UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LAFACE RECORDS, LLC., et al.,

Plaintiffs,

v.

Case No. 2:07-cv-187
HON. PAUL L. MALONEY

DOES 1-5,

Defendants.
_____/

OPINION AND ORDER

Defendant Doe #5, a college student at Northern Michigan University ("NMU"), has filed a Motion to Quash, Vacate and Amend. Defendant seeks to amend a subpoena issued by this court. Plaintiffs are members of the music recording industry. Plaintiffs filed this complaint against five unknown individuals for copyright infringement under 17 U.S.C. § 101 *et seq*. On September 27, 2007, the Court issued an order under Rule 45 to allow plaintiffs to subpoena information from NMU in an effort to identify the defendants. The order required NMU to notify the individuals of the subpoena to allow those individuals to file a motion to quash the subpoena before the return of the subpoena on November 7, 2007. Doe #4 filed a motion to quash the subpoena, vacate the discovery order and dismiss the action which was denied by the court. Doe #5 filed this motion on December 20, 2007. Doe #5 is the remaining defendant in this action.

The complaint alleges that defendants engaged in downloading and distributing copyrighted sound recordings owned by plaintiffs. Defendants' identities were unknown to plaintiffs at the time of the filing of the complaint. Defendants learned that plaintiffs were downloading and

distributing the sound recordings by using a file sharing network on the internet. Plaintiffs discovered defendants by using the file sharing network to downloaded the music files made available by defendants. Plaintiffs were then able to identify each defendants' internet protocol (IP) address. The IP address is unique for each specific computer user and is assigned by the internet service provider (ISP). In this case NMU was the ISP. Plaintiffs have already learned the names of the defendants based upon the subpoena issued to NMU.

This court has previously stated that Rule 45 authorizes a court to quash or modify a subpoena if the subpoena (1) does not allow a reasonable time for compliance, (2) requires a person who is not a party to the action to travel more than 100 miles, (3) requires disclosure of privileged or other protected matter and no exception or waiver applies, or (4) subjects a person to undue burden. Fed. R. Civ. P. 45(c)(3)(A)(i-iv).

The court has already addressed some of the issues raised in this motion when denying the motion to quash the subpoena filed by Doe #4. The court found:

> First, Doe #4 argues the order should be set aside and the complaint dismissed because Plaintiffs failed to provide advance notice of copyright infringement under 37 C.F.R. § 201.22. This argument does not fall within any of four reasons for a court to quash a subpoena under Rule 45.
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> Second, Doe #4 argues the order granting the Rule 45 subpoena should be set aside because Plaintiffs misrepresented the authority for granting the subpoena. Doe #4 advances two subarguments here. Doe #4 argues the Digital Millennium Copyright Act (DMCA) provides the sole authority available to Plaintiffs for requesting a subpoena. Doe #4 then argues the information sought through the subpoena is protected by the Family Educational Rights & Privacy Act (FERPA).
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> This Court authorized the subpoena under Federal Rules of Civil Procedure 45 after finding good cause under Rule 26. This Court did not issue the subpoena under either the DMCA or the Cable Communications Policy Act (CCPA) Furthermore, Plaintiffs did not mislead this Court into relying on the wrong authority. This Court

> was aware the various opinions cited by Doe #4 on this issue, and even cited them in the order granting Plaintiffs' motion. The limited authority to issue subpoenas under the CCPA and the DMCA is not a reason to quash the subpoena issued in this case under Rule 45. Doe #4 cites no authority supporting the argument that the statutory subpoenas somehow limit the authority provided under Rule 45.
>
> Doe #4 argues the subpoena should be quashed for privacy concerns. This argument falls squarely within one of the reasons a court may quash or modify a subpoena. *See* FED. R. CIV. P. 45(c)(3)(A)(iii). The authority cited in the brief is confusing. FERPA, 20 U.S.C. § 1232g, restricts federal funds to institutions that release educational records, including personal information. *See* 20 U.S.C. § 1232g(b)(1). FERPA includes a provision allowing those institutions to release such information in response to a court ordered subpoena. *See* 20 U.S.C. § 1232g(b)(2)(B); *Victory Outreach Center v. City of Philadelphia*, 233 F.R.D. 419, 420 n.1 (E.D. Pa. 2005). The Protection of Pupil Rights (PPRA), 20 U.S.C. § 1232h, deals with surveys and evaluations administered to students. *See* 20 U.S.C. § 1232h(a) and (b). PPRA requires local authorities to develop policies to protect student privacy. 20 U.S.C. § 1232h(c). The PPRA restricts the release of "personal information," as that phrase is defined in 20 U.S.C. § 1323h(c)(6)(E), when the personal information is collected from students for the purpose of marketing or selling the information. *See* 20 U.S.C. § 1232h(c)(1)(E) and (F)(i), (c)(2)(C)(i), and (c)(4)(A). The PPRA does not implicate the release of Doe #4's personal information. The subpoena provision in FERPA overrides the privacy concerns that statute protects.
>
> Doe #4 argues the response to the subpoena will reveal each Doe's student records to the other Does in the action. That concern is not significant enough to merit quashing the subpoena. The order granting the Rule 45 subpoena limits the information Plaintiffs may seek. Plaintiffs may request from NMU only the name, address, telephone number, email address and media access control address for each unknown Defendant.

See Docket #27 at pages 4-6.

Doe #5 claims that NMU is the actual responsible party because NMU leases laptop computers to its students and provides no instruction regarding copyright laws or any supervision over the students who lease the computers. Additionally, Doe #5 claims that the laptop has been

returned to NMU as part of the two-year lease agreement and it was not continuously used or in use as alleged by plaintiffs. Doe # 5 claims that plaintiffs violated the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and the Wiretap Act, 18 U.S.C. § 2515, by obtaining private information from the computer. Doe # 5 also claims that plaintiffs violated the Fourth Amendment by searching computer files without a warrant, because some employees and agents of the plaintiffs are former government employees. Doe #5 claims that plaintiffs contracted with MediaSentry to undertake the investigation of the file sharing incidents and that since MediaSentry is not a licensed private investigator in the State of Michigan, plaintiff and MediaSentry violated Mich. Comp. Laws § 338.823 which prohibits a person from conducting private investigative work without a license.

However, defendant has failed to show how any of the these arguments could be relevant to quashing the subpoena or how these arguments could fit into one of the factors that provides the court with authority to quash the subpoena under Rule 45. Accordingly,

IT IS HEREBY ORDERED that the Motion to Quash, Vacate and Amend (Docket #22) and Motion to Quash Subpoena (Docket #28) are DENIED.

IT IS SO ORDERED.

/s/ Timothy P. Greeley
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

Dated: October 14, 2008