

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
at ASHLAND**

Civil Action No. 08-31-HRW

**ZOMBA RECORDING LLC,
et al.,**

PLAINTIFFS,

v.

ORDER

DOES 1-15,

DEFENDANTS.

This matter is before the Court upon the Motion of Morehead State University to Quash Subpoena Pursuant to FRCP 45 [Docket No. 7].

In this copyright infringement action, brought pursuant to The Copyright Act, 17 U.S.C. § 101, *et seq.*, Plaintiffs Zomba Recording LLC, Atlantic Recording Corporation, BMG Music, Capitol Records, Inc., Elektra Entertainment Group, Inc., Lava Records Inc., Maverick Recording Company, Motown Record Company, Sony BMG Music Entertainment, UMG Recordings, Inc., Virgin Records America, Inc., Warner Brothers Records, Inc. and Arista Records LLC seek to protect and enforce their exclusive rights under the Copyright Act and seek redress for the theft of their intellectual property.

Specifically, in their Complaint, Plaintiffs allege that fifteen unknown Defendants, without the permission or consent of Plaintiffs, use, and continue to use, an online media distribution system to download and distribute to the public sound recordings, which, by virtue of a federal copyright, are the property of Plaintiffs [Docket No. 1]. The alleged infringement is no small matter as Plaintiffs allege that the Defendants have collectively wrongfully appropriated at least 140 of Plaintiffs' copyrighted recordings. The Does attend Morehead State University ("Morehead").

On the day the Complaint was filed, Plaintiffs filed an *ex parte* motion for leave to take immediate discovery pursuant to Fed.R.Civ.P. 26 and 45 [Docket No.3]. The undersigned sustained the motion by Order entered on March 10, 2008 [Docket No. 5].

On March 19, 2008, a subpoena was issued to Morehead, requesting

[i]nformation, including name, current and permanent address, telephone numbers, e-mail addresses, and Media Access Control addresses, sufficient to identify the alleged infringers of copyrighted sound recordings, listed by IP address in Attachment A to the Subpoena. In the event that Morehead cannot link the IP address to a specific individual, provide all documents and electronically-store information relating to the assignment of the IP address.

[Docket No.6].

Morehead seeks to quash the subpoena on the grounds that it poses an undue burden upon it and seeks federally protected student records.

Morehead also argues that the subpoena runs afoul the Digital Millennium Copyright Act, 17 U.S.C. § 512(h) (“DMCA”).

The Court is not persuaded by Morehead’s argument of undue burden. As Plaintiffs point out, Morehead has responded, without objection, to virtually identical requests in other, similar litigation.

The Court also finds that the request is narrowly tailored. In this electronic age, piracy has become a formidable problem. Traditional discovery methods may not accommodate this new type of illegal activity. As such, courts must be willing to permit unorthodox discovery, within reason, for the purpose of gathering evidence which may be resistant to traditional document production. Further, the Court notes that Plaintiffs are willing to amend the subpoena in order to clarify precisely what information is being sought.

Morehead also argues that the Family Education Rights and Privacy Act, 20 U.S.C. § 1232(g)(“FERPA”) prohibits the release of the requested

information. However, FERPA specifically authorizes the disclosure of “directory information,” that is “information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed”, such as the student’s name, address, telephone listing, email address and other identifying information.” 34 C.F.R. § 99.3. The school need only provide an annual notice of the type of information designated as “directory information” and give students an opportunity to submit a written refusal of the designation. *Id.* If a school does not provide an annual notice as described above, the information may be disclosed in response to a valid subpoena if the school notifies the Defendants of the subpoena prior to complying with it. *Id.*

In this case, Plaintiffs seek information which would be deemed “directory information” under FERPA. The Court does not find a violation of the rights protected by FERPA.

As for the requisite notice, the record does not reflect whether Morehead provides the type of annual notice contemplated by FERPA. In either event, Morehead can provide notice to the affected students prior to complying with the subpoena. Plaintiffs state that they, in fact, encourage

such notice to the students in question.

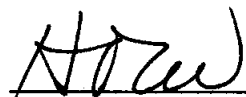
As for the DMCA, it was not cited as a basis for the subject subpoena, nor was it relied upon by the undersigned in sustaining Plaintiff's motion for expedited discovery. Rather, Plaintiffs seek discovery pursuant to Fed.R.Civ.P. 26 and 45. The DMCA simply does not apply.

Finally, the identity of the Defendants is crucial for the prosecution of Plaintiffs' case. Without this information, the case will not move forward.

The Court is not without sympathy, however, for the resources which will be expended by Morehead in complying with the subpoena. The Court will entertain a motion for reasonable costs, should Morehead elect to seek such a remedy.

Accordingly, **IT IS HEREBY ORDERED** that the Motion of Morehead State University to Quash Subpoena Pursuant to FRCP 45 [Docket No. 7] be **OVERRULED**.

This 2 day of June, 2008.



Henry R. Wilhoit, Jr.
Senior Judge