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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ARISTA RECORDS LLC, et al.,

Plaintiffs,

v.

DOES 1-17,

Defendants.

CV No. 6:07-CV-6197-HO

Plaintiffs'
SURREPLY IN OPPOSITION TO THE UNIVERSITY'S MOTION TO QUASH

Plaintiffs submit this surreply to address the University's incorrect statement of the standard of review to be applied to the disposition of the University's Motion to Quash, and to address the new arguments and assertions first raised by the University in its Reply brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

As stated in Plaintiffs' Motion to Strike Or, In The Alternative, Motion For Leave To File Surreply, most of the arguments and issues raised by the University of Oregon (the "University") in its reply brief were not raised by the University or Plaintiffs in any previous pleading and should, therefore, be stricken. Even if the Court does not strike the new arguments raised for the first time in the University's reply brief, for the reasons stated below, none of these arguments provides a valid basis for quashing the subpoena in this case.

As an initial matter, the University's stated purpose for moving to quash the subpoena is improper. In the opening paragraph of its Reply, the University states that, "by challenging Plaintiffs' overbroad and burdensome subpoena, the University has attempted to protect the fundamental privacy rights of its students," and that Plaintiffs' efforts to protect their statutory rights under copyright law "must be tempered by basic notions of privacy and due process." (Reply, p. 2.) The University is not a party to this litigation and does not have standing to raise privacy or due process arguments on behalf of Defendants. Moreover, such arguments are not ripe for consideration because, once the University notifies Defendants of the subpoena, Defendants themselves will have an opportunity to raise any objections before the University responds to the subpoena. Even if the University did have standing to raise these arguments on behalf of Defendants, it is clear from the University's arguments that it is pursuing an agenda other than simply ensuring that it complies with applicable regulations or protecting its own rights and those of its students. The fact that the University, a third party, now seeks to propound discovery to Plaintiffs on issues such as damages and copyright ownership as a condition of responding to the subpoena is telling as to its hidden goals. As discussed below, the majority of the University's arguments are meritless, irrelevant, or go to the merits of Plaintiffs' claims and therefore are not appropriate at this stage of the proceedings. Plaintiffs respectfully submit that, whatever the University's political agenda may be, this is not the appropriate venue for pursuing it.

First, the University attempts to impose a summary judgment standard on Plaintiffs' request for expedited discovery, which, according to the University, would require Plaintiffs to state a *prima facie* claim for copyright infringement before allowing Plaintiffs to discover the Defendants' identities from the University. This argument fails because it applies the wrong standard to Plaintiffs' request. Courts routinely apply a flexible "good cause" standard, which Plaintiffs have already met. Even if the Court were to apply the heightened standard espoused by the University, however, Plaintiffs would meet this standard as well. Plaintiffs have pled their

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claims sufficiently under Rule 8 and have alleged and adduced concrete evidence of *actual* copyright infringement by each of the Defendants in this case.

Next, the University attempts to call into question Plaintiffs' pre-litigation discovery efforts to discover copyright infringement over peer-to-peer ("P2P") networks in an effort to convince the Court to reconsider its grant of Plaintiffs' discovery motion. The Court should reject the University's attempts for two reasons. One, the University has no evidence whatsoever that Plaintiffs acted at all improperly during the course of this litigation. The University's arguments concerning Plaintiffs' discovery and litigation practices are based entirely on allegations and deposition testimony from different cases and amount to nothing more than pure conjecture. Two, the University's attempted challenge to Plaintiffs' discovery and litigation practices is irrelevant to any issues presently before this Court. The evidence submitted regarding what *may* have happened in *different* cases involving *different* parties, *different* facts, *different* allegations, and *different* circumstances has no bearing on this case.

Likewise, the University's continued insistence that the subpoena is unduly burdensome and overly broad, despite the fact that Plaintiffs have clarified the scope of information they are seeking, is unavailing. Plaintiffs are seeking only information sufficient to identify the individual(s) associated with the IP addresses listed in the subpoena, information that the University admits it already has. The University's argument that this information is overbroad and that producing this information would be unduly burdensome is specious. Over one hundred different universities around the country have responded to identical subpoenas without raising objections based on burden.

Similarly, the University's argument that the information requested by the subpoena is not "directory information" and that FERPA somehow provides a basis for quashing the subpoena also fails. Those courts that have addressed this precise issue have rejected the University's argument and held instead that FERPA expressly allows the disclosure of the information sought by the subpoena.

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The University next argues that joinder in this case may be improper. This argument fails for three reasons. First, any decision on joinder would be premature where, as here, the Defendants have not yet been identified or appeared before the Court. Second, Plaintiffs' claims against Defendants share common issues of law and fact and arise out of a common scheme or pattern of behavior by each of the Defendants in using the University's network to share files over P2P networks. Third, joinder imposes the minimum burden on the parties to this litigation and on the Court. Accordingly, Plaintiffs have demonstrated good cause for joining the Doe defendants in this case.

Finally, the University's request to propound discovery on Plaintiffs as a condition of responding to Plaintiffs' subpoena should be denied because the University has failed to provide any authority for its request. Indeed, a subpoenaed third party's attempt to propound discovery is not authorized under the Federal Rules.

ARGUMENT

I. PLAINTIFFS ARE NOT REQUIRED TO PROVE THEIR CASE ON THE MERITS AT THIS STAGE.

The University asserts that Plaintiffs must meet a summary judgment standard by producing evidence sufficient to establish a prima facie claim in order to obtain the discovery they seek in this case. (Reply, pp. 2-3.) This argument fails for three reasons. First, it is wrong as a matter of law. Simply stated, Plaintiffs need not prove their case at this stage of the proceedings. Rather, they need only show good cause for the expedited discovery requested, which they have done. Second, even if the sufficiency of Plaintiffs' Complaint were at issue for the purpose of the University's motion to quash, Plaintiffs have more than met their pleading requirements under Fed. R. Civ. P. 8(a) and have properly stated a claim for copyright infringement. Finally, even if this Court were to reach the issue of whether Plaintiffs have provided factual allegations and supporting evidence sufficient to make out a *prima facie* claim for copyright infringement against the Defendants in this case, Plaintiffs have clearly done so.

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A. Plaintiffs Have Met The Standard For Granting Expedited Discovery.

As the standards set forth in Fed. R. Civ. P. 45(c)(3)(A) make clear, a motion to quash a Rule 45 subpoena is not the place for contesting the merits of the underlying action.[1] Acknowledging this premise, courts do not apply a standard that considers the merits or sufficiency of a plaintiff's complaint in deciding whether to grant orders for expedited discovery in circumstances like those presented here. Rather, despite the University's arguments to the contrary, (Reply, pp. 2-3), most courts apply a flexible good cause standard in determining whether expedited discovery should be allowed.

For instance, in a recent case involving nearly identical claims and a nearly identical request for expedited discovery by similarly-situated plaintiffs, the court allowed plaintiffs to serve a Rule 45 subpoena on the University of Kansas, holding that FRCP 26(d) "allows a court to order expedited discovery *upon a showing of good cause*," and that "[g]ood cause can exist in cases involving claims of infringement and unfair competition." *Interscope Records v. Does 1-14*, No. 5:07-4107-RDR, 2007 U.S. Dist. LEXIS 73627, *3 (D. Kan. Oct. 1, 2007) (emphasis added); *see also* Memorandum Opinion, *Warner Bros. Records Inc., et al. v. Does 1-6*, Civ. Action No. 07-1878 (EGS), pp. 2-3 (D.D.C. Dec. 7, 2007) (same) (attached hereto as Exhibit 1), *Warner Bros. Records, Inc. v. Does 1-4*, No. 2:07 cv 0424 TC, 2007 U.S. Dist LEXIS 48829 at *2 (D. Utah July 5, 2007) (same). Likewise, the court in *Energetics Sys. Corp. v. Advanced Cerametrics*, No. 95-7956, 1996 U.S. Dist. LEXIS 2830, *5-6 (E.D. Pa. March 8, 1996) permitted expedited discovery, noting that the good cause standard for expedited discovery is satisfied where the moving party had asserted claims of infringement.

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[1] If it were, a full-blown trial would be required every time a party sought to resist such discovery. The Defendants in this case will have ample opportunity to respond to the merits of the Complaint and to raise appropriate defenses once they are identified and served. To permit the University to resist discovery by arguing *its* view of the merits at this stage, before Plaintiffs even know who Defendants are or have taken any discovery, would prohibit Plaintiffs from ever being able to vindicate their legal rights.

The University's reliance on *Best Western, Int'l, Inc. v. Doe*, 2006 U.S. Dist. LEXIS 56014 (D. Ariz. July 25, 2006) for the proposition that Plaintiffs must satisfy a summary judgment standard that requires Plaintiffs to produce evidence sufficient to establish a *prima facie* claim is misplaced. (See Reply, pp. 2-3.) The *Best Western* court did not hold that expedited discovery is only permissible if the requesting party first meets the type of quasi-summary judgment standard that the University espouses here. To the contrary, the *Best Western* court found that the plaintiff had "established good cause to conduct discovery before the Rule 26(f) conference." *Id.* at *4.

Moreover, the *Best Western* case involved First Amendment issues that are not present in this case. The court required the plaintiffs in that case to meet a higher summary judgment standard only because the defendants' postings on an internet chat room were "purely expressive" and therefore entitled to robust First Amendment protection. *Id.* at *11. In contrast, Defendants here did not engage in protected speech. Rather, they used a P2P network to unlawfully download and distribute Plaintiffs' copyrighted sound recordings. "[A] person who engages in P2P file sharing is not engaging in true expression . . . the individual's real purpose is to obtain music for free." *Sony Music Entertainment, Inc., et al. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004). Moreover, even if Defendants did deserve some constitutional protection here, in *Sony Music Entertainment v. Does 1-40*, a court considering some of the same issues as those facing this Court explicitly rejected a First Amendment argument in a copyright infringement case and instead held that the "defendants' First Amendment right to remain anonymous must give way to plaintiffs' right to use the judicial process to pursue what appear to be meritorious copyright infringement claims." *Id.* at 567.

As this Court has already found in this case, Plaintiffs' *ex parte* request for expedited discovery is reasonable under the good cause standard in light of (1) the allegations of Plaintiffs' Complaint; (2) the harm to Plaintiffs of having Defendants infringe hundreds, if not thousands, of Plaintiffs' copyrighted works; (3) Plaintiffs' inability to pursue their claims against

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Defendants absent expedited discovery; (4) the opportunity that Defendants will have to defend against Plaintiffs' claims at the appropriate time; and (5) the limited nature of the information requested. Plaintiffs' subpoena is narrowly-tailored to request only enough information to allow Plaintiffs to identify the Defendants and allow Plaintiffs to proceed with their claims, and Plaintiffs have agreed to limit the use of that information to the enforcement of their rights under the Copyright Act. Moreover, the *only* entity that can identify Defendants is the University. Thus, because Plaintiffs' Complaint meets the good cause standard for granting expedited discovery, the University's Motion to Quash should be denied.

B. Even If The Sufficiency Of Plaintiffs' Complaint Were At Issue, Plaintiffs' Complaint Would Be Judged By The Liberal Notice Pleading Standards Of Rule 8, Not By The Summary Judgment Standard Espoused By Defendants.

As discussed above, whether Plaintiffs' complaint can survive a summary judgment motion is not the standard by which Plaintiffs' Discovery Motion is to be judged. However, even if the University's arguments regarding the sufficiency of Plaintiffs' Complaint were appropriate at this stage (which, as discussed above, is not the case), Plaintiffs have met their pleading burden under FRCP 8 by alleging facts sufficient to state a claim for copyright infringement.

FRCP 8(a) requires, in pertinent part, that Plaintiffs' Complaint include "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." FRCP 8(a).

To state a claim for copyright infringement, a plaintiff need only allege: (1) ownership of a valid copyright and (2) that the defendant violated one or more of the exclusive rights in 17 U.S.C. § 106 by, for example, copying or distributing the plaintiffs' copyrighted works. *See Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) ("To establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."); 4 Melville Nimmer & David Nimmer,

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NIMMER ON COPYRIGHT § 13.01, at 13-5 & n. 4 (2002) ("Reduced to most fundamental terms, there are only two elements necessary to the plaintiff's case in an infringement action: ownership of the copyright by the plaintiff and copying [or public distribution or public display] by the defendant."). Despite this well-settled case law establishing the elements of a claim for copyright infringement, the University makes numerous baseless arguments regarding the sufficiency of Plaintiffs' Complaint, none of which apply the proper standard under FRCP 8(a). As discussed below, the University's' arguments fail.

Plaintiffs here have properly pled their claims under FRCP 8. Specifically, Plaintiffs have alleged that they own valid copyrights in the sound recordings identified in Exhibit A of the Complaint, which are the recordings at issue, and that they have properly registered their copyrights in each of those sound recordings. (Complaint ¶ 18.) Indeed, the University does not refute these allegations. Plaintiffs have further alleged that Defendants have used and continue to use an online media distribution system to download (copy) and distribute the sound recordings at issue, in violation of Plaintiffs' copyrights and exclusive rights under the Copyright Act. (*Id.* ¶ 22.) These allegations are well supported on the face of the Complaint, which alleges massive infringement by each of the Defendants. (*See id.* ¶ 20.) Moreover, in support of their allegations, Plaintiffs have attached to the Complaint a partial list of the thousands of copyrighted audio files that Defendants had in their "shared folders," which files Defendants were unlawfully copying and distributing to millions of users without authorization. (*Id.,* Ex. A.)

Such allegations more than suffice to establish a copyright claim because they establish Plaintiffs' ownership of valid copyrights in clearly specified works and because they expressly state the acts by which copyright infringement took place and that such infringement was continuous. *See Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 565-66 (allegations that each defendant "used and continues to use an online media distribution system to download, distribute to the public, and/or make available for distribution to others certain of the copyrighted recordings in Exhibit A to the complaint" held sufficient to adequately plead

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defendants' infringement of plaintiffs' copyrights) (citation, internal quotation marks omitted); *Elektra Entertainment Group, Inc. v. Santangelo*, No. 05-CV-2414-CM, 2005 U.S. Dist. LEXIS 30388 (S.D.N.Y. Nov. 28, 2005) (denying a similar motion to dismiss, finding that nearly identical complaint satisfied Rule 8's pleading requirements, as applied to copyright infringement claims.).

C. The University's Unsupported Assertions Regarding Plaintiffs' Discovery And Litigation Practices In Other Cases Are Irrelevant To Any Issue Before The Court In This Case.

In response to the foregoing, and unable to challenge the subpoena under any proper standard, the University misconstrues the nature of Plaintiffs' claims, attempts to add unnecessary elements to Plaintiffs' claims, and makes numerous unsupported, hypothetical arguments regarding Plaintiffs' evidence and litigation strategies. These arguments lack merit.

The University asserts that "[t]he record in this cases 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." (Reply, p. 2.) The so-called "record in this case" upon which the University relies actually consists of orders, pleadings, and selected deposition testimony excerpts from a number of separate cases that were not cited to or relied upon by any of the parties in any prior pleading. (*See* Reply, pp. 4-6 (citing to selected deposition testimony in two different cases, and the allegations in a complaint filed in yet a third case).)

Based on this newly-introduced "record," the University first argues that "Plaintiffs have shown only a *potential* for illegal file sharing; they have not shown that any infringing activity took place." (Reply, p. 4 (emphasis in original).) This assertion is incorrect. The record in *this* case establishes that Plaintiffs have alleged and adduced concrete evidence of actual file-sharing by each of the Defendants in this case. As discussed above, Plaintiffs' claims for copyright infringement are based on well-supported allegations of *direct* copying of Plaintiffs' copyrighted sound recordings by each Doe defendant and *actual* distribution of Plaintiffs' copyrighted sound

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recordings to millions of P2P network users across the world. (*See* Complaint ¶ 22; *see also* pp. 7-8 *supra*.) Uploading and downloading copyrighted works over a P2P network clearly violates federal law and Plaintiffs' exclusive rights under the Copyright Act. *See BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005); *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003) ("swap[ping] computer files containing popular music . . . infringes copyright"); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001) (Napster users who "download and upload copyrighted music . . . infringe . . .the copyright holders' exclusive rights . . . to reproduction and distribution.") (internal quotation marks, citations omitted); *see also* Order, *UMG Recordings, Inc., et al. v. Blumenreich*, Case 1:06-cv-00298-SS, pp. 5-6 (W.D. Tex. June 11, 2007) (attached as Ex. 2).

Second, the University surmises that Plaintiffs' "investigation practices" in this case "*probably* provide the capability to 'mine' private, confidential information unrelated to copyright infringement" and that "Plaintiffs' investigator, MediaSentry, has access to such information when it is stored in a file-sharing program that it is 'mining.'" (Reply, pp. 4-5 (emphasis added).) These assertions are purely hypothetical, entirely baseless, and wrong.[2] There is no evidence that MediaSentry has accessed or "mined" private or confidential information from any of the Defendants in this case. Indeed, they have not. The only "evidence" to which the University can point in support of its contention is selected deposition testimony from other cases that bears no relevance here.

Third, the University questions Plaintiffs' "investigation and litigation tactics" in this case. (Reply, pp. 5-6.) To support this argument, the University relies on the untested and unsupported allegations contained in the plaintiffs' complaint in *Andersen v. Atlantic Recording*

[2] The University's speculation is irrelevant in any event. Whether some of the Defendants in this case chose to distribute their personal information by publishing it to millions of people through a file-sharing program, and thereby gave anyone with internet access and the same file sharing program access to that personal information, has no bearing on whether Plaintiffs have established good cause for seeking the Defendants' identifying information in this case.

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Corp., et al, a copy of which is attached as Exhibit D to Ms. Von Ter Stegge's Affidavit in support of the University's Reply brief. This argument should be rejected. The defendants in the *Andersen* case deny Ms. Andersen's allegations and are defending themselves against her specious claims. Until those untested and unsupported allegations are subjected to the rigors of the judicial process, which will demonstrate their lack of merit, they cannot be a basis to avoid discovery in this case. Moreover, the allegations contained in a complaint filed in a completely separate case involving different parties, different circumstances, and different facts cannot form the basis for quashing the subpoena in *this* case. The University has not shown, nor could it, that the issues presented in *Andersen* are relevant here. Ms. Andersen's allegations are of no "interest" or relevance "in assessing Plaintiff's entitlement to expedited discovery" in *this* case, where Plaintiffs have alleged and adduced concrete evidence of direct, actual infringement by each of the Defendants. Thus, the University's attempt to inject Ms. Andersen's allegations into this case should be rejected. For these same reasons, the University's absurd contention that it should be allowed to conduct "a reciprocal discovery process" in *this case* in order to determine the accuracy Ms. Andersen's allegations in a *separate* case should be rejected. (Reply, p. 6.)

Fourth, the University suggests that "the record shows more intent to harass than anything else," and that Plaintiffs' discovery efforts are nothing more than a "fishing expedition." (Reply, p. 3.) This suggestion is outrageous and ignores entirely the allegations in the Complaint. As discussed above, Plaintiffs have adduced concrete evidence of actual infringement by each of the Defendants in this case. Attempting to identify the individuals responsible for the wide-scale infringement alleged in the Complaint by seeking the information from the only entity in possession of that information can hardly be characterized as harassment or a "fishing expedition."

Finally, the University baldly asserts, for the first time, that "Plaintiffs' third-party investigator, MediaSentry, is investigating in Oregon without a license as required by ORS 703.405." (Reply, p. 5.) The University has provided no support for this argument and, indeed,

cannot do so, because MediaSentry is not an "investigator" under ORS 703.401. The University's conclusory, two-sentence assertion that MediaSentry is investigating in Oregon without a license should be disregarded. In any event, the status of MediaSentry is irrelevant to the subpoena at issue here, for even if MediaSentry needed a license and did not have one, the supposed failure to obtain the necessary license would have no bearing on the strength, validity, or relevance of the evidence collected by MediaSentry.

In sum, Plaintiffs have stated viable claims for copyright infringement and have provided more than sufficient information to warrant the limited discovery that they seek. The University may dispute Plaintiffs' evidence and may question Plaintiffs' efforts to identify infringement over peer-to-peer ("P2P") networks, but, as courts across the country have recognized, that is not a basis for quashing the subpoena. Moreover, if the *Defendants* wish to challenge the nature and sufficiency of Plaintiffs' investigation, they will have an opportunity to do so after they have been identified, given notice of the Complaint, and permitted to participate in this process. For all of the foregoing reasons, the University's Motion to Quash should be denied.

II. THE SUBPOENA DOES NOT PLACE AN UNDUE BURDEN ON THE UNIVERSITY AND IS NOT OVERBROAD.

Despite the fact that the University admits that it can identify the individual or individuals associated with each of the IP addresses listed in Plaintiffs' subpoena (*see* Ex. 103 to the University's Motion to Quash, ¶¶8-10), the University continues to insist that, to comply with the subpoena, it will have to "investigate Plaintiffs' case or create discoverable material through such an investigation" and that Plaintiffs' subpoena is overly broad. (*See* Reply, pp. 9-10.) This assertion is utterly specious. Plaintiffs have repeatedly stated that they are only seeking information sufficient to identify the individuals to whom the IP addresses in the subpoena were assigned at the date and time of infringement listed in the subpoena. By providing *this* information, the University will provide "information . . . sufficient to identify the alleged infringers" and will, therefore, fully comply with the subpoena, as countless Universities across

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the country have done in identical circumstances. Accordingly, the University's insistence that the subpoena requires the University to conduct an investigation to determine which individual or individuals are *actually* responsible for the infringement alleged in the Complaint is, itself, unreasonable, and does not provide a valid basis for quashing the subpoena.

III. FERPA DOES NOT PROHIBIT DISCLOSURE OF THE INFORMATION SOUGHT BY THE SUBPOENA.

FERPA does not prohibit the disclosure of the Defendants' identifying information because the information sought falls squarely within the definition of directory information and is being sought subject to a court order. Nevertheless, the University argues that the information sought is not Directory Information, but rather "personally identifiable information," 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. (Reply, p. 10.) This argument fails because Plaintiffs are not asking the University to produce additional information related to that conduct. Defendants' illegal conduct took place in public, where Plaintiffs and the millions of users of Defendants' P2P networks could witness it. Because Plaintiffs have already gathered information concerning Defendants' infringement, Plaintiffs' subpoena simply seeks information sufficient to determine Defendants' true identities. Moreover, as discussed below, those courts which have addressed the issue directly have rejected the University's reading of FERPA by holding that it explicitly authorizes a University's disclosure of the information sought in the subpoena in precisely this context.

Shortly after Plaintiffs filed their Opposition to the University's Motion to Quash, the United States District Court for the District of Columbia issued an order in a similar infringement case in which the plaintiffs sought leave to serve Georgetown University with a subpoena identical to the one Plaintiffs' requested in this case. In granting the plaintiffs' request in that case, the court, noting that the information the plaintiffs sought was "not only relevant but crucial to the prosecution of plaintiffs' claims," held explicitly that Georgetown's disclosure of

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the requested information would be "consistent with Georgetown University's obligations under the Family Educational Rights and Privacy Act (FERPA)." Ex. 1, pp. 3-4. The court 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."[3] *Id.* at 4.

Likewise, in *Arista Records, LLC, et al. v. Does 1-11*, Civ-07-568-R (W.D. Okla. Nov. 14, 2007), several Doe defendants filed a motion to quash an identical subpoena that was served on Oklahoma State University. The Doe defendants raised many of the same issues the University now raises in its Reply brief. The court in *Arista Records* denied the motion to quash, holding 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."[4] Order, *Arista Records, LLC, et al. v. Does 1-11*, Civ-07-568-R (W.D. Ok. Nov. 14, 2007) (attached as Ex. 3) (emphasis added).

The University's tortured reading of FERPA would protect from disclosure the identifying information for any student engaged in any illegal activity simply because the party seeking the information *already knows* that the individual is engaged in illegal activity. Such an expansion of the definition of "personally identifiable information" cannot possibly be the intent of FERPA. Notwithstanding the University's argument to the contrary, both the express

[3] Although the University's FERPA argument is not raised for the first time in its Reply, the Court should consider this and the *Arista Records* case cited *infra* on page 10 because these Orders were entered after Plaintiffs filed their opposition to the University's motion and directly reject the University's argument that FERPA protects the requested information from disclosure.

[4] That same court rejected an argument, nearly identical to the University's argument in this case, that the Digital Millennium Copyright Act ("DMCA") somehow barred the plaintiffs' discovery request or that plaintiffs failed to comply with the requirements of the DMCA because, as here, the plaintiffs did not seek a subpoena under the DMCA. *Id.* at 3.

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language of FERPA and those courts that have interpreted FERPA in similar contexts prove that FERPA expressly permits the disclosure of the information sought by the subpoena.

IV. PLAINTIFFS' INFRINGEMENT CLAIMS AGAINST DEFENDANTS ARE PROPERLY JOINED.

Finally, the University asserts that "Plaintiffs may have improperly joined the seventeen John Does named in this suit under Fed. R. Civ. P. 20." This argument, too, fails. First, this argument is premature. Second, Plaintiffs submit that they have satisfied the Federal Rules' liberal standards for joinder in this case and that good cause exists to permit joinder here. Furthermore, a Doe lawsuit like this one increases efficiency and imposes a minimum burden on the judicial system and all parties involved, including the Defendants in this case.

A. Any Decision On Joinder Would Be Premature Here.

Plaintiffs respectfully submit that a decision on joinder is premature before the Defendants' true identities have been identified and formal service has been effected. As most of the courts that have considered this question have agreed, issues of joinder can and should properly be considered after all parties are before the Court. *See Loud Records, LLC, et al. v. Does 1-251*, No. C-05-1202-WHA (N.D. Cal. April 18, 2005) (J. Alsup) (allowing case to proceed as filed after requesting supplemental briefing on the propriety of joinder); *Sony Music Entertainment v. Does 1-40*, 326 F. Supp. 2d at 567-68; *UMG Recordings v. Does 1-199*, 1:04-CV-0931 (D.D.C. Mar. 10, 2004) ("[i]t is clear to the Court that Defendants must be identified before this suit can progress further" and ruling that it is "premature" to consider joinder); *Priority Records LLC, et al. v. Does 1-8*, Case No. C-04-1136 SC (N.D. Cal. July 13, 2004) (rejecting arguments that joinder was improper and granting Motion for Leave to Take Immediate Discovery as to all Doe defendants). Accordingly, the question of joinder is best left until Plaintiffs have identified Defendants and can make a more informed decision as to whether to proceed against them individually.

B. Even If The Issue Of Joinder Were Ripe, Joinder Is Proper In This Case.

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Even if the issue of joinder were ripe, the University's argument would still fail because joinder was, and is, proper in this case. Joinder is appropriate where 1) there is any issue of law or fact common to all parties in the action and 2) there is asserted against them any right to relief arising out of the same transaction or occurrence or *series* of transactions or occurrences. Fed. R. Civ. P. 20(a); *League to Save Lake Tahoe v. Tahoe Re'l Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977). As the Supreme Court has explained, the terms "transaction" and "occurrence" are "word[s] of flexible meaning. *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926). Joinder may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Id.*

The Federal Rules direct "the broadest possible scope of action consistent with fairness to the parties [because] joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of Am. V. Gibbs*, 383 U.S. 715, 724 (1966). The rule "regarding permissive joinder is to be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits." *League to Save Lake Tahoe*, 558 F.2d at 917. Joinder of appropriate parties is encouraged to address common issues in a single action. *Roe v. City of New York*, 151 F. Supp. 2d 495, 509 (S.D.N.Y. 2001).

To establish the propriety of permissive joinder of defendants, "[a]ll that a plaintiff must show is that there is some systematic pattern or logical relationship connecting the tortious conduct of each defendant." *Stone Age Foods, Inc. v. Exchange Bank*, 1997 WL 123248, at *2 (N.D. Cal. 1997) (citing *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974)). Importantly, "[t]he second prong of that test does not require precise congruence of all factual and legal issues; indeed, joinder may be permissible if there is but one question of law or fact common to the parties." *Morris v. Paul Revere Ins. Group*, 986 F. Supp. 872, 885 (D.N.J. 1997).

Plaintiffs have satisfied both of FRCP 20's requirements here. First, this action undoubtedly involves common questions of fact and copyright law, because Plaintiffs have alleged that all of the Defendants have illegally downloaded and distributed copyrighted works

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over a P2P network, in violation of copyright law, and because all of the Defendants used the University's ISP service in connection with these activities. Plaintiffs note that several other districts have consolidated actions involving Doe defendant infringers before a single judge, recognizing that many of the legal and factual issues are common. *See* Ex. 3 (list of similar cases where discovery was granted without severance).

Second, Plaintiffs' claims against Defendants arise out of a logically related series of transactions or occurrences. *See Stone Age Foods*, 1997 WL 123248 at *2. Specifically, Plaintiffs' claims against each Defendant are linked by a common ISP and by their use of a P2P network to commit the exact same violation of law in exactly the same way. Defendants are active participants in what can only be described as an on-line music swap meet, unlawfully copying copyrighted works from other users and distributing such works to other users. Defendants and others have participated in a common scheme or pattern of behavior, without which no individual Defendant would have been able to commit much (if any) of the infringing activity that underlies Plaintiffs' Complaint. It is this concerted action by the Defendants and others that allows the distribution of billions of digital copies of Plaintiffs' copyrighted sound recordings. Defendants' concerted actions as users of the University's P2P network provide the "logical relationship" required for joinder.

In sum, the case at hand involves common questions of fact and copyright law (the illegal copying and distribution of copyrighted sound recordings). Furthermore, at this stage of the proceedings, the factual and legal issues regarding Plaintiffs' subpoena to the University are exactly the same for each Defendant. On the same facts, the great majority of courts around the country that have addressed these issues, including this one, have found joinder to be appropriate. *See, e.g.,* Exhibit 4 (list of cases where discovery was granted without severance). Notably, the University completely ignores this fact in their brief, choosing instead to cite to the few cases that have split with the majority, including a case in Texas from 2004 that involved an entirely different set of facts and allegations in support of joinder.

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C. Joining The Defendants In One Doe Action Imposes A Minimum Burden On All Parties Involved And Promotes Trial Efficiency.

Finally, Plaintiffs note that Doe lawsuits such as this one serve the goals of efficiency and judicial economy. In pursuing a nationwide enforcement program against massive copyright infringement, Plaintiffs must balance the need to stop the infringement as quickly as possible with the most efficient manner in which to enforce their rights. To this end, Plaintiffs generally accumulate multiple instances of infringement involving individuals sharing the same ISP before filing a Doe lawsuit.

Doe lawsuits like this one permit a threshold issue identical to all of the suits of this nature – discovery from a particular ISP – to be litigated in a single case, rather than hundreds of times in hundreds of different cases. Bringing suit in this manner is far more efficient for the Court and all parties involved than bringing hundreds of cases before multiple judges, where all of the cases involve the same threshold issue and many common issues of fact and law (including, but not limited to, the underlying standards for infringement, the operation of P2P networks, and the ISP's network). In a Doe case such as this one, the Court receives only one case involving multiple subscribers of the same ISP and can decide the identical threshold issue, including any motions to quash by the ISP or by its subscribers, only once.

V. THE UNIVERSITY IS A THIRD PARTY AND IS NOT ENTITLED TO PROPOUND DISCOVERY.

Finally, the University argues that it is entitled to conduct telephonic depositions to obtain information regarding Plaintiffs' "investigative practices," and to serve interrogatories to obtain information regarding, among other things, Plaintiffs' damages, Media Sentry's and the RIAA's business registrations, and specific information relating to Defendants' illegal downloading of Plaintiffs' copyrighted sound recordings. (Reply, p. 13; Von Ter Stegge Aff., Ex. H.) Setting aside the fact that these inquiries are irrelevant to the validity of and good cause for the subpoena in this case, the University does not have standing to conduct discovery in an effort to "protect the fundamental privacy rights of its students," or to raise "privacy and due

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process" arguments on behalf of Defendants. (Reply, p. 2.) Once the University notifies the affected students of the subpoena, they will have an opportunity to object to the subpoena and to raise any such arguments for themselves before the University complies with the subpoena.

Even if the University did have standing to protect its students privacy rights and challenge the merits of Plaintiffs' claims on the students' behalf, the University has provided no authority to justify its request to take discovery in this case. Indeed, no such authority exists. FRCP 26(b), which governs the scope and limits of permissible discovery, states clearly that "*Parties* may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." FRCP 26(b)(1) (emphasis added). FRCP 26 does not, however, allow a non-party to conduct discovery. Likewise, FRCP 45(d), which specifies the duties of a third party when responding to a subpoena, does not allow a subpoenaed third party to issue discovery of its own as a condition of responding to a validly-issued subpoena. FRCP 45(d). The University has not, because it cannot, pointed to a single case in which a recipient of a third party subpoena was allowed to take unilateral, one-sided discovery of a party. In short, the University's attempt to litigate this case on the merits at this stage, before Plaintiffs even know who the Defendants are, is not only legally unsupportable, but it is frivolous and a waste of the Court's and the parties' time and effort.

In any event, the only issue before this Court is the validity of, and good cause for, the discovery that Plaintiffs seek in this case. Simply put, the discovery sought by the University is irrelevant to that issue. There is no genuine dispute that Plaintiffs have gathered competent evidence of the Defendants' infringing activities. Plaintiffs have attested to their efforts and evidence in a pleading that was signed pursuant to, and in accordance with, FRCP 11. An "affidavit from an individual actually involved in the investigation attesting to this fact" would be both unnecessary and duplicative. (Reply, p. 12.) While the University recklessly asserts that "Plaintiffs may be spying on students who use the University's computer system and may be accessing much more than IP addresses," such speculation (which is as baseless as it is absurd) is

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irrelevant to the validity of the Plaintiffs' discovery request and the good cause for the subpoena at issue here, and is no basis for any non-party to propound discovery at this stage.

Finally, as discussed above, it is obvious from reading the University's proposed interrogatories that they do not speak to the standard set forth above for evaluating an early discovery motion and are aimed instead at pursuing an agenda other than protecting the University's rights. For example, Interrogatory Nos. 2 and 3 ask for information regarding Plaintiffs' "economic damage." (Von Ter Stegge Aff. Ex. H) Such information goes to the elements of Plaintiffs' claims and the Defendants' possible defenses. Not only does the University lack standing to challenge the merits of Plaintiffs' claims, but the discovery the University seeks is irrelevant to determining the propriety of a party's request for discovery prior to the FRCP 26(f) conference. Likewise, the University's requests for information regarding MediaSentry and the RIAA's registration to do business in Oregon, (Interrogatory Nos. 10 and 11), MediaSentry's registration as a private investigator, (Interrogatory No. 12), and possible collection of "email, credit card information," and other personal information relating to any of the Defendants, (Interrogatory No. 7), have no bearing on the standard for quashing a Rule 45 subpoena.[5] Such requests belie the University's assertion that it is only attempting to protect its students' privacy rights, conserve public resources, and provide *pertinent* information to the Court. (Reply, p. 2.) Accordingly, the University's request to serve discovery on Plaintiffs should be denied.

[5] Although the University asserts that Plaintiffs *may* have had access to the Defendants' private information, such as credit card information, user names, passwords, etc., if they published it on a file-sharing network, this argument is irrelevant to determining whether the subpoena seeks confidential or privileged information under Rule 45 because, among other things, it is undisputed that the subpoena does not request this type of information.

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CONCLUSION

For all of the foregoing reasons, as well as those stated in Plaintiffs' original Opposition to the University's Motion to Quash, the University's Motion to Quash and request for discovery should be denied.

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