

Amendment Rights, and (3) the Linares Declaration is supposedly improper. All three of Defendant's Motions should be denied.

First, in Defendant's Motion to Dismiss Plaintiffs' Complaint, Defendant argues that Plaintiffs' Complaint fails under the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 547 U.S. ---, 127 S. Ct. 1955 (2007) because it does not allege infringement of any rights protected by §106 of the Copyright Act. ("Def.'s Br.," Doc. No. 7, p. 3.) On the contrary, Plaintiffs' Complaint provides detailed, factual information alleging that Defendant violated §§106(1) (the right to reproduce) and 106(3) (the right to distribute) of the Act. (*See* Complaint, Doc. No. 1, ¶ 13; *See also* Ex. A to the Complaint, Att. No. 2 to Doc. No. 1.) In fact, the Eastern District of North Carolina, among other courts, decided this very issue less than four months ago when evaluating a substantially identical complaint, and held that the complaint "sufficiently state[s] a claim and supporting factual basis for copyright infringement." *LaFace Records, LLC v. Does 1-38*, Case No. 5:07-cv-298, slip op. at 3 (E.D.N.C. Feb. 27, 2008) (attached as *Exhibit 1*).

Next, Defendant seeks to have the Court ignore binding precedent by arguing that Plaintiffs' Complaint should be dismissed because Plaintiffs have not alleged "actual distribution" of their copyrighted works. (*See* Def.'s Br., pp. 4-6.) Defendant's argument fails because Plaintiffs have clearly and unambiguously alleged that Defendant *actually* distributed nine of the copyrighted works at issue. (*See* Complaint, ¶ 13.) As a result, the Court need not reach, at this stage of the litigation, Defendant's argument that the distribution right protected by §106(3) does not include the so-called right of "making available." Should the Court find it necessary to address this question, however, the law in the Fourth Circuit on this issue is unequivocal that making copyrighted works available for distribution constitutes a violation of

the copyright holder's protected rights. *See Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997).

Third, Defendant's argument that her identifying information is protected under the First Amendment fails as well. Contrary to Defendant's assertions, distributing copyrighted material in violation of the Copyright Act is not constitutionally protected speech. Even if it were, Plaintiffs have substantial evidence of Defendant's infringement in this case and meet any limited heightened pleading requirements.

Fourth, Defendant's argument that the Court should strike the Linares Declaration should be rejected because Defendant does not cite any legal authority to support such a remedy. Moreover, Mr. Linares' statements are based on personal knowledge, and MediaSentry's observation and downloading of sound recordings from cyberspace, through a P2P network accessible to the general public, is not an activity regulated by the North Carolina statutes. Finally, Defendant's attacks on the Linares Declaration are not within the four reasons to quash under Fed. R. Civ. P. 45.

Accordingly, and for the reasons set forth more fully below, Plaintiffs respectfully request that the court deny Defendant's Motion to Dismiss the Complaint, Strike the Plaintiffs' Affidavit, and Quash the Subpoena.

BACKGROUND

As Plaintiffs discussed in their Discovery Motion, every month copyright infringers like Defendant unlawfully distribute billions of perfect digital copies of Plaintiffs' copyrighted sound recordings over P2P networks. *See Lev Grossman, It's All Free*, Time, May 5, 2003. As a direct result, Plaintiffs have sustained, and continue to sustain, substantial financial losses.

P2P users who distribute (upload) and copy (download) copyrighted material violate the copyright laws. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913,

918-923 (2005) (noting that users of P2P networks share copyrighted music and video files on an enormous scale; and, as such, even the providers of those networks “concede infringement” by the individual users). Despite the clear violation of copyright laws, copyright infringement over P2P networks is widespread because users can conceal their identities by means of an alias. Thus, copyright owners can observe infringement occurring on P2P networks but cannot, without assistance from the courts, identify the true names and locations of the infringers.

Defendant is an active participant on the Gnutella P2P network, distributing copyrighted sound recordings stored on his computer to, and downloading copyrighted sound recordings from, the millions of other users of the Gnutella P2P network. Plaintiffs discovered Defendant openly distributing sound recordings whose copyrights are owned by Plaintiffs by logging onto the P2P network and viewing the files that Defendant was distributing to other users. Defendant has chosen to distribute from his computer 256 audio files whose copyrights are by and large owned by various of Plaintiffs. (*See* Exhibit A to the Complaint, which lists a sample of the 256 sound recordings that Defendant was distributing without authorization.)

As previously discussed in the Linares Declaration filed with the original Discovery Motion, upon finding Defendant distributing large numbers of copyrighted works, Plaintiffs gathered substantial evidence of Defendant’s illegal conduct. Plaintiffs could not ascertain Defendant’s name, address, or any other contact information, but they could identify the Internet Protocol (“IP”) address from which Defendant was unlawfully distributing Plaintiffs’ copyrighted works. (*See* Linares Decl. ¶ 18). From the IP address, Plaintiffs determined that Defendant was using NCSU’s internet service to distribute copyrighted works unlawfully. *Id.* NCSU maintains logs that match IP addresses with their users’ computer hardware. *Id.* ¶ 12. Thus, NCSU can match the IP addresses, dates, and times with the computers that were using the

IP addresses when Plaintiffs observed the infringement by looking at its IP address logs. As such, NCSU — and only NCSU — can identify Defendant in this case.

ARGUMENT

I. DEFENDANT’S MOTION SHOULD BE DENIED UNDER RULE 12(b)(6) BECAUSE PLAINTIFFS’ COMPLAINT STATES A VALID CLAIM FOR RELIEF AGAINST DEFENDANT

A. Standard Of Review Under Rule 12(b)(6)

When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, the district court must decide whether the facts alleged in the Complaint, if true, would entitle Plaintiffs to some form of legal remedy. The allegations found in the Complaint “must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. at 1965. The Complaint must contain “‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” 127. S. Ct. at 1964 (citations omitted). Ultimately, a court should not dismiss a complaint for failure to state a claim unless the complaint fails to include “plausible grounds” for relief. *Id.*

The court must accept “as true all well-pleaded allegations in the complaint” and “draw all reasonable factual inferences . . . in the plaintiff’s favor.” *Styles v. Liberty Mut. Fire Ins. Co.*, 2006 U.S. Dist. LEXIS 49294, *2 (W.D. Va. July 7, 2006). Dismissal of an action under Rule 12(b)(6) is warranted only when “no relief could be granted *under any set of facts that could be proved consistent with the allegations.*” *Teachers’ Ret. Sys. v. Hunter*, 477 F.3d 162, 170 (4th Cir. 2007) (citation and internal quotation omitted).

B. Plaintiffs’ Complaint Satisfies Rule 12(b)(6) And *Twombly*

Defendant’s Motion should be denied because Plaintiffs’ Complaint complies with Rule 12(b)(6) and satisfies the standards set out in *Twombly*. To state a claim for copyright

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

Plaintiffs allege each of these elements in their Complaint. (*See* Complaint, ¶ 11 ("Plaintiffs are . . . the copyright owners or licensees of exclusive rights . . . [to] all of the copyrighted sound recordings on Exhibit A to this Complaint."); Complaint, ¶ 13 ("Defendant, without the permission or consent of Plaintiffs, has continuously used, and continues to use, an online media distribution system to download and/or distribute to the public certain of the Copyrighted Recordings.")) Defendant appears to acknowledge these allegations, but argues that they are not "sufficient to support [Plaintiffs'] claim for relief." (Def.'s Br., p. 5 & n.4 (citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. at 1965.)) Defendant is misguided.

As a preliminary matter, the Eastern District of North Carolina decided this very issue less than four months ago in *LaFace Records, LLC v. Does 1-38*, Case No. 5:07-cv-298, slip op. at 3 (E.D.N.C. Feb. 27, 2008) (*Ex. 1*).¹ In *LaFace Records, LLC v. Does 1-38*, the record company plaintiffs (including many of the Plaintiffs in this case) filed an infringement action against 38 defendants who were unlawfully downloading and/or distributing the plaintiffs' copyrighted sound recordings. The complaint contained substantially identical allegations to the Complaint here. *Compare* Complaint in *LaFace Records, LLC v. Does 1-38*, attached as *Exhibit*

¹ Defendant is aware of this decision because Defendant's counsel, Stephen E. Robertson, was counsel for the defendants that unsuccessfully challenged plaintiff record companies' complaint in *Laface Records, LLC v. Does 1-38*.

2, with Complaint, Doc. No. 3. In *LaFace Records, LLC v. Does 1-38*, seven defendants filed a motion to dismiss that challenged the plaintiffs' complaint under the *Twombly* standard. The Court specifically rejected the defendants' argument, holding that "[p]laintiffs have . . . sufficiently stated a claim and supporting factual basis for copyright infringement." *LaFace Records, LLC v. Does 1-38*, slip op. at 3. Accordingly, Plaintiffs here urge the Court to follow its decision in *LaFace Records, LLC v. Does 1-38*, and find that their Complaint meets the *Twombly* standard.

Every other court to have ruled on a motion to dismiss similar complaints brought by the record companies has denied the motion, finding the plaintiffs' complaint to be sufficient. See *Arista Records LLC v. John Does 1-19*, Case No. 1:07-cv-01649, slip op. at 15-16 (D.D.C. April 28, 2008) (holding that substantially identical allegations were "more than sufficient to find that Plaintiffs' right to relief rises 'above the speculative level' described in [*Twombly*].") (attached as Exhibit 3);² *LaFace Records, LLC v. Does 1-5*, 2008 U.S. Dist. LEXIS 13638, *20 (W.D. Mich. Feb. 22, 2008) (denying defendant's motion to dismiss, finding "[u]nder the standard recently established by the United States Supreme Court, the complaint alleges sufficient facts to raise the right to relief above the speculative level."); *Atlantic Recording Corp. v. Serrano*, 2007 U.S. Dist. LEXIS 95203, *7-8 (S.D. Cal. Dec. 28, 2007) (observing that plaintiffs' complaint, including Exhibit A, identified the time, place, IP address, internet programs, and audio files that comprised defendant's alleged infringement, and holding that "[t]aken together, Plaintiffs supply more than enough information to give Defendant fair notice of who owns the copyrights and how

² Stephen E. Robertson, Defendant's counsel here, also authored, and was on notice of, this unsuccessful attempt to dismiss the record company plaintiffs' complaint under *Twombly*.

and when Defendant allegedly infringed them.”);^{3 4} *Elektra Entertainment Group, Inc. v. Serrano*, Case No. 06-cv-5025, slip op. at 2 n.1 (E.D. Pa. May 1, 2007) (“Plaintiffs have sufficiently alleged the ‘what, how, and when’ necessary for their Complaint to survive Defendant’s motion.”) (attached as *Ex. 5*); *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 971-972 (N.D. Tex. 2006) (“Plaintiffs’ pleading provides a short and plain statement that alleges both their copyright ownership and violation of one or more of the exclusive rights identified in 17 U.S.C. § 106.”).

Plaintiffs here have alleged more than enough information to meet the *Twombly* standard. Specifically, as to Defendant, Plaintiffs allege the reproduction and/or distribution of the ten defined copyrighted recordings using the Gnutella P2P network at IP address 152.7.8.75 on March 12, 2007 at 12:43:01 EDT. (*See* Complaint, ¶ 13, Ex. A). These allegations are more than sufficient to give Defendant fair notice of who owns the copyrights and how and when she infringed them. *See Serrano*, 2007 U.S. Dist. LEXIS 95203, *7-8 (finding that Plaintiffs’

³ The Exhibit A attached to the complaint filed by the plaintiffs in *Serrano* provides the same information as the Exhibit A attached to the Complaint in this action. Attached hereto as *Exhibit 4* is a true and correct copy of the Exhibit A to the complaint filed in *Serrano*.

⁴ The *Serrano* decision issues from the same court that produced the *Interscope Records v. Rodriguez* case upon which Defendant relies. (*See* Def.’s Br., p. 12.) Besides being the more recent statement from the Southern District of California on this issue, *Serrano* is also more applicable to the facts of this case, as *Rodriguez* is easily distinguished. First, *Rodriguez* arose in the context of a default judgment motion, which the court denied *sua sponte*. Thus, neither party had opportunity to brief or argue the issue of whether the complaint adequately stated a claim under the *Twombly* standard. Second, the complaint in *Rodriguez* contained different allegations and facts than the Complaint presently before this Court. Specifically, the complaint in *Rodriguez* did not allege which peer-to-peer network was used to infringe the plaintiffs’ copyrights, the IP address through which the infringing activity occurred, the date and time that the plaintiffs detected the infringement, or the total number of audio files offered for distribution. Thus, the *Rodriguez* court considered, and ruled on, a complaint that was significantly different from the Complaint at issue here, and therefore, that case provides little, if any, authority for the issues presently before this Court.

complaint alleged adequate facts to state a copyright infringement claim and survive a Rule 12(b)(6) motion to dismiss).

For the foregoing reasons, Plaintiffs' Complaint satisfies Rule 12(b)(6) and Defendant's Motion to Dismiss should be denied.

C. Although The Court Need Not Address Defendant's Argument Against The Making Available Right Of Distribution, Defendant's Argument Fails On The Merits.

According to Defendant, Plaintiffs' distribution claim fails and the Complaint should be dismissed "because §106(3) requires an actual dissemination of a copy," and "merely 'making available' is at most a non-actionable attempt at infringement." (Def.'s Br., pp. 4-5.) As a threshold matter, Plaintiffs have alleged an actual distribution "to the public" on a specific date and time of each of the ten Copyrighted Recordings identified in Exhibit A to the Complaint. (Complaint at ¶ 13, Ex. A.) Because Plaintiffs have alleged actual distribution, this Court need not reach Defendant's challenge to the "making available" right of distribution or "deemed distribution," as it is referenced in the Ninth Circuit. *See, e.g., Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 971-972 (N.D. Tex. 2006); *Interscope Records v. Duty*, 2006 U.S. Dist. LEXIS 20214 at *6 (D. Ariz. Apr. 14, 2006).

Even if the Court were to reach this issue, however, Defendant's argument still fails. The Fourth Circuit and numerous district court decisions have held that making a copyrighted work available for distribution to the public without authorization from the copyright holder violates the copyright holder's distribution right under §106(3). In *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), the defendant's library obtained unauthorized copies of the plaintiffs' work, added a listing of the copies to its index of available works, and made the copies available for the public to check out of its library, without keeping records of what was checked out. Based on this evidence, the Fourth Circuit held that, even in the absence

of proof that the work had actually been checked out by anyone from the public, the work had been distributed within the meaning of §106(3). *Id.* at 203.

The same analysis is applicable here. Defendant posted the list of sound recordings that she had available for anyone to download, Defendant had the recordings in her possession, and, as in *Hotaling*, Defendant did not maintain a “checkout log” indicating who downloaded these sound recordings. For the same reasons as discussed in *Hotaling*, under these circumstances, Defendant should be held to have distributed the works at issue. To hold otherwise would allow would-be infringers in cases like this to infringe with impunity merely by choosing not to maintain records as to who received infringing works from the infringer. It would also allow users of unauthorized P2P networks to escape substantial liability because these services are set up so as to make it exceedingly difficult, if not impossible, to determine who downloaded a particular recording from another.⁵

In light of the foregoing, numerous courts have applied the *Hotaling* analysis to facts that are virtually identical to this case and have found a violation of the distribution right. *See, e.g., A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1014 (9th Cir. 2001) (holding that “users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”); *Sony Pictures Home Entm’t, Inc. v. Lott*, 471 F. Supp. 2d 716, 722 (N.D. Tex. 2007) (“[I]t is well-established that unauthorized downloading and uploading of copyrighted media files . . . is a violation of the copyright holders’ exclusive rights to reproduce and distribute the files.”); *Motown Record Co. v. DePietro*, 2007 U.S. Dist. LEXIS 11626, at *12 (E.D. Pa. Feb. 16, 2007) (“A plaintiff claiming infringement of the exclusive-distribution right can establish infringement

⁵ Under Defendant’s articulation of what the law should be, a music distributor such as Apple’s “iTunes” could distribute music without having obtained any license from copyright holders, and escape liability by merely refusing to maintain a log confirming that they had actually distributed the works they were “making available” on their website.

by proof of actual distribution or by proof of offers to distribute, that is, proof that the defendant ‘made available’ the copyrighted work.”); *Arista Records, LLC v. Greubel*, 453 F. Supp. 2d 961, 969, 971 (N.D. Tex. 2006) (plaintiffs’ allegations that the defendant “made the copyrighted recordings available to others without permission and actively reproduced and/or distributed the copyrighted recordings” stated a claim of copyright infringement); *Universal City Studios Prods. LLP v. Bigwood*, 441 F. Supp. 2d 185, 190-91 (D. Me. 2006) (“[B]y using KaZaA to make copies of the Motion Pictures available to thousands of people over the internet, Defendant violated Plaintiffs’ exclusive [distribution] right.”); *In re Aimster*, 252 F. Supp. 2d 634, 648 (N.D. Ill. 2002), *aff’d*, 334 F.3d 643 (7th Cir. 2003) (holding defendant liable for infringement and citing evidence of “hundreds of works found to be available through the Aimster system.”).

Defendant has expressly requested that the Court depart from the Fourth Circuit’s holding in *Hotaling* to decide this Motion. (Def.’s Br., p. 6.) The Court should deny Defendant’s request because *Hotaling* is binding precedent in the Fourth Circuit. The Court must follow *Hotaling* in a case that squares with *Hotaling* on all fours, as it does here. *See Varghese v. Honeywell Int’l, Inc.*, 424 F.3d 411, 423 (4th Cir. 2005) (declining to depart from binding precedent even though cases from other circuits had adopted contrary rulings, stating that “their approach simply conflicts with our own.”).

Defendant’s assertion that *Hotaling* runs contrary to the statute and other Circuit authority is inaccurate. In her Brief, Defendant relies heavily upon *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), to support her argument that “making available” copyrighted works does not constitute distribution. (Def.’s Br., p. 7.) *Perfect 10*, however, expressly supports the making available right of distribution in this context. *Perfect 10* reaffirmed the holding in *A&M Records, Inc. v. Napster* that “the distribution rights of the

plaintiff copyright owners [in the *Napster* case] were infringed by Napster *users* (private individuals with collections of music files stored on their home computers) when they used Napster software to make their collections available to all other Napster users.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d at 1162. *Perfect 10* then distinguished *Napster* because there were no files behind Google’s index and because Google, unlike the individual Napster users, “does not have a collection of [the plaintiffs’] images it makes available to the public.” *Id.* at 1162–63. Here, it is undisputed that there are files behind the index, as demonstrated by MediaSentry’s ability to download nine sound recordings and obtain information and metadata on the other files. Thus, the “deemed distribution rule,” as laid out in *Napster* and reaffirmed in *Perfect 10*, squarely applies.

Finally, Defendant suggests that the First Circuit rejected the making available argument in *Latin American Music Co. v. Archdiocese of San Juan*, 499 F.3d 32, 46 (1st Cir. 2007) (“*LAMCO*”).⁶ (Def.’s Br. p. 7.) Defendant is incorrect. In *LAMCO*, the court expressly noted that it might well have been infringing for LAMCO to list a publisher’s copyrighted works in its catalogue where certain of the songs at issue also “*were available* on [its affiliate’s] website” and where certain songs had been distributed by LAMCO and its affiliate on a compact disc. *LAMCO*, 499 F.3d at 47 (emphasis added). Because the court could not tell which recordings were merely listed in the catalogue and which also were made available through LAMCO’s affiliate’s website or by CD, the court held that summary judgment on the issue of infringement was inappropriate. In other words, the court permitted the case to go to trial where there was a fact question as to whether the alleged infringers had done more than merely list songs on an

⁶ Defendant also relies on *London-Sire Records, Inc. v. Does 1-4*, 2008 U.S. Dist. LEXIS 38817 (D. Mass. March 31, 2008) to support her argument. Plaintiffs respectfully submit that the *London-Sire* decision was wrongly decided. Plaintiffs in that case have moved for reconsideration and believe that it will be granted.

index. In this respect, *LAMCO* is completely consistent with Plaintiffs' argument here that the distribution right is violated where copyrighted sound recordings are not only listed in an index of recordings but also are available behind the index, i.e., available for download once identified on the index, which was the case here.

In short, the great majority of cases to have addressed the "making available" right, including one in the Fourth Circuit, have found such a right to be part and parcel of the right of distribution, and neither of the cases cited by Defendant to support her argument held otherwise.

For the foregoing reasons, the exclusive right of distribution is violated where, as here, a defendant uploads a copyrighted work and makes it available for download by other users on a P2P network. Accordingly, Plaintiffs have properly pled an infringement of their exclusive right to distribution, and Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss.

II. PLAINTIFFS' SUBPOENA DOES NOT IMPLICATE DEFENDANT'S FIRST AMENDMENT RIGHTS, AND PLAINTIFFS HAVE SUBSTANTIAL EVIDENCE OF DEFENDANT'S INFRINGEMENT IN THIS CASE

Defendant argues her identity is protected by the First Amendment and that Plaintiffs must meet a heightened standard of review in order to serve the expedited discovery they seek. (Def.'s Br., pp. 13-17.) Defendant's argument fails for two reasons. First, distributing copyrighted material is not speech protected by the First Amendment. Second, even if Defendant's actions constitute protected speech, Plaintiffs' allegations meet the heightened scrutiny required for expedited discovery, and Plaintiffs' interest in protecting their copyrights outweighs Defendant's limited privacy interest.

Defendant argues that sharing copyrighted files over the Internet is protected speech and is subject to qualified immunity under the First Amendment. (Def.'s Br., p. 14.) This argument is baseless. "The 'Supreme Court . . . has made it unmistakably clear that the First Amendment

does not shield copyright infringement.”” *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 260 (D.D.C. 2003) (quoting *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000) and citing *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 568 (1985)), *rev'd on other grounds, Recording Indus. Ass'n of America, Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003). Defendant did not engage in protected speech, she used a P2P network to unlawfully download and distribute Plaintiffs' copyrighted sound recordings. The law does not allow Defendant to invoke the First Amendment to shield such wrongdoing. *See A&M Records v. Napster, Inc.*, 239 F.3d at 1028 (holding that the First Amendment does not protect use of a P2P file sharing network that constitutes copyright infringement); *Arista Records LLC v. John Does 1-19*, Civ. Action No. 07-cv-1649, slip op. at 11 (stating that defendant's First Amendment privacy interest is “exceedingly small where the ‘speech’ is the alleged infringement of copyrights.”) (*Ex. 3*); *Arista Records LLC v. Does 1-11*, CIV-07-568-R, slip op. at 2 (W.D. Okla. November 14, 2007) (stating that similarly situated defendants' First Amendment rights were “not implicated because the information sought by the subpoena [did] not infringe [defendants'] rights to engage in protected speech”) (attached as *Ex. 6*).

Defendant next argues that Plaintiffs must meet a heightened pleading requirement to take expedited discovery. Defendant relies primarily on *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. App. 2001), *Doe v. Cahill* 884 A.2d 451 (Del. 2005), and *Mobilisa, Inc. v. John Doe 1*, 170 P.3d 712 (Ariz. Ct. App. 2007) to support her argument. (Def.'s Br., p. 14-15.) Her argument and citation of authority is misguided. First, none of the three cases are applicable because they do not involve copyright infringement. In addition, *Dendrite*, *Cahill*, and *Mobilisa* involved actual speech, as the plaintiffs' claims were based on

statements that the defendants posted on internet message boards, blogs, or e-mails. In all three of those contexts, the First Amendment was implicated. Here, as discussed above, Defendant did not engage in protected speech and Plaintiffs are entitled to pursue their claims.⁷ *See Arista Records LLC v. John Does 1-19*, Civ. Action No. 07-cv-1649, slip op. at 11 (declining to apply heightened pleading requirements set forth in cases involving actual speech to a copyright infringement case such as here) (*Ex. 3*).

Moreover, even if the Court were to find that sharing copyrighted files implicates the First Amendment, Plaintiffs meet any limited increase in the standard of pleading. The First Amendment protection Defendant seeks will at most entitle her to minimal protection because her actions constitute copyright infringement. *See Arista Records LLC v. John Does 1-19*, Civ. Action No. 07-cv-1649, slip op. at 11 (“[C]ourts have routinely held that a defendant’s First Amendment privacy interests are small where the ‘speech’ is the alleged infringement of copyrights.”) (*Ex. 3*); *In re Verizon Internet Servs.*, 257 F. Supp. 2d at 260 (stating that the degree of protection to be afforded to anonymous expression on the internet is minimal where alleged copyright infringement is at issue). Plaintiffs urge the Court to consider *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004), a case cited by the Defendant that is substantially identical to the case at bar. (*See* Def.’s Br., p. 14 n.31 & p. 16 n.38.) In *Sony Music Entertainment*, the court denied the defendants’ motion to quash and held that the plaintiff copyright owners were entitled to discovery. *Id.* at 568. The court stated that the plaintiffs, on evidence similar to that submitted here, had “made a concrete showing of a *prima facie* claim of copyright infringement.” *Id.* at 565. When determining the extent of defendant file-sharers’ First Amendment protection, the court balanced the magnitude of harm

⁷ Attached as *Exhibit 7* is a partial list of cases in which courts allowed expedited discovery to go forward on nearly identical allegations.

with the defendants' interest in free speech and privacy and held 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. The same holds true here. Plaintiffs have sufficiently pled a *prima facie* case of copyright infringement and made a concrete showing of harm, as discussed above. *See Arista Records LLC v. John Does 1-19*, Case No. 1:07-cv-01649, slip op. at 9 ("[E]ven if the Court were to accept Defendant's proposed *prima facie* standard, Defendant's argument would nevertheless fail on its merits.") (*Ex. 3*); *LaFace Records, LLC v. Does 1-5*, 2008 U.S. Dist. LEXIS 13638, *17-18 (finding that plaintiffs had pled a *prima facie* claim in a substantially identical case and denying defendant's motion to quash based on similar First Amendment grounds). In addition, Plaintiffs' interests in obtaining discovery outweigh Defendant's interest in protecting her anonymity. Without expedited discovery, Plaintiffs would not be able to determine the identity of Defendants and move their case forward. Defendant has "little to no expectation of privacy because [she is] broadcasting [her] identifying information to everyone in the [P2P network]." *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 452 (C.D. Cal. 2007). What limited privacy interest Defendant does have is offset by the Court's Order limiting the scope and use of the information to be obtained. (*See* Discovery Order, Doc. No. 5, p. 2.)

Therefore, to the extent the requested discovery affects Defendant's First Amendment rights, her Motion to Quash fails because Plaintiffs have sufficiently pled their complaint and their interest in discovering identifying information to protect their copyrights outweighs Defendant's limited privacy interest. *See Arista Records LLC v. Does 1-11*, CIV-07-568-R at 2-3 ("To the extent the information sought impinges on the Doe Defendants' right to communicate anonymously, that 'right to remain anonymous must give way to plaintiffs' right to use the

judicial process to pursue what [facially] appear to be meritorious copyright infringement claims.”) (*Ex. 6*).

III. PLAINTIFFS’ SUPPORTING EVIDENCE IS PROPERLY BEFORE THE COURT

Defendant also argues that the Linares Declaration should be stricken because it is not based on personal knowledge and it refers to evidence gathered by MediaSentry. (Def.’s Br., p. 9.) As an initial matter, the Declaration was submitted in support of Plaintiffs’ Motion for Expedited Discovery (Doc. No. 4), not in support of Plaintiffs’ Complaint. To the extent Defendant argues that the Complaint cannot “survive the *Twombly* standard” without the Declaration (Def.’s Br., p. 12), that argument must fail. The Complaint stands on its own.

A. The Linares Declaration Is Factually Correct And Based On Personal Knowledge.

Defendant’s argument that the Declaration should be stricken from support of Plaintiffs’ Discovery Motion is without merit. Mr. Linares is an attorney who serves as Vice President, Anti-Piracy Legal Affairs for RIAA. (Linares Decl., ¶ 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 the cases before the Court. *Id.* The statements in the Linares Declaration are based upon personal knowledge. *Id.* In addition, attacks on the credibility of the Linares Declaration are improper at this stage of the litigation. There will be a time for Defendant to deny Plaintiffs’ allegations and to contest Plaintiffs’ theory of their case, but that time is not now. *See Eicken v. USAA Federal Sav. Bank*, 498 F. Supp. 2d 954, 960-61 (S.D. TX. 2007) (denying motion to strike affidavit that included disputed factual allegations). For this reason alone Defendant’s Motion should be denied.

B. Plaintiffs Conducted a Proper Investigation of Defendant’s Infringement.

Defendant argues that the Linares Declaration is improper because MediaSentry is required to have a license to operate in the State of North Carolina. (Def.'s Br., p. 9.) Defendant's argument fails because MediaSentry's activities do not fall under the proscribed activities of the Private Protection Services Act ("PPSA," N.C. Gen. Stat. §74C-1 *et al.*), and MediaSentry has neither been contacted by the Private Protective Services Board ("PPSB") nor been charged with operating without a license by the Attorney General under the PPSA. Moreover, Defendant does not state how MediaSentry's lack of a license is relevant to her Motion to Quash Plaintiffs' Subpoena.

The purpose of the PPSA is to regulate professions that overlap the functions of the public police. *See Shipman v. North Carolina Private Protective Servs. Bd.*, 346 S.E. 2d 295, 297 (N.C. App. 1986). Surely, observing and downloading sound recordings and other digital information that another has placed on the Internet, available to members of the general public, is not an activity that materially overlaps with the functions of the public police. The PPSA simply does not apply.⁸

Defendant attaches an informal opinion letter from the Director of the PPSB to support her argument that MediaSentry's actions violated the PPSA. ("Informal Op. Letter," Ex. 1 to Appendix to Def.'s Br.) Such a letter is not a final determination that MediaSentry's actions were illegal for three reasons. First, the Director makes it clear that the letter contains an *informal opinion* based on information provided to the PPSB by Defendant. (Informal Op.

⁸ Assuming, *arguendo*, that Defendant is correct regarding MediaSentry needing a license, the impact would be that any individual gathering evidence from a Website or cyberspace would need to obtain a license in North Carolina, and every other State with a similar licensing law, without ever having set foot in the State. Obviously, this would be a significant expansion of the contemplated reach of the statute.

Letter, p. 2.) The PPSB has not contacted MediaSentry regarding its activities, and MediaSentry has not had an opportunity to respond to Defendant's allegations.

Second, Defendant misrepresented to the Board that MediaSentry "entered the hard drives of . . . citizens to look for music recordings stored there." (Letter from Stephen Robertson to PPSB, Ex. 1 to Def.'s Br.) This is simply not true, nor can Defendant cite to any facts stating otherwise.⁹ MediaSentry does not "enter the hard drives" of private citizens. MediaSentry simply logs onto P2P networks accessible by any member of the general public and observes and/or downloads sound recordings that infringers are offering to distribute over the Internet. (See Linares Decl., ¶¶ 11-14.) Defendant cites to a Declaration by Elizabeth Hardwick ("Hardwick Decl., attached as *Exhibit 8*") in a different case in an attempt to convince the Court that MediaSentry "intruded" on Defendant's hard drive and searched through Defendant's private files to find the copyrighted sound recordings. (Def.'s Br. pp. 10-11.) A closer reading of the Hardwick Declaration reveals that Defendant is misguided. The Declaration states that MediaSentry connects to a P2P user's computer to view the files that the user is offering to distribute. (Hardwick Decl., ¶ 5-6.) Once MediaSentry requests a sound recording, the user's computer makes a copy of the sound recording, and sends it to MediaSentry's computer, along with other basic information such as the user's IP address. (Hardwick Decl., ¶ 5.) Indeed, all of the information that MediaSentry obtained from Defendant was in Defendant's publicly-shared

⁹ Defendant's Brief is replete with factual assertions for which there is no citation, nor can there be any citation, because her assertions are simply not true. One example of the serious factual deficiencies in Defendant's Brief is her statement that all data on a P2P network must reside on endpoint computers. (Def.'s Br., p. 10-11.) To the contrary, some P2P networks, such as FastTrack, rely on a series of supernodes that function as intermediaries on the network. These supernodes are neither servers nor the user's computer. Moreover, when a file is distributed on the FastTrack network, the end user actually sends the file to the requesting party. Accordingly, Defendant's argument that MediaSentry must intrude into a defendant's computer in order to download sound recordings fails.

folder and being offered for distribution over the Internet. MediaSentry's request, and Defendant's subsequent delivery of such information, does not constitute an intrusion into Defendant's hard drive, and thus the PPSA does not apply.

Finally, in order for MediaSentry's activities to be determined illegal, the Attorney General or the district attorneys of the State must prosecute and obtain a conviction. *See* N.C. Gen. Stat. § 74C-17(b). Defendant does not have standing to assert a claim under the PPSA, and Plaintiffs are unaware of any such prosecution by the State's attorneys. Accordingly, the Court should reject Defendant's claim that the Linares Declaration should be stricken because MediaSentry's activities violate the PPSA.

Even if the PPSA regulated MediaSentry's activities, which Plaintiffs maintain that it does not, an investigator's engagement in activities that allegedly violate the PPSA is not within one of the four bases to quash a subpoena under Federal Rule of Civil Procedure.¹⁰ Rule 45 authorizes a court to quash or modify a subpoena if the subpoena (1) does not allow a reasonable time for compliance, (2) requires a person who is not a party to the action to travel more than 100 miles, (3) requires disclosure of privileged or other protected matter and no exception or waiver applies, or (4) subjects a person to undue burden. *See LaFace Records, LLC v. Does 1-5*, 2008 U.S. Dist. LEXIS 13638 at *6-*7 (citing Fed. R. Civ. P. 45(c)(3)(A)(i-iv)). Defendant does not, and cannot, argue that MediaSentry's alleged impropriety falls within any of the four reasons to quash Plaintiffs' subpoena, and therefore Defendant's Motion to Quash should be denied.

Defendant's implied argument that the evidence obtained by MediaSentry should be excluded also fails. No provision of the PPSA supports the exclusionary rule as a remedy for violating the Act. Moreover, the instant case is a purely civil matter that does not involve any

¹⁰ Moreover, even if the PPSA regulated MediaSentry's activities, such regulation would not undermine the credibility of the evidence in this case.

government action that would invoke the Fourth Amendment, and thus the exclusionary rule should not apply. *See O’Leary v. Purcell Co.*, 108 F.R.D. 641, 646-47 (M.D.N.C. 1985) (refusing to extend the exclusionary rule to a civil matter because the primary purpose of the rule is to deter illegal governmental conduct); *County of Henrico v. Ehlers*, 237 Va. 594, 604 (1989) (expressly declining to extend the Fourth Amendment exclusionary rule to civil cases). *See also 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)).

In addition, no court has interpreted a violation of the PPSA to invoke the exclusionary rule. Indeed, the Federal District Court for the District of Maine, when interpreting a similar licensing statute, held that 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), the Court concluded that:

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, the cases Defendant cites to support the application of the exclusionary rule are inapposite. Defendant’s reliance on *Rickenbaker v. Rickenbaker*, 290 N.C. 373 (1976), is misplaced because *Rickenbaker* involved a violation of the Federal Wiretap Act, 18 U.S.C. § 2510, which contains a provision requiring the exclusion of evidence obtained in violation of

the Act. *Rickenbaker*, 290 N.C. at 377. As stated above, the PPSA contains no such provision and thus the exclusionary rule does not apply.

Similarly, the decision in *Gallagher v. Van Lott, Inc.*, 2006 WL 3254464 (D.S.C. 2006), does not support Defendant's position. In *Gallagher*, defense counsel in a sexual harassment suit retained a private investigator to conduct surveillance regarding the plaintiff's daily activities. *Id.* at 1. The investigator videotaped the plaintiff driving to work the day after the plaintiff testified that he was unable to drive. In addition, the investigator, unbeknownst to the defendant's attorney, secretly recorded a conversation with the plaintiff during which the investigator misrepresented himself as a teacher interested in purchasing the plaintiff's vehicle. The court found that the conversation violated the ethical prohibition against contacting represented parties. Accordingly, the court did not allow the audiotape into evidence, but allowed the videotape of the plaintiff driving because it was not obtained through misrepresentation or unethical contact with a represented party. Here, MediaSentry neither contacted a represented party nor misrepresented itself to Defendant when it downloaded the sound recordings at issue. It merely connected to a P2P network accessible to the general public and observed Defendant's illegal activity in Cyberspace. The ruling in *Gallagher*, therefore, is not applicable here.

Finally, the third case cited by Defendant, *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155 (1994), directly contradicts Defendant's position. In *Madden*, the Supreme Court of West Virginia held that the circuit court abused its discretion by excluding testimony from a private investigator who observed the plaintiff's work activities that the plaintiff conducted "in full view of the general public." *Madden*, 192 W. Va. at 164. In so holding, the court noted that the exclusionary rule exists primarily to deter "unconstitutional

conduct by state actors,” and is not usually extended to civil cases. The court also stated that the plaintiff had no reasonable expectation of privacy when conducting his affairs in a public setting. *Id.* at 163-65. Accordingly, the court’s opinion in *Madden* actually counsels against applying the exclusionary rule where, as here, no constitutional right has been threatened by a state actor, and MediaSentry merely observed Defendant’s illegal activity on a P2P network accessible by any member of the general public.

Plaintiffs respectfully urge the Court to consider the court’s order denying a defendant’s motion to quash in *Arista Records LLC v. Does 1-5*, Case No. C08-0158 (W.D. Wash. June 10, 2008) (attached as *Exhibit 9*). In *Arista Records LLC v. Does 1-5*, a similar case filed by record company plaintiffs, the defendant similarly argued that the plaintiffs’ subpoena should be quashed and a declaration by Carlos Linares should be stricken because the declaration was allegedly not based on personal knowledge and MediaSentry was allegedly not licensed in Washington. The court denied the defendant’s motion to quash, stating that the defendant’s “sweeping attacks on the Affidavit of Carlos Linares and plaintiffs’ litigation strategies do not alter or otherwise invalidate the Court’s order granting leave to take immediate discovery.” *Arista Records LLC v. Does 1-5*, Case No. C08-0158, slip op., p. 1. The court held that plaintiffs “ha[d] shown good cause” for the issuance of their subpoena, that the court “may permit immediate discovery of any matter relevant to [the] litigation,” and that “the identification of the defendants [was] clearly relevant.” *Id.* at 1-2. Plaintiffs here urge the Court to follow the reasoning of the Western District of Washington and deny Defendant’s Motion.

For the foregoing reasons, Plaintiffs submit that MediaSentry conducted a proper investigation into Defendant’s activities and that the exclusionary rule does not apply. Accordingly, Plaintiffs respectfully request that the Court deny Defendant’s Motion.

CONCLUSION

For the reasons stated above, Plaintiffs ask that the Court deny Defendant's Motion to Dismiss the Complaint, Strike the Affidavit, and Quash the Subpoena.

Respectfully submitted, this the 9th day of July, 2008.

/s/ Lacey M. Moore

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 9, 2008, a copy of the foregoing **PLAINTIFFS' OPPOSITION TO MOTION OF DEFENDANT JOHN DOE TO DISMISS THE COMPLAINT, STRIKE THE PLAINTIFFS' AFFIDAVIT, AND QUASH THE SUBPOENA** was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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And I also certify that on the same date a copy of the same document was served upon the following non-CM/ECF participant via electronic mail:

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