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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ARISTA RECORDS, LLC, a Delaware limited liability company; ATLANTIC RECORDING CORPORATION, a Delaware corporation; 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; LaFACE RECORDS, LLC, a Delaware limited liability company; 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; WARNER BROS. RECORDS, INC., a Delaware corporation,

Plaintiffs,

v.

DOES 1-17,

Defendants.

Case No. 6:07-cv-06197-HC

UNIVERSITY OF OREGON'S REPLY IN
SUPPORT OF MOTION TO QUASH
PLAINTIFFS' SUBPOENA

The University of Oregon (University) currently finds itself on a battleground not of its own making. By challenging Plaintiffs' overbroad and burdensome subpoena, the University has attempted to protect the fundamental privacy rights of its students, conserve limited public resources, and to provide pertinent information for the Court's consideration regarding whether Plaintiffs' discovery efforts are appropriate. Sadly, the University's efforts thus far have been met by accusations that the University is obstructing the process and even conspiring with law breakers.¹ Those accusations are not warranted. Certainly it is appropriate for victims of copyright infringement to lawfully pursue statutory remedies. However, that pursuit must be tempered by basic notions of privacy and due process. The record in this case suggests that the larger issue may not be whether students are sharing copyrighted music, but whether Plaintiffs' investigative and litigation strategies are appropriate or capable of supporting their conclusory allegations.

THE COURT MAY RECONSIDER ITS ORDER GRANTING PLAINTIFFS LEAVE TO TAKE IMMEDIATE DISCOVERY

The Court has the inherent power to reconsider its Order based on new evidence. *Interscope Records v. Doe*, 2007 U.S. Dist. LEXIS 73627, * 4 fn 8(D. Kans.Oct. 1, 2007) (Further evidence or argument by the University of Kansas pursuant to a motion to quash, would enable the court to reconsider its position on the scope of discovery and the finding of "good cause" sufficient to warrant *ex parte* discovery). Before Plaintiffs may properly obtain the identities of the Doe Defendants through a compulsory discovery process, Plaintiff must support those allegations with facts sufficient to defeat a summary judgment motion. This standard does not require Plaintiff to prove a claim as a matter of undisputed fact, but instead to produce

¹ Plaintiffs suggest the University is engaged in an "effort to permit [its] students to infringe unabated." *Opposition*, p. 2, ¶2.

evidence within its control sufficient to establish a prima facie claim. *Best Western Int'l, Inc. v. Doe*, 2006 U.S. Dist. LEXIS 56014, *11-15 (D. Ariz. July 25, 2006).

Since expedited discovery is a discretionary process, it follows that the Court may also consider information relating to Plaintiffs' conduct. The request should be viewed in light of the entire record to date. *Semitool, Inc. v. Tokyo Electron Am.*, 208 F.R.D. 273, 275 (N.D. Cal 2002) quoting *Merrill Lynch*, 194 F.R.D. at 624. Where the record shows more intent to harass than anything else, expedited discovery is simply not appropriate. *Merrill Lynch, Pierce, Fenner & Smith v. O'Connor*, 194 F.R.D. 618, 623 (ND Ill. 2000). The same is true if the discovery is fairly characterized as a fishing expedition, causing needless expense and burden to all concerned. Such discovery runs counter to the important but often neglected Rule 1 of the Federal Rules of Civil Procedure, which requires that all rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action." *North River Ins. Co. v. Greater N.Y. Mut. Ins. Co.*, 872 F. Supp. 1411, 1412 (E.D. Penn. 1995).

ADDITIONAL INFORMATION REGARDING PLAINTIFFS' ALLEGATIONS AND ITS CONDUCT

Plaintiffs were granted leave to conduct expedited discovery based upon their *ex parte* motion and the supporting declaration of Mr. Linares. That declaration made a number of broad representations to create the impression they had sufficient information to warrant extraordinary relief, including the following:

- “[The] Doe Defendants, without authorization, used an online media distribution system ... to download Plaintiffs’ copyrighted works and/or distribute copyrighted works to the public. *Plaintiffs’ Memorandum*, page 2.
- “Plaintiffs already have developed a substantial case on the merits against each infringer.” *Id.*, page 7.

- “Plaintiffs have copies of a sample of several of the sound recordings that each Defendant illegally distributed to the public and have evidence of every file that each Defendant illegally distributed to the public.” *Id.*, page 8.
- “Information [maintained by the University] may be erased very soon.” *Id.*, page 7.

As previously stated, Plaintiff’s only affiant, Mr. Linares, has no first hand information about the alleged misconduct and played no role in its investigation. The record now includes deposition testimony from a principal in Plaintiffs’ investigative firm, Gary Millin, and a computer expert used by Plaintiffs, Douglas Jacobson. *Affidavit of von Ter Stegge*, Exhibits E and F. The testimony of Mr. Millin indicates that the “data mining” techniques used to investigate computer users really only prove that computer files associated with a particular IP address contain copyrighted songs and also contain software used to exchange data files, including but not limited to music files.² *Id.*, Exhibit E, p. 10-11. The data mining does not indicate how the music files were obtained in the first instance (legally or illegally) or even whether the files were actually shared thereafter. *Id.* It follows that Plaintiffs have shown only a *potential* for illegal file sharing; they have not shown that any infringing activity took place. *Id.* The testimony also shows that when the file-sharing software is enabled on an individual’s computer, with or without his knowledge, it allows copyright violators elsewhere to access his music files and copy them without his participation or awareness. *Id.* p. 8-9.

Other red flags are apparent. For instance, Plaintiffs’ investigation practices probably provide the capability to “mine” private, confidential information unrelated to copyright infringement. Plaintiffs’ expert, Mr. Jacobson, testified under oath that file-sharing programs Plaintiffs are accessing sometimes upload personal and confidential information of the user and

² “Data mining” is a term Mr. Millin uses to explain the data-gathering process MediaSentry engages in identify alleged infringers. *Affidavit of von Ter Stegge*, Exhibit E, p. 6.

make that information available for sharing unbeknownst to the user. *Affidavit of von Ter Stegge*, Exhibit F, p. 3. It only follows that Plaintiffs' investigator, MediaSentry, has access to such information when it is stored in a file-sharing program that it is "mining." In conferral, Plaintiffs refused to answer interrogatories that would shed light on this obvious and legitimate concern. *Affidavit of von Ter Stegge*, page 2, ¶ 7, and Exhibit I (See draft interrogatory 7, asking whether Plaintiffs or their agents obtained, intentionally or otherwise, any electronic information of the Doe defendants, including email, credit card information, user name, passwords, internet purchase information, internet search history, and file sharing). Without reciprocal discovery, there is no process to assess precisely how invasive Plaintiffs' investigation was with regard to the John Does named in this suit.

Furthermore, Plaintiffs' third-party investigator, MediaSentry, is investigating in Oregon without a license as required by ORS 703.405. *Affidavit of von Ter Stegge*, ¶10. By investigating Oregonians without proper licensing, MediaSentry may be in violation of ORS 703.993(2), a misdemeanor crime.

In another case filed by Plaintiffs in Oregon, the credibility of their investigation and their litigation tactics was squarely at issue. In *Atlantic Recording Corp., et al. v. Tanya Andersen*, US District Court Case Number CV05-933-AS, Plaintiffs sued an Oregon woman for copyright infringement, based on the same theories and investigative techniques at issue herein.³ Defendant actively contested the allegations and denied any unlawful activity. In the court's estimation, Plaintiffs stalled and resisted discovery that case. *Affidavit of von Ter Stegge*, Exhibit B, p. 4. Defendant Andersen moved for summary judgment, arguing that Plaintiffs had no evidence to connect her to the infringement and, rather than submit to discovery or oppose the motion, Plaintiffs abandoned their case. *Id.*, Exhibit B, p. 2-3. Andersen was given leave to pursue her own claims against Plaintiffs; her action is pending. *Id.*, exhibit D. Her allegations are

³ The University asks the Court to take judicial notice of its own records and files in that case.

chilling.⁴ If true or substantially true, information bearing on those allegations would be of direct interest to this Court in assessing Plaintiff's entitlement to expedited discovery.

Tanya Andersen claims Plaintiffs' litigation strategy involves the use of collection firms like Settlement Support Center, which apparently engage in debt collection activities in Oregon and across the country. *Id.* Information in her Complaint suggests that Plaintiffs may use the judicial power of this and other courts to identify persons suspected of copyright infringement, and then, rather than pursue the litigation, use the collection firms to leverage payment of arbitrary sums of money, based on threats and evidence from the data mining. *Id.* Is this true? The University certainly doesn't know and won't know unless a reciprocal discovery process is allowed.⁵

THE UNIVERSITY, THROUGH ITS COUNSEL OF RECORD, DID CONFER WITH PLAINTIFFS' COUNSEL PRIOR TO FILING ITS MOTION TO QUASH. BASED ON THAT CONVERSATION, ADDITIONAL DISCUSSION WOULD HAVE BEEN POINTLESS.

Plaintiffs incorrectly assert that Counsel for the University of Oregon failed to sufficiently confer before the filing of the University's motion to quash on October 31, 2007 ("Had the University engaged in dialogue with Plaintiffs and conducted the meet and confer requirements imposed by Local Rule 7.1 (a) prior to filing its motion to quash. . .) *Opposition*, p.3, ¶2. While Counsel for the University inadvertently failed to include a certificate of conferral on the face on the motion to quash, she did confer with Moshe Rothman, national counsel for Plaintiffs, in advance of filing the motion. *Exhibit 1*, ¶3. Indeed, Mr. Rothman's own

⁴ Andersen alleges, essentially, that Plaintiffs have a national litigation strategy wherein they choose targets (students, in this case) without the financial means to litigate against big corporations. Targets are often unnamed, and therefore lack the opportunity to challenge Plaintiffs' *ex parte* discovery process. When challenged, Andersen suggests, information is developed to the effect that Plaintiff's data mining techniques are unlawful and unreliable. *Affidavit of von Ter Stegge*, Exhibit D.

⁵ The State has a unique interest in policing trade and commerce and has the power to conduct investigations and take enforcement actions pursuant to the Unlawful Trade Practices Act, ORS 646.605 et.seq., the Unlawful Debt Collection Practices statute, ORS 646.639, and the Oregon Civil RICO statute, ORS 166.715 et.seq.. No such actions are pending now.

Declaration in support of Plaintiff's "*Opposition to Motion to Quash Subpoena Pursuant to FRCP 45(B)(3)(a) by the University of Oregon*," clearly states that he spoke with Counsel for the University by phone on October 24, 2007 regarding the proposed motion to quash and that she provided information on the University's specific objections to Plaintiffs' subpoena. *Opposition*, Exhibit 4, p. 3. Mr. Rothman, in his rush to inform the Court of his own "cooperative" behavior (namely offering to contact represented parties at the University directly to obtain their compliance with his clients' subpoena), neglects to inform the Court that when he spoke with Counsel for the University on October 24, 2007, he also informed her that the University's objections were meritless and that any opposition to Plaintiffs' subpoena was a "waste" of his client's money—comments not likely to foster out-of-court dispute resolution. *Exhibit 1*, ¶4. It is axiomatic that 7.1 does not require the University to acquiesce to Mr. Rothman's position. The University and Plaintiffs conferred but could not agree; plaintiffs' misrepresentation regarding conferral is both improper and wasteful of the resources of all parties.

PLAINTIFFS OMITTED MATERIAL FACT IN OBTAINING THE EX PARTE ORDER

Plaintiffs omitted a material fact in order to obtain the *ex parte* order to take early discovery and now attempt to shift blame to the University for this omission. It is undisputed that attorneys for the Plaintiffs were told in July 2007 by the University that the information that they had requested in their pre-litigation notices had been gathered and would be preserved. *Opposition*, Exhibit 5, p. 2. It is also undisputed that the Declaration of Carlos Linares omitted a material fact by not recounting the specific discussion between the parties' counsel in July 2008; the subsequent Declaration of Katheryn Jarvis Coggon confirms this. *Id.* Plaintiffs now attempt to justify this omission by stating that the University failed to inform them of precisely what material it had gathered and how long it would preserve it. *Id.* Whether or not Plaintiffs received a guarantee from the University that evidence would be preserved is a fact material to the Court's good cause analysis; how Plaintiffs felt about the guarantee does not alter or negate

the fact that the conversation with the University took place and the guarantee was made. Plaintiffs should have made all relevant facts available to the Court in advance of obtaining the order and failed to do so.

THE SUBPOENA REQUIRES AFFIRMATIVE INVESTIGATION BY THE UNIVERSITY AND THUS PLACES AN UNDUE BURDEN ON THE UNIVERSITY.

Plaintiffs allege that the 2004 response of Portland State University (PSU) and the Oregon Department of Justice to a previous subpoena somehow "belies the University's current assertions of undue burden." *Opposition*, p. 8. The University of Oregon and Portland State University are separate state agencies, each with in-house counsel, and do not coordinate their responses in legal affairs. *Affidavit of von Ter Stegge*, ¶8. The Oregon Attorney General represents state agencies involved litigation, and as in any attorney-client relationship, ultimately takes direction from its client agency. Thus, at most, that two separate educational institutions with different legal counsel responded differently to a similar subpoena means only that minds may differ.

Moreover, Portland State's decision to comply with Plaintiffs' subpoena seeking information about one individual in 2003 is factually distinct from the University of Oregon's objection to a subpoena seeking information about seventeen individuals in 2007. The subpoena served on the University of Oregon imposes an additional burden over the subpoena served on PSU because it seeks information concerning 17 individuals, as opposed to only one individual. Importantly, much more is known about Plaintiffs' tactics in pursuing alleged infringers in 2007 and more actions brought by Plaintiffs in the intervening years have resulted in a larger body of caselaw in John Doe infringement suits now than was available in 2003. Additionally, Plaintiffs may have improperly joined the seventeen John Does named in this suit under Fed. R. Civ. Pro. 20. In 2004, two U.S. District Court Judges in the Western District of Texas dismissed all but the first John Doe in a series of identical lawsuits filed by Plaintiffs, finding that there was no basis to join 254 Does who were alleged to have committed copyright infringement with nothing

more in common than use of the same Internet Service Provider. *Affidavit of von Ter Stegge*, Exhibit G. PSU had less information and less obligation with regard to Plaintiffs' 2003 subpoena. If faced with another, more burdensome subpoena in the future, PSU might reach a different result, as evidenced by the position taken by the University in this case.

The University believes that Plaintiffs' subpoena imposes an undue burden on the University's limited resources. In order to comply with Plaintiffs' subpoena in its current form, the University must do more than produce an existing record. It must affirmatively investigate to determine whether the computer at issue in fact connected to the University network. It must then locate the user names associated with the computer or account, if possible. If not possible, it must identify the location where the connection was made. It must then identify the names of the students who resided at the location and may have visited the location, and produce the names, addresses, and telephone numbers of the residents. The University has an obligation to produce existing documents to comply with narrowly-tailored third-party subpoenas, it does not have an obligation to investigate Plaintiffs' case or create discoverable material through such an investigation.

PLAINTIFFS' SUBPOENA IS OVERBROAD

Plaintiffs now insist that they seek only "information sufficient to identify the individual or individuals assigned to the IP addresses listed in the subpoena at the date and time of infringement." *Opposition*, p. 10, ¶1. If this indeed is the only information that Plaintiffs seek, they should subpoena this information. What they have asked for in fact is much broader: "[i]nformation, including names, current and permanent addresses, and telephone numbers, sufficient to identify the alleged infringers. . . ." *Opposition*, Exhibit 1, p.1. Such a request requires that the University go beyond identifying the individuals assigned to live in particular dormitory room or the owner of a computer associated with a particular an IP address. Plaintiffs submit their subpoena does not require the University to identify the alleged infringers, but the

University effectively must identify the infringer to gauge whether it is providing information “sufficient” to identify the alleged infringer. The University agrees with Plaintiffs’ assertion that the subpoena is clear on its face. The University is not engaging in an “effort to concoct burdens” as the Plaintiffs are quick to allege, rather it is relying on the plain language of the subpoena to assess whether the Plaintiffs’ request is reasonable—and finds that it is not.

Opposition, p. 9, ¶3.

THE SUBPOENA RAISES SUBSTANTIAL ISSUES UNDER THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974, 20 U.S.C. 1232g

A. The Information Sought is Not "Directory Information"

Plaintiffs mislead the court by stating that the information they seek concerning the John Does is "directory information" and thus available under FERPA even in the absence of a subpoena. Plaintiffs seek the name, address and telephone number of students who were allegedly engaged in specific conduct at specific times. *Opposition*, Exhibit 1, p.1. Such information, however, under the present circumstances, is in fact "personally identifiable information" as defined in 34 C.F.R. Sec. 99.3 (definition of "personally identifiable information"). Under that regulation, personally identifiable information is defined as:

- (a) The student's name;
- (b) The name of the student's parent or other family member;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number or student number;
- (e) A list of personal characteristics that would make the student's identity easily traceable; or
- (f) Other information that would make the student's identity easily traceable.

Clearly, when Plaintiffs seek the names of individuals with access to an IP address associated with a specific computer or a specific residence at a specific point in time, the information sought is personally identifiable information. *See also*, OAR 571-020-0110(5).

Further, as described in the attached letter dated September 7, 2007, from Diane Auer Jones, Assistant Secretary of the U.S. Department of Education, "an institution may not disclose

'directory information' that is linked to non-directory information . . ." *Affidavit of von Ter Stegge*, Exhibit A. The alleged directory information sought by Plaintiffs—names, addresses and phone numbers—is clearly linked to non-directory information—computer habits, an individual's physical presence at a specific location at a particular point in time—and thus cannot be released absent appropriate legal process.

B. FERPA does not Require Blind Compliance with all Subpoenas

FERPA and the Oregon Administrative Rules require that the University notify students before disclosing personally identifiable information pursuant to a valid subpoena. This is designed to protect students from improper disclosure of personally identifiable information. However, nothing in FERPA precludes the University from contesting the validity of such a subpoena. See 34 C.F.R. 99.31(a)(9) ("An educational agency or institution **may** disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions: (9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena. . . . (ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action . . .").

Typically, civil litigants have already identified the student about whom they seek personally identifiable information pursuant to a subpoena. Here, Plaintiffs would obtain information not just about the John Doe defendants, but also about individuals who likely have no involvement in the alleged infringement activity giving rise to Plaintiffs' lawsuit. Indeed, the University will even have to conduct an investigation to determine who to notify, an investigation not required by FERPA or any other law. As Congress has enacted special legislation to protect students' privacy rights in their educational records and charged the

University with protection of those rights, it is imperative that the University examine the burdens imposed by subpoenas for educational records closely and to challenge them where appropriate. The University has chosen to challenge Plaintiffs' overbroad and burdensome subpoena as allowed by the Federal Rules of Civil Procedure; this position is in no way inconsistent with its obligations under FERPA.

**THE UNIVERSITY SHOULD BE ALLOWED TO CONDUCT LIMITED DISCOVERY
IN SUPPORT OF ITS MOTION TO QUASH**

Plaintiffs have failed to address the University's request to conduct limited discovery to determine whether a factual basis for Plaintiffs' *ex parte* discovery exists. Plaintiffs maintain that they do not know the identities of the seventeen John Does named in this lawsuit, but they have failed to produce an affidavit from an individual actually involved in the investigation attesting to this fact. Their representations that they cannot identify the John Does in question appear to be nothing more than hearsay. Plaintiffs have indicated that their third-party investigator, MediaSentry, collected additional evidence against the John Does other than what was attached to the subpoena served on the University. The University, nor the Court, has been informed of what this additional information consists.

Because Plaintiffs routinely obtain *ex parte* discovery in their John Doe infringement suits, as they themselves have pointed out, their factual assertions supporting their good cause argument are never challenged by an adverse party and their investigative methods remain free of scrutiny. They often settle their cases quickly before defendants obtain legal representation and begin to conduct discovery, as Mr. Rothman attested they did in the 2003 Portland State University case, and have dropped cases, such as their case against Tanya Andersen, in which their methods and practices have been challenged through counterclaims. *Opposition*, Exhibit 4, p. 2, ¶6 & *Affidavit of von Ter Stegge*, Exhibit C, p. 12 ("In poker terms, defendant didn't call; plaintiffs folded").

While the University is not a party to the case, Plaintiffs' subpoena affects the University's rights and obligations. Plaintiffs may be spying on students who use the University's computer system and may be accessing much more than IP addresses. The University seeks the Court's permission to serve the attached interrogatories on Plaintiffs and conduct telephonic depositions of the individuals who investigated the seventeen John Does named in this lawsuit to determine 1) what their investigative practices are and 2) whether they have any additional information with which to identify the John Does. Plaintiffs have refused to provide the University with answers to these basic questions. If Plaintiffs have nothing to hide, they should be able to agree to these reasonable requests. Since Plaintiffs have declined to share any information about what they know and how they know it, the University seeks the assistance of the Court to obtain it.

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CONCLUSION

The University respectfully requests that this Court allow the University to determine whether Plaintiffs truly have no additional information with which to identify the seventeen John Does through limited discovery and quash Plaintiffs' subpoena as overbroad and burdensome.

DATED this 26th day of November, 2007.

Respectfully submitted,

HARDY MYERS
Attorney General



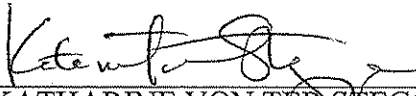
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CERTIFICATE OF SERVICE

I certify that on November ~~20~~, 2007, I served the foregoing University of Oregon's Reply in Support of Motion to Quash Plaintiffs' Subpoena upon the parties hereto by the method indicated below, and addressed to the following:

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