



MediaSentry did not conduct an investigation subject to the Maine licensing provisions because its work merely involved gathering public information. Finally, Defendant does not have standing to enforce the statute.

Defendant also claims that Plaintiffs have failed to make a showing of good cause for expedited discovery. Defendant's argument is based in part upon a mischaracterization of the Linares Declaration. Defendant argues that Plaintiffs have not shown irreparable harm because they have failed to provide evidence that, absent expedited discovery, information regarding Defendant's identity would be destroyed by the Internet Service Provider ("ISP"), the University of Maine (the "University"). This is simply not true. Instead, Plaintiffs seek discovery to learn Defendant's identity. Absent this information, Plaintiffs would be irreparably harmed because they could not proceed with this case. Not surprisingly, this Court, along with courts throughout the country, has concluded that Plaintiffs have shown good cause for expedited discovery.

Defendant also raises disputed factual issues and seeks limited discovery. A dispute over factual issues, however, does not provide a proper basis for striking the Linares declaration. Additionally, Defendant's factual arguments are incorrect. For example, Defendant claims that Mr. Linares is not a reliable witness. Defendant's Motion at 4. This is simply not true. Mr. Linares is an attorney employed by the Recording Industry Association of America ("RIAA") to work on behalf of the Plaintiff record companies. His duties include supervising copyright infringement investigations, including the work of MediaSentry in this case. Thus, Mr. Linares' testimony is well founded and based on personal knowledge.

Defendant also claims that she will be irreparably harmed if her identity is revealed. Conspicuously absent from Defendant's argument is an assertion of innocence or

misidentification. Instead, Defendant simply seeks to avoid identification and prosecution for copyright infringement.

Finally, Defendant seeks Court authorization to depose Mr. Linares and a representative of MediaSentry. Defendant's request is premature. Once properly before the Court, Defendant may proceed with depositions and other discovery.

## ARGUMENTS

### 1. Plaintiffs Conducted a Proper Investigation of Defendant's Infringement.

Defendant argues that the Linares Declaration should be stricken because it is based on an improper investigation conducted by MediaSentry. Defendant claims that this investigation was improper because MediaSentry is not licensed in Maine.<sup>1</sup>

Defendant's arguments are wrong for at least three reasons. First, this Court has already held that failure of a witness to obtain a private investigator's license did not warrant excluding his testimony at trial. In *TNT Road Co. v. Sterling Truck Corp.*, 2004 U.S. Dist. LEXIS 13463 \*6 (D. Ma. July 19, 2004)<sup>2</sup>, the Court concluded that:

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<sup>1</sup> Much of Defendant's argument is based upon a similar Massachusetts statute. The factual basis for Defendant's argument is limited at best. MediaSentry received a letter, dated January 2, 2008, from a Sergeant Bishop in the Certification Unit of the Massachusetts Department of State Police, indicating that MediaSentry was allegedly in violation of the Massachusetts General Law Provisions. By letter dated January 10, 2008, counsel for MediaSentry disputed Sergeant Bishop's initial assessment. Since then, MediaSentry has received no further communication from the State Police.

<sup>2</sup> Defendant relies on an Ohio case to support her argument. In *Donegal Mut. Ins. Co. v. White Conol. Indus.*, 143 Ohio App. 3d 619, 621 (Ohio Ct. App. 2003), the court excluded the testimony of an unlicensed fire investigator based upon legislative history indicating a strong public policy interest in having fire investigators be licensed and regulated. There is no such legislative intent present in this case. Moreover, this Court has already considered and rejected this argument in interpreting the Maine statute at issue in this case.

Assuming that [the expert] was required by Maine law to have a license to conduct his investigation of the vehicle fire in this case, I am not persuaded that his failure to do so justifies the exclusion of his testimony. Nor do I think that his failure to obtain a license prevents the court from considering his expert qualifications or the reliability of his investigatory methods.

*Id* at \* 6.

Moreover, defendant has not and cannot point to any authority that supports exclusion. There is no portion of the M.R.S. Provisions that support Defendant's position. The instant case is a purely civil matter that does not involve any government action that would invoke the Fourth Amendment. *Mejia v. City of News York*, 119 F. Supp. 2d 232, 254 (S.D.N.Y. 2000) ("the Fourth Amendment's exclusionary rule does not apply in civil actions other than civil forfeiture proceedings.") (citing *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998); *Nutrasweet Co. v. X-L Eng'g Corp.*, 926 F. Supp. 767, 769 (N.D. Ill. 1996) ("[T]he Fourth and Fourteenth Amendments do not require in civil cases that the exclusionary rule be extended to situations where private parties seek to introduce evidence obtained through unauthorized searches made by state officials.")).

Second, the investigations performed by MediaSentry do not fall under the M.R.S. Section 8104 licensing requirements because this section does not apply to "an attorney acting in a professional capacity." Section 8104 (2)(f). The scope of this provision has not been addressed by courts within Maine. However, similar exemptions in New York and Massachusetts have been interpreted to include agents and investigators retained by the attorney.<sup>3</sup> The New York Attorney General, interpreting a provision similar to Section 8104, found that "[o]ne who devotes himself exclusively to making investigations for patent attorneys in connection with litigations for infringements does not require a license." Op. Atty. Gen., 21

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<sup>3</sup> Any other interpretation of the Maine Statute, could result in paralegals others assisting an attorney being required to obtain a private investigator's license.

St Dept Rep 495 (1919); New York Supreme Judicial Court Rule 3:08, PF 15; N.Y. Gen. Bus. Law §70 (annotated case notes No. 3); *Grand Jury Investigation*, 407 Mass. 916 (1990). In this case, MediaSentry's work was performed under the supervision and direction of MediaSentry's own counsel and Mr. Linares, an attorney working on behalf of Plaintiffs in their investigation and litigation against copyright infringers.

Third, there was no private investigation here because the information that MediaSentry gathered is public information that was placed out on the Internet from Defendant's computer, on Defendant's internet account, for any P2P user to see.<sup>4</sup> As a result, Defendant has no expectation of privacy with respect to such information and cannot claim to have been harmed by the disclosure of private information. *See In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 257, 267 (D.D.C. 2003) (when an ISP subscriber "opens his computer to permit others, through peer-to-peer file sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world."), *rev'd on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (activation of file-sharing mechanism shows no expectation of privacy); *Elektra Entm't Group, Inc. v. Does 1-9*, 2004 LEXIS 23560 at \*13 (S.D.N.Y. Sep. 7, 2004) (holding that defendant has "minimal expectation of privacy in downloading and distributing copyrighted songs without permission") (citations omitted). For this reason, too, Defendant's allegation that MediaSentry has violated the M.R.S. provisions fails.

Finally, Defendant does not have standing to assert claims under the M.R.S. Provisions. Defendant fails to cite any authority in support of her standing argument. Indeed, Title 8108, The Private Investigations Act, does not contain a provision that authorizes a private party to

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<sup>4</sup> The integrity of the evidence gathered by MediaSentry is not at issue.

enforce the statute. Instead, the Commissioner of Public Safety and local law officials are charged with enforcing its provisions.<sup>5</sup> 32 M.R.S. §§8113-8116. Indeed, MediaSentry recently received a letter from Detective Pelletier of the Maine State Police, requesting further information that would clarify his understanding of MediaSentry's work. (Attached as Exhibit A). Plaintiffs anticipate that once MediaSentry provides additional information, this matter will be dropped.

For all of these reasons, there is no basis to strike the Linares Declaration based upon MediaSentry's work in this case.

2. **Mr. Linares' Declaration is Factually Correct and Based on Personal Knowledge.**

The Linares Declaration was submitted in support of Plaintiffs' Motions for Expedited Discovery. Mr. Linares is an attorney who serves as Vice President, Anti-Piracy Legal Affairs for RIAA. (Linares Decl at ¶2) In this capacity, he works entirely on behalf of the Plaintiff record companies, supervising investigations into copyright infringement, including the work of MediaSentry in this case. *Id.* The statements in the Linares Declaration are based upon personal knowledge. *Id.*

Defendant offers various factual challenges to the Linares Declaration. Factual challenges, however, do not provide a legal basis for excluding the Linares Declaration. *Eicken v. USAA Federal Savings Bank*, 498 F. Supp. 2d 954, 960-61 (S.D. Tx. 2007) (denying motion to strike affidavit that included disputed factual allegations); *Freeman v. Berge*, 2003 U.S. Dist. LEXIS 24692, 2-4 (W.D. Wis. Dec. 3, 2003) (disputes over proposed findings of fact are not

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<sup>5</sup> Indeed, MediaSentry recently received letter from Detective Pelletier of the Main State Police, requesting further information regarding that would clarify his understanding of MediaSentry's work. (Attached as Exhibit A). Plaintiffs anticipate that once MediaSentry provides additional information, this matter will be resolved.

grounds to strike an affidavit). Additionally, Defendant's factual arguments are incorrect. Defendant claims that the Linares Declaration should be stricken because he is not have the expertise to make the statements in his declaration. In fact, Mr. Linares' offers factual testimony that is based personal knowledge derived from his supervision of MediaSentry, who investigated the copyright infringement at issue in this case. As such, Mr. Linares is intimately familiar with the infringement investigation procedures and resulting evidence in this case. At best, Defendant's assertions involve factual disputes that are properly addressed in discovery and trial.

**3. Plaintiffs Have Shown Good Cause for Expedited Discovery.**

This Court previously concluded that Plaintiffs had shown good cause for expedited discovery. Defendant's challenge to this holding is based upon a mischaracterization of the Linares Declaration. Defendant claims that the Plaintiffs' showing of good cause for expedited discovery was based upon the possibility that the University would destroy the information Plaintiffs seek. In fact, Plaintiffs' good cause showing was primarily based upon Plaintiffs' need to identify the Doe Defendants.

Good cause exists where, as here, the complaint alleges claims of infringement.

*Interscope Records v. Does 1-14*, No. 5:07-4107-RDR, 2007 U.S. Dist. LEXIS 73627, \*3 (D. Kan. Oct. 1, 2007) (citations omitted) ("Good cause can exist in cases involving claims of infringement and unfair competition"); *Energetics Sys. Corp.*, 1996 U.S. Dist. LEXIS 2830 at \*5-6 (good cause standard satisfied where the moving party had asserted claims of infringement); *Semitool*, 208 F.R.D. at 276; *Benham Jewelry Corp. v. Aron Basha Corp.*, No. 97 CIV 3841, 1997 WL 639037, at \*20 (S.D.N.Y. Oct. 14, 1997). *Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d 1034, 1042 (8th Cir. 2003); *Health Ins. Ass'n of Am. v. Novelli*, 211 F. Supp. 2d 23, 28 (D.D.C. 2002) ("A copyright holder [is] presumed to suffer irreparable harm as a matter

of law when his right to the exclusive use of copyrighted material is invaded.”) (quotations and citations omitted); ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 66 (2d Cir. 1996).

In summary, without this information, this case cannot proceed.<sup>6</sup> Defendant implicitly admits that the case could not go forward without identification of the Doe Defendants, noting that “[i]f plaintiffs cannot learn [Defendants’] identity, [Defendants] are relieved of the burden of defending lawsuits. . .”. Defendants Motion at 8. Defendant claims that this identification will cause her irreparable harm. Defendant doesn’t claim to be innocent. Instead, Defendant seeks to avoid prosecution for copyright infringement by remaining anonymous.

Finally, Defendant seeks leave of this Court to depose Mr. Linares and a representative of MediaSentry. Defendant’s discovery request is premature at this stage of the litigation. Once the parties are before the Court, Defendant will have ample opportunity to take depositions and serve written discovery requests.

### CONCLUSION

For all of the reasons set forth above Defendant’s Motion should be denied and the ongoing expedited discovery in this case should continue.

Respectfully submitted,

**ATLANTIC RECORDING CORPORATION,  
ARISTA RECORDS LLC, BMG MUSIC,  
CAPITOL RECORDS, INC., ELEKTRA  
ENTERTAINMENT GROUP INC.,  
INTERSCOPE RECORDS, LAFACE  
RECORDS LLC, LAVA RECORDS LLC,  
MAVERICK RECORDING COMPANY,  
MOTOWN RECORD COMPANY, L.P., SONY**

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<sup>6</sup> To support her good cause argument, Defendant cites *McMann v. Doe*, 460 F. Supp. 2d 259, 265 (D. Mass. 2006). In *McMann*, the plaintiff failed to make a prima facie showing of definition. As a result, discovery of information that would identify the defendant was not warranted. In contrast, in this case and many others, the Court found that Plaintiffs provided sufficient evidence to made a prima facie case of copyright infringement.

**BMG MUSIC ENTERTAINMENT, UMG RECORDINGS, INC., VIRGIN RECORDS AMERICA, INC., WARNER BROS. RECORDS INC., and ZOMBA RECORDING LLC**

By their attorneys,

**SHEEHAN PHINNEY BASS + GREEN,  
PROFESSIONAL ASSOCIATION**

Dated: May 5, 2008

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of May, 2008, a copy of the foregoing **PLAINTIFFS' OPPOSITION TO MOTION OF DOE 10 TO VACATE EX PARTE DISCOVERY ORDER, TO QUASH THE SUBPOENA AND TO TAKE DISCOVERY** was sent via the court's ECF filing system to Robert E. Mittel, Esquire, counsel to Doe #4 and all counsel of record.

/s/ James S. LaMontagne  
James S. LaMontagne