintiffs claim to own the copyrights in a number of sound recordings made by artists who no longer control the copyrights at issue. Over the last several years, these plaintiffs, and other labels in cooperation with them, have sued tens of thousands of individuals, perhaps as many as fifty thousand, alleging that these individuals have "uploaded," "downloaded, "and "made available" sound recordings, although Plaintiffs rarely, if ever, have actual knowledge of any copying or dissemination of the recordings themselves.

These defendants, facing the resources of an industry that generates billions of

dollars in revenue annually, rarely have the means to contest the claims. Many who do conclusively show that the Plaintiffs have misidentified their targets. Spokespersons for these Plaintiffs have compared their suits against innocent defendants to "catching dolphins" while "fishing with a net."

As part of their campaign against digital downloading, Plaintiffs frequently file mass actions against numerous so-called "John Does." The purpose of these John Doe suits is not, as it should be, to engage in a legitimate determination of Plaintiffs' rights under the Copyright Act. Instead, these actions are solely for purposes of discovering the identities of individual account holders with a particular Internet Service Provider or, as in this case, a university whose students' records are protected by federal privacy laws. *See, e.g.*, 20 U.S.C. § 1232g (providing for confidentiality of student information).

In this case, Plaintiffs have apparently applied for an order authorizing their *ex parte* subpoena to the University of South Florida, seeking the disclosure of confidential student records – in particular, details relating to the students' usage of the University's Internet facilities – and the Court has issued such an order. A subpoena has been served, and its response is due from the University on August 12, 2007.

But while the Plaintiffs seek disclosure of the students' confidential records, their application and the resulting Order are themselves secret. Neither the *ex parte* application nor the order can be found in the Court's public electronic docket. Without obtaining the application or order directly from the Plaintiffs, these Does have had no way of knowing for sure what they state or authorize.[1] (Docket, Ex. A)

---

[1] Undersigned counsel for Does #21 and #37 has seen a copy of the order, provided by the

Plaintiffs, under cover of the secret Order, have issued their subpoena without prior notice to the parties as required by Rule 45, or any notice to the public whatsoever. The Does have had no chance to participate in any of the discovery planning that normally, for very good reasons, precedes *any* discovery by any party from any source. The exclusion of the Does raises basic concerns of fairness and due process – especially where, as here, the information sought is protected by federal privacy laws – and no good cause remains for any third party to respond to the subpoena now that these Does have appeared and wish to participate in the discovery planning process before discovery begins.

ARGUMENT

I. Plaintiffs do not have "good cause" to conduct discovery without notice to, and involvement of, defendants who have made their appearance in this case.

The plaintiff record companies have asked this Court to circumvent the ordinary discovery procedures, and allow them to issue a subpoena seeking the names, addresses, phone numbers, e-mail addresses, and "MAC" addresses of certain users of the University of South Florida's computer network. In support of their motion, Plaintiffs claim that this third-party subpoena is the only way to identify the defendants, without which they claim the case cannot move forward.

The Plaintiffs characterize this as merely "expedited" discovery. In reality, they have asked for much more – the opportunity to obtain students' records from an educational institution, without the participation of those student defendants – in the

University, who apparently obtained it from Plaintiffs, and upon request of Plaintiffs' counsel, obtained a copy of the application. Nonetheless, the public at large has no access to these records, and so the Does did not have any opportunity to discover the subpoena but through the grace of the university and the post-issuance cooperation of Plaintiffs' counsel.

discovery conference normally required by Rule 26(f), Fed. R. Civ. P.

Plaintiffs seek an extraordinary remedy by asking for discovery without notice to parties. And when faced with a request for an extraordinary remedy, this Court should carefully weigh the rights of the parties involved and the costs of premature disclosure of information protected by federal law. 20 U.S.C. § 1232g.

Plaintiffs can point to no Eleventh Circuit authority – or any other circuit-level authority – supporting their theory that, for "good cause," they should be entitled to deprive other parties of notice of a Rule 45 subpoena. Even if they could, the facts they claim as a basis for such "good cause" are moot here where the defendants whose identity they seek have appeared as parties.

In their Motion, Plaintiffs assert two main points: first, that the conference required by Rule 26(f) cannot be had without a means to communicate with any defendants; and second, that they cannot identify the Doe defendants – and thereby cannot serve them – without the *ex parte* discovery. Both of those arguments, now moot anyway, fail.

A. Plaintiffs could have served the Doe defendants prior to seeking *ex parte* discovery, but failed to even try.

Once a party appears, they are subject to all normal and proper discovery in due course and subject to the rules of court. So with all Doe defendants, Plaintiffs can obtain the information directly from the Does themselves, once the Does appear in the action. Plaintiffs imply, without actually stating in their motion, that they could not obtain service on the Doe defendants without knowing their names. But there is one way they could – and should – have tried prior to seeking *ex parte* discovery: the waiver of service

provisions of Rule 4(d), Fed. R. Civ. P.

Waiver of service under Rule 4(d) merely requires the Plaintiff to forward, through first-class mail or "other reliable means" a notice of the action and a request for waiver of service. Rule 4(d)(2)(B), Fed. R. Civ. P. The Rule does not require that the notice bear the defendant's actual name, where it is unknown, or his actual address, or any other information that Plaintiffs demand in their *ex parte* discovery. Because Plaintiffs may use "other reliable means," if such means exist Plaintiffs should attempt to use them before seeking discovery without the knowledge or input of any of the actual parties to the litigation.

In this case, forwarding by the University could be "reliable means." Although some universities in this position have refused to serve as the middleman between Plaintiffs and their students, no such allegations have been made here, and they could not, in fairness, be made. This university has cooperated with nearly every communication that Plaintiffs have sought to forward so far, and there is no indication that policy would change. In other words, Plaintiffs' own experience with the University should have shown it to be a "reliable" means by which Plaintiff could attempt to serve notice of suit under Rule 4(d). Unfortunately for the Does, the Plaintiffs didn't even try, preferring to wage their discovery battles unopposed.

If Plaintiffs had made such an attempt to deliver the Rule 4(d) requests for waiver, but were unsuccessful, then *and only then* could they argue to this court that *ex parte* discovery was the only way for Plaintiffs to proceed. Until they have tried that method, Plaintiffs cannot truthfully claim to have exhausted all other means of contacting the

Does. Only if every other method has failed should plaintiffs even consider *ex parte* discovery.

B. Plaintiffs have an obligation under Rule 26 to confer with the known counsel of appearing parties prior to conducting any discovery.

Even if Plaintiffs once argued that they had good cause to conduct discovery without notice to the Doe defendants, that justification no longer exists, at least with respect to the two Does who are appearing through undersigned counsel.

First, any future service required can be accomplished through the normal procedures for serving papers through the parties legal representative, whether or not the Does' identity has been disclosed. Second, any issue regarding destruction of evidence is moot, because the university is now fully aware that this matter is in contested litigation, since the subpoena has already been served, and should be presumed to know the consequences of any destruction or deletion of evidence. Third, the discovery that Plaintiffs seek can be obtained in due time and with due safeguards from an actual party to this litigation – the Does themselves – rather than a third party.

Plaintiffs rely, for their "good cause" argument, on a number of non-binding district court opinions. All of them are distinguishable.

Unlike the cases cited by Plaintiffs, this case involves litigation where the opposing party – these Does – have made an appearance, and the evidence in question is in the custody of a third party who has the power and the duty to preserve it. Under those circumstances, the Does have a procedural right, as a well as a due process right, to participate in discovery planning before Plaintiffs seek third-party discovery of federally-protected student information. *See e.g. Mann v. University of Cincinnati*, 824 F.Supp.

1190, 1201-2 (S.D. Ohio, 1993) (where federally protected privacy rights were at issue, party had the right to notice and chance to object to subpoena of records from third-party university, and sanctioning attorney for *ex parte* production demand).

Where, as here, a party seeks discovery of federally-protected confidential information relating to another party, the interests of justice are greatly disserved if any of the affected parties are deprived of their input. Furthermore, in this case, involving forty different defendants, each with unique claims and fact patterns supporting those claims,[2] the participation of all affected parties can avoid accidental disclosure of information that ought not to be disclosed. *See, e.g., Theofel v. Farey-Jones*, 341 F.3d 978 (9th Cir. 2003) (where subpoena *duces tecum* for production of electronic records was "patently illegal," district court quashed subpoena; issuing attorneys were subject to sanctions and civil liability under federal laws protecting electronic data).

Now that the Does have appeared, they should have the chance to exercise their Rule 26(f) privileges and participate in the formation of a discovery plan *before* any discovery takes place. Rule 26 requires it, and no reason currently exists to deviate from the requirements of that rule.

II. Rule 45 does not allow for discovery without notice to parties.

The plain language of Rule 45, Fed. R. Civ. P., precludes the issuance of a subpoena without prior notice to all other parties in the matter. It provides, in pertinent part:

---

[2] See Does' Motion to Dismiss for Improper Joinder, filed simultaneously with this Motion.

> (b)(1) …Prior notice of any commanded production of documents and things or inspection of premises before trial *shall be served on each party* in the manner provided by Rule 5(b).

(Emphasis added.) Rule 5(b) merely provides for various methods of service upon those parties. It provides no exception to the mandate that each party "shall be served."

Under Rule 45, courts – including this very district – have considered prior service upon the parties as mandatory. *Florida Media, Inc. v. World Publications, LLC*, 236 F.R.D. 693, 694-5 (M.D. Florida, 2006) (quashing as "void" subpoenas that were served without notice; "A subpoena is a formal method of discovery, and the a party using a subpoena must comply with the notice requirements of Rule 45."), *citing Butler v. Biocore Med. Tech. Inc.*, 348 F.3d 1163, 1173 (10th Cir. 2003); *Mann*, at 1202. *See also Universal Licensing Corp. v. Paola del Lungo S.p.A.*, 293 F.3d 579, 583 (2d Cir. 2002) ("...*ex parte* use of a Rule 45 subpoena is beyond the bounds of federal practice."); *See also U.S. v. Daniels*, 95 F.Supp.2d 1160, 1162-3 (D.Kan. 2000) (comparing Rule 17(c), Fed. R. Crim. P., with Rule 45; noting that the former allowed for *ex parte* subpoenas where it uses the word "may" regarding service where Rule 45 uses the word "shall.")

Without prior service upon the parties, the subpoena is void and the third party should be relieved of response. *Florida Media*, at 695. The prior void subpoenas generally do not affect the right of the parties to prospectively issue properly-noticed subpoenas in their proper time. *Id*.

One other court, in precisely these circumstances, has determined that Rule 45 does not allow for *ex parte* discovery. The Eastern District for Virginia, considering a virtually identical application by these same Plaintiffs for *ex parte* discovery under Rule

45, flatly rejected the request. *Interscope Records, et al. v. Does 1 – 7*, Opinion and Order (E.D.Va., July 12, 2007) (Ex. B).

In that case (hereafter cited as *Interscope – Virginia*) the court considered a materially identical request for issuance under Rule 45 of an *ex parte* subpoena to the College of William and Mary for the identities of several students alleged to have infringed Plaintiff's copyrights. *Id*. That district court considered two potential statutory sources of an *ex parte* subpoena power, the Cable Communications Policy Act of 1984 ("CCPA"), 47 U.S.C. § 551(c)(2)(B), and the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(h). *Id*. After considering, and rejecting, the possibility of either statute serving as a basis for the *ex parte* request, the court denied the motion, after dismissing Plaintiffs' Rule 45 argument in one sentence: "The Court is unaware of any other authority that authorizes the *ex parte* subpoena requested by plaintiffs." *Id*., p. 5.

Like these other courts, this Court should consider whether Rule 45 authorizes an *ex parte* subpoena of third-party evidence without notice to parties, and like these other courts, should conclude that it does not.[3]

III. Rule 45 does not allow for secret motions or orders on *ex parte* subpoenas.

There is no question that, even where the absence of a party makes notice impractical, that the very existence of an *ex parte* discovery motion and corresponding order should not be a secret to the public, for that may be the only way the subject of a subpoena's inquiry may ever find out about it. In this case, both the application and the

[3] Plaintiffs will likely call the Court's attention to numerous district court orders granting their relief. The vast majority of these orders, by their very nature, are issued without opposition from the defendants. It also appears that none of the oppositions have raised the question of *ex parte* applications where, like here, a party has appeared. Accordingly, those cases should be distinguished on their facts.

order are absent from the Court's public docket, and not available for download. (Docket, Ex. A.) This, despite the fact that Plaintiffs did not make any request under Local Rule 1.09 for the documents to be filed under seal, and the procedural safeguards contained therein have not been observed.

Undersigned counsel has obtained the actual Order from the University, who apparently obtained it from Plaintiffs; and has, upon request, received a copy of the application from Plaintiffs' counsel. (The Does do not contend that Plaintiffs deliberately concealed the application and order from the public view, but object only to the pernicious effect of its nondisclosure.)

Where, as here, Plaintiffs do not or cannot directly provide notice to the parties to the litigation, and absent any reason to seal the application or the resulting order, it is a gross violation of defendants' due process rights to conceal from the public the very fact that discovery has begun without the defendants' knowledge or input. This alone should serve as grounds for this Court to quash the subpoena until Does have a chance to participate in the discovery planning process to ensure that no future due process violations occur.

IV. The subpoena *duces tecum* is over-broad and will result in improper disclosure of confidential student information to other students.

The subpoena itself requests information related to the Internet usage of each student Doe, collectively. As noted in Does' Motion to Dismiss for Improper Joinder, filed simultaneously with this motion, the collective response to the subpoena will expose each student Doe's student records, protected under 20 U.S.C. § 1232g, to each other Doe who has been joined in this matter, even though the information is completely irrelevant

to the claims against any other Doe. *See, e.g., Interscope Records v. Does 1-25*, 06:04-cv-00197-ACC-DAB, U.S. Dist. LEXIS 27782 (M.D. Fla. April 1, 2004), *report and recommendation adopted*, 06:04-cv-00197-ACC-DAB, 2004 U.S. Dist. LEXIS 27778 (M.D. Fla. April 27, 2004) (report and recommendation noted that once discovery began, each party would be subject to an onslaught of irrelevant information about the other defendants in record-company John Doe suit). Accordingly, until such time as each Doe is sued individually, the subpoena response will result in the improper disclosure of federally-protected confidential information and this Court should therefore quash it.

CONCLUSION

Where parties have appeared in an action, no "good cause" exists to conduct discovery without the prior participation of, and notice to, every appearing party. Furthermore, subpoenas without notice to parties in civil matters violate the plain language of Rule 45, which provides that notice "shall" be given to every other party.

In addition, the degree to which this subpoena has been concealed – even if by mistake – exacerbates the due process issues inherent in the demanded disclosure of federally-protected student information without notice. And to the extent that the subpoena will result in the disclosure of such confidential student information to other parties who would not benefit from it and should not have it, the subpoena is over-broad and should be quashed.

Certification of Conference of Counsel

Undersigned counsel has conferred with counsel for Plaintiffs regarding the substance of this motion, and Plaintiffs do not consent to the relief sought.

Respectfully submitted this
8th day of August, 2007
RICARDO & WASYLIK, PL

/s/ Michael Alex Wasylik
Michael Alex Wasylik, Trial Counsel
FBN 067504
P.O. Box 2245
Dade City, FL 33526-2245
(352) 567-3173
Fax 352-567-3193
E-Mail: mike@ricardolaw.com
COUNSEL FOR DEFENDANTS
JOHN DOE #21 AND
JOHN DOE #37

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 8, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Chaila D. Restall, Esq., Counsel for Plaintiffs

I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

None

/s/ Michael Alex Wasylik