IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ARISTA RECORDS, LLC, a Delaware limited liability company, et al.,

Plaintiffs,

v.

DOES 1-17,

Defendants.

Civ. No. 07-6197-HO

ORDER

Background

The complaint alleges that defendants, whose identities are unknown to plaintiffs, used a file-sharing network and internet protocol (IP) addresses assigned by the University of Oregon, an internet service provider (ISP), to illegally download and distribute plaintiffs' copyrighted sound recordings. Complaint, §§ 16-17, 19-21. After obtaining an order authorizing immediate discovery, plaintiffs served the University with a subpoena duces tecum commanding that it produce "[i]nformation, including names, current and permanent addresses, and telephone numbers,

sufficient to identify the alleged infringers of copyrighted sound recordings, listed by IP address in Attachment A . . ." The University filed a motion to quash the subpoena. As understood by plaintiffs, the subpoena does not impose undue burden on the University. As written, however, the requirement that the University provide "information . . . sufficient to identify the alleged infringers of copyrighted sound recordings" is unduly burdensome. The University's remaining arguments do not state grounds to quash the subpoena.

The University's motion is granted. The subpoena is quashed for imposing an undue burden of production. Plaintiffs may serve a second subpoena on the University that reflects their understanding of the production requirements of the first subpoena.

Discussion

The court must quash or modify a subpoena that "(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A).

The University first contends that the subpoena subjects it to undue burden because it can identify "practically none" of the defendants based on the IP addresses provided by plaintiffs, and

could possibly do so only after conducting an investigation.[1] The University explains that 16 of the 17 defendants accessed the content using IP addresses assigned to single or double occupancy dormitory rooms, or from the University's wireless network or a similar system called the "HDSL Circuit." The University knows the IP addresses and occupants assigned to the dorm rooms, but does not know the identities of the persons who accessed the content in question. Similarly, the University knows the identities of persons with assigned user names used to access the content in question through the wireless network and HDSL Circuit, but it does not know whether those persons or others accessed the content. Ex. 103, ¶¶ 8-10.

Plaintiffs further contend that the subpoena is unduly burdensome because it requires production of information related to witnesses of the alleged copyright infringement and employees of the University's information technology department, and data stored on the computers associated with the IP addresses listed on Attachment A.

Plaintiffs respond that the University's reading of the subpoena is "hyper-technical," and that the subpoena only requires that the University provide information already known to

[1]Dale Smith, Director of Network Services for the University states that he believes it is not possible to identify sixteen of the seventeen alleged infringers without conducting interviews and forensic investigation of the computers likely involved. Ex. 103 at 3, ¶ 11.

it, that is, identifying information of persons associated by dorm room occupancy or username with the 17 IP addresses listed in Attachment A to the subpoena.

As understood by plaintiffs, the production requirements of the subpoena are not unduly burdensome on the University. The University's understanding of the subpoena's production requirement reflects the plain language of the subpoena, however. The University naturally construes the requirement to produce sufficient information to identify alleged infringers to require that it conduct an investigation to determine whether persons associated with IP addresses or others infringed copyright protected sound recordings.

The University next argues that plaintiffs seek disclosure of information protected by the Family Educational and Privacy Rights Act (FERPA) and Oregon Administrative Rules. These laws require the University to provide or attempt to provide notice to a student and/or parents prior to the release of educational records or personally identifiable information in compliance with a judicial order or lawfully issued subpoena. See 20 U.S.C. § 1232g(b)(2)(B); Or. Admin. R. 571-020-0180(3). Nothing in the statute or rule justifies quashing the subpoena.

The University next argues that the subpoena process specified in the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512(h), is the sole mechanism by which a subpoena may

issue to an ISP for identification of an alleged infringer.[2] The University cites two cases in support of this proposition. In Recording Indus. Ass'n of Am. (RIAA) v. Verizon Internet Svcs., Inc., 240 F. Supp. 2d 24, 30 (D. D.C. 2003), the court held that Section 512(h) applies to all ISPs, whether or not infringing material is stored on, or simply transmitted over, an ISP's network. The court found

> absolutely nothing in the DMCA or its history to indicate that Congress contemplated copyright owners utilizing John Doe actions in federal court to obtain the identity of apparent infringers, rather than employing the subsection (h) process specifically designed by Congress to address that need.

Id. at 45.

In Interscope Records v. Does 1-7, 494 F. Supp. 2d 388 (E.D. Va. 2007), the court denied the plaintiffs' motion to serve a subpoena on the College of William and Mary to discovery information about the unknown Doe defendants after holding that the subpoena was not authorized by the Cable Communications Policy Act of 1984 or the DMCA. The court wrote that it "is unaware of any other authority that authorizes the ex parte subpoena requested by plaintiffs." Id. at 391.

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[2]A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

17 U.S.C. § 512(h).

Plaintiffs argue that the DMCA does not apply where, as here, plaintiffs seek information by subpoena under Rule 45 of the Federal Rules of Civil Procedure. Plaintiffs further argue that Interscope Records is wrongly decided. Plaintiffs submitted a list of more than 300 cases, which they characterize as a partial list of cases where courts permitted plaintiffs to issue subpoenas under Rule 45 in situations nearly identical to this case. Pl's ex. 6.

The United States Court of Appeals for the District of Columbia Circuit reversed the district court in the RIAA case. 351 F.3d 1229 (D.C. Cir. 2003). Based on the language and structure of the DMCA, the court of appeals held that a Section 512(h) subpoena may not be issued to an ISP that does not store on its servers infringing material or material that is the subject of infringing activity. Id. at 1233.

The language of Section 512(h) is permissive. A copyright owner "may" request a subpoena to learn the identity of an alleged infringer. Section 512(h) does not evince Congressional intent to bar Rule 45 subpoenas in John Doe actions. In the Ninth Circuit,

> where the identity of the alleged defendants will not be known prior to the filing of a complaint[,] the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds.

Gillespie v. Civiletti, 629 F.2d 637, 643 (9th Cir. 1980).

The court finds no authority holding that the discovery authorized in a John Doe action by Gillespie may not include a subpoena.[3] The argument that the DMCA is the exclusive mechanism for the issuance of a subpoena to the University is rejected.

The University next contends that plaintiffs misrepresented the potential for spoliation of evidence in their application for immediate discovery, because they failed to inform the court that the University guaranteed it would preserve the evidence plaintiffs seek. Plaintiffs claim that University counsel informed plaintiffs' counsel that the University preserved whatever information it had, but that plaintiffs did not understand that the University guaranteed it would preserve the evidence indefinitely. The primary reason for the order authorizing immediate discovery was the plaintiffs' need for the evidence in order to identify the defendants. At the present time, the court will presume that this dispute is the result of honest mistake as to the content of the University's assurances regarding preservation of information. The court is not convinced that plaintiffs' alleged misrepresentation is a separate and sufficient basis to quash the subpoena.

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[3]The court acknowledges that where the defendants are unknown, plaintiffs cannot comply with the requirement of Rule 45(b)(1) that notice be served on each party prior to service of a subpoena duces tecum.

Finally, the University requests permission to propound interrogatories to plaintiffs and to depose individuals involved in the identification of IP addresses designated by plaintiffs. The University apparently wants to determine whether plaintiffs have additional information with which to identify the defendants. This request is denied. As the University recognizes, non-parties have no access to the discovery process. Memo. at 8.

Conclusion

Based on the foregoing, the University's motion to quash subpoena [#8] is granted. Consistent with the limitations stated in the order dated September 6, 2007, plaintiffs' are authorized to serve a second subpoena on the University seeking identifying information of persons associated by dorm room occupancy or username with the 17 IP addresses listed in Attachment A to the first subpoena.

IT IS SO ORDERED.

DATED this 25th day of September, 2008.

s/ Michael R. Hogan
United States District Judge