

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION
Case No. 08-cv-0031-HRW

Eastern District of Kentucky
FILED

APR 23 2008

At Ashland
LESLIE G. WHITMER
Clerk, U.S. District Court

ZOMBA RECORDING LLC,
ET AL

PLAINTIFFS

MEMORANDUM OF MOREHEAD STATE UNIVERSITY IN SUPPORT
OF ITS MOTION TO QUASH SUBPOENA

VS.

DOES 1-15

DEFENDANTS

Comes Morehead State University, by and through counsel, and states as follows in support of its Motion to Quash Subpoena.

INTRODUCTION

On or about February 21, 2008, Plaintiffs filed this action alleging copyright infringement against unnamed Defendants (Does 1-15) who were alleged to be computer users at Morehead State University (University or MSU). They were to have illegally downloaded or transferred copyrighted materials through the University's computer network. On March 10, 2008 an Order was entered in this Court granting Plaintiffs' Ex Parte Application for Leave to Take Immediate Discovery pursuant to FRCP 45. On March 19, 2008 a subpoena was issued for University records and was served on undersigned counsel on behalf of the institution on March 24, 2008. The subpoena requested "Information, including name, current and permanent addresses, telephone numbers, e-mail addresses, and Media Access Control addresses, sufficient to identify the alleged infringers of copyrighted sounds recordings, listed by IP address in Attachment A to this Subpoena. In the event that Morehead cannot link the IP address to a specific individual, provide all documents and electronically-stored information relating to the assignment of the IP address."

The University moves the Court to quash the above subpoena on the grounds that the subpoena poses an undue burden on the University as the majority of the Does are not

identifiable from records alone, the subpoena is overbroad in seeking federally protected student education records of many persons not involved with the alleged infringements, and because the Plaintiffs failed to use the required procedure to seek the information through the Digital Millenium Copyright Act (DMCA), the subpoena should never have been authorized.

ARGUMENT

I. THE SUBPOENA POSES AN UNDUE BURDEN ON THE UNIVERSITY IN CONTRAVENTION OF FRCP 45.

This Court is authorized under FRCP 45(c)(3)(iv) to quash or modify a subpoena if it subjects the recipient to an undue burden. Pursuant to the affidavit of Zoltan Ori (Ori) filed in support of this motion, MSU is unable to identify any of thirteen of the Doe defendants in this case and cannot determine for certain the identity of the remaining two Does. (Ori Affidavit)

Thirteen of the fifteen Does reside in residence hall rooms that accommodate two or more students, some of the rooms accommodate four students. MSU does have records to identify the assigned occupants of the rooms—each room with a specific IP address-but the University cannot determine from its records which person in the room is using the IP address at a given time. It is possible that even a visitor to the room accessed the IP address assigned to that room. (Id.) Without a thorough investigation interviewing witnesses, including room occupants and potential visitors, and performing expensive diagnostic forensic investigations of the computer hard drives, it would be impossible to identify alleged infringers. Such activities would take extensive time and expense which the University cannot afford, especially as a non-party to litigation.

One of the Does accessed the IP address from a single occupancy room. (Id.) Although a person can be identified with the IP address, without extensive investigation MSU cannot determine if that person or a visitor accessed the IP address at the time of the alleged infringement. (Id.) Similarly, for the one remaining Doe who accessed the IP address from an identifiable wireless computer, the University cannot, without substantial investigation, determine if the person assigned to the computer was actually using same at the time of the alleged infringement. (Id.)

Thus, it is clear the subpoena requires the University to undertake overly burdensome actions and expense. Under such circumstances, this Court may quash the subpoena pursuant to FRCP 45.

II. THE SUBPOENA IS OVERBROAD IN THAT IT SEEKS FEDERALLY PROTECTED STUDENT EDUCATION RECORDS OF THOSE NOT INVOLVED WITH THE ALLEGED INFRINGEMENT.

Plaintiffs' subpoena is overbroad in that it not only requires MSU to produce information to designate the alleged infringers but also "In the event that Morehead cannot link the IP address to a specific individual, provide all documents and electronically-stored information relating to the assignment of the IP address." (Plaintiff's Subpoena) Such request would include education records of those persons not engaged in the alleged copyright infringement.

This overbreadth is exacerbated by the fact these education records are protected by the Family Education Rights and Privacy Act. (FERPA) For purposes of FERPA, "education records" are defined as "those records, files, documents and other materials which (i) contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency." 20 U.S.C. Sec. 1232 g(a)(4)(A)(i) & (ii). Identification of students with address, phone numbers and such by IP addresses clearly falls within the protected records.

FRCP 45 (c)(3)(A)(iii) requires the Court to quash or modify a subpoena if it "requires disclosure of privileged or other protected matter and no exception or waiver applies." Although FERPA does provide a means for subpoenaing student education records, FERPA was enacted "to assure parents of students. . . access to their educational records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." Rim of the World Unified School Dist. V. Superior Court, 104 Cal. App. 4th 1393,1399 (2002) citing 120 Cong. Rec. 39,862 (1974). FERPA's purpose was also to "deter schools from indiscriminately releasing student records" and to place "a heavy burden on a party seeking access to student records to demonstrate a genuine need which outweighs the student's privacy interest." Smith v. Duquesne University, 612 F. Supp. 72, 80 (W.D. Pa. 1985) quoting 120 Cong. Rec. Sec 39858 (daily ed. Dec. 13, 1974). In an opinion written by Judge Karl S. Forrester sitting by designation, the Sixth Circuit stated, "Accordingly, certain student privacy interests are recognized in the FERPA and may find protection in the Constitution." U.S.A. v. Miami University, 294 F.3d 797, 818 n. 18 (2002). Thus both the courts and Congress have made clear that releasing student education records is a serious matter that should require need more important than student privacy interests. To provide such information for an identifiable Doe would, in the University's perspective, meet that burden. To allow Plaintiffs to go on a fishing expedition for records of students that cannot be identified as violators falls far short of the of the student privacy guaranteed by Congress and the courts. As such, the subpoena to MSU should be quashed.

III. PLAINTIFFS SHOULD NOT HAVE BEEN GRANTED THE RIGHT TO SUBPOENA THE UNIVERSITY IN THEIR EX PARTE MOTION.

In 1998 Congress enacted the Digital Millennium Copyright Act (DMCA) to

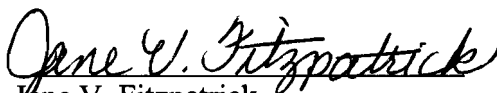
extend federal copyright laws to the world wide web. At the same time it provided specific subpoena provisions for allowing copyright holders to determine identities of infringers. 17 U.S.C. 513(h).

In a case with facts like the present, the Eastern District of Virginia refused to grant plaintiffs, recording companies, the right to issue Doe subpoenas for student records on the College of William and Mary. The Court there held that the DMCA was the only authority for the authorization of an ex parte subpoena to identify alleged infringers and that the Court could find no authority authorizing Doe subpoenas to be issued against a University provider for student records. Interscope v. Does 1-7, 494 F. Supp. 2d 388, 391 (E.D. Va. 2007). The Interscope plaintiffs were required to proceed to obtain information on potential copyright violators through the procedures set forth by statute. The procedure was not through a Doe lawsuit. Therefore, the subpoena to MSU should not have been entered, and thus the subpoena should be quashed.

CONCLUSION

For the above stated reasons, pursuant to FRCP 45, Morehead State University respectfully requests the quashing of the subpoena for overly burdensome production of protected student education records contrary to the DMCA and FERPA.

Respectfully submitted,



Jane V. Fitzpatrick
General Counsel
Morehead State University
305 Howell McDowell Admin. Bldg.
Morehead, Kentucky 40351
(606) 783-2053 Telephone
(606) 783-2053

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Memorandum of Morehead State University in Support of Its Motion to Quash Subpoena and attached Affidavit in support of

Page Five

said motion was served by first class mail on David D. Black, Esq., Dinsmore & Shohl, LLP, 255 East Fifth Street, Suite 1900, Cincinnati, OH 45202 on this the 22nd day of April, 2008.


Jane V. Fitzpatrick