

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LAFACE RECORDS LLC, *et al.*,

Plaintiffs,

v.

Hon. : Paul L. Maloney
Magistrate: Timothy P. Greeley
Case : 2:07-cv-0187 PLM

DOES 1-5,

Defendants.

MATTHEW E. KRICHBAUM (P52491)
SOBLE ROWE KRICHBAUM, LLP
Attorneys for Plaintiffs
221 North Main Street, Suite 200
Ann Arbor, Michigan 48104
(734) 996 5600

**PLAINTIFFS' RESPONSE TO DEFENDANT DOE #5'S AUGUST 13, 2008
LETTER TO THE COURT AND OBJECTION TO SUPPLEMENTAL
AUTHORITY**

Plaintiffs respectfully respond to Defendant Doe #5's ("Defendant's") August 13, 2008 letter to the Court and supplemental authority ("Letter," Doc. No. 39).

In support of their response, Plaintiffs state as follows:

INTRODUCTION

As described to the Court in earlier pleadings, Plaintiffs are facing large scale infringement of their exclusive rights to copyrighted sound recordings, due in large part to digital piracy over peer-to-peer ("P2P") networks. (*See* Doc. No. 31, pp. 3-4.) In an effort to protect their copyrights from online infringement, Plaintiffs have retained a

third-party, MediaSentry, to assist them in locating individuals infringing their copyrights over P2P networks.

MediaSentry logs on to P2P networks and observes users distributing files over the network. If MediaSentry observes files being distributed that appear to be digital copies of sound recordings whose copyrights are owned by Plaintiffs, it may download the files. As part of that downloading process MediaSentry receives basic information about the user from whom the work is being downloaded, including the user's IP address. All information obtained by MediaSentry is available to any other P2P user.

On January 17, 2007, MediaSentry observed Defendant distributing approximately 1731 sound recordings, whose copyrights were by and large owned by various Plaintiffs. (Exhibit A to the Complaint, p. 6.) MediaSentry downloaded a sampling of the sound recordings that Defendant was distributing to other P2P users. A list of eight such sound recordings downloaded by MediaSentry is attached at page six of Exhibit A to the Complaint.

Plaintiffs filed this action for copyright infringement against Does 1-5 on September 20, 2007 (Doc. No. 1), and sought leave from the Court to determine the Defendants' true names and contact information. ("Discovery Motion," Doc. No. 2.) The Court granted Plaintiffs' Discovery Motion on September 27, 2007, and Plaintiffs subsequently issued a subpoena to the University requiring that the University produce Defendants' identifying information. Plaintiffs' subpoena triggered a string of filings from Defendant requesting the Court to quash the subpoena.¹ Her latest filing is a Letter

¹ Because Defendant did not properly file a motion to quash the subpoena prior to the response date on the subpoena, the University has already produced Defendant's

to the Court attaching House Bill 5274, the Professional Investigator Licensure Act (“PILA,” Mich. Comp. L. §§ 338.821 to 338.851 (2008)), an Act that revised Michigan’s Private Detective Licensing Act (“PDLA,” Mich. Comp. L. §§ 338.821 to 338.851 (2007)) on May 28, 2008.² (*See* Doc. No. 39.) In the Letter, Defendant argues that the Legislature’s addition of “computer forensics” as a regulated industry in the PILA implies that the PDLA regulated activities such as those conducted by MediaSentry in 2007. (Letter, pp. 1-2.) According to Defendant, because MediaSentry did not acquire a license pursuant to the PDLA before it detected Defendant’s infringement, MediaSentry’s actions were illegal, and the evidence contained in Exhibit A should not be considered by the Court.³ Defendant’s argument is wrong for two reasons. First, the PILA’s definition of “computer forensics” does not regulate an out-of-state entity, such as MediaSentry, that simply observes and downloads information from the Internet. Second, the Michigan House and Senate Committee reports on the PILA reveal that the PDLA as applied at the time MediaSentry detected Defendant’s unlawful conduct did not regulate any form of computer investigation, much less the observation and downloading of sound recordings from cyberspace conducted by MediaSentry.

Accordingly, Defendant’s Letter and supplemental authority contradict her argument that MediaSentry’s conduct was illegal, and her Motion to Quash should be denied.

identifying information to Plaintiffs, rendering Defendant’s subsequent pleadings moot. Nevertheless, Plaintiffs have fully briefed the issues before the Court.

² Hereinafter, Plaintiffs refer generally to the current licensing act as the PILA, and the licensing act as it existed prior to May 28, 2008, as the PDLA.

³ Defendant still has not cited any authority to support the application of the exclusionary rule in this case, because the exclusionary rule does not apply. (*See* Doc. No. 31, pp. 9-10.)

ARGUMENT

Plaintiffs do not agree that the provisions of the PILA pertaining to “computer forensics” apply to the nature of activities conducted by MediaSentry. The legislature included “computer forensics” in the PILA to regulate the growing number of individuals in Michigan that claim to be qualified to examine, analyze, and extract data from computer hard drives and systems. By requiring computer forensic examiners to be licensed, the PILA seeks to ensure that the citizens of Michigan can expect a minimum level of professionalism and quality when seeking a forensic examination. *See* Senate Fiscal Agency, Bill Analysis of House Bill 5274 at p. 5, March 25, 2008 (stating that the PILA would recognize a degree in computer forensics for licensure, and that the PILA “would regulate those who use the computer as an investigative tool; otherwise any ‘hacker’ could claim to be a computer forensic examiner.”) (attached hereto as *Exhibit A*).

MediaSentry does not conduct “computer forensics” examinations of this nature. When MediaSentry observes and downloads sound recordings and other digital information that a copyright infringer has placed on the Internet, its agents are *located outside* the State of Michigan. Moreover, the information MediaSentry downloads is available to each and every member of the general public. MediaSentry may not even know the physical location of the infringer’s computer until after MediaSentry requests and receives transmission of the copyrighted sound recordings. The Michigan Legislature does not have the authority to regulate the behavior of an entity located outside of its boundaries that receives information through cyberspace from a source whose location may be unknown at the time the information is transmitted. The impact of such a law would be that any individual gathering evidence from a Website or cyberspace would need to obtain a license in Michigan, 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.

Moreover, the legislative analysis of the PILA makes it clear that at the time of MediaSentry's allegedly illegal activities in this case, the PDLA did not regulate computer forensics at all. MediaSentry detected Doe #5 infringing Plaintiffs' exclusive rights to approximately 1731 sound recordings on January 17, 2007. (*See* Exhibit A to the Complaint.) The legislative analysis of the PILA reported by the House Regulatory Reform Committee noted that on November 27, 2007, more than ten months after MediaSentry detected Doe #5's unlawful activity, the PDLA "doesn't regulate those engaged in computer forensics" House Fiscal Agency, Legislative Analysis of House Bill 5274 at p. 1, Nov. 27, 2007, attached hereto as *Exhibit B*; *see also* Senate Fiscal Agency, Bill Analysis of House Bill 5274 at p. 2, (stating that the PDLA did not define a "private detective" or "private investigator" as a person who engages in activities "pertaining . . . computer forensics"), *Exhibit A*. To the extent Doe #5 argues that the enactment of the PILA should "inform the Court[] as to the intent" of the PDLA, she is correct, but the proper conclusion is that the PDLA did not regulate MediaSentry's conduct nor require MediaSentry to be licensed in Michigan. Plaintiffs' evidence, therefore, was not obtained by illegal conduct and is properly before the Court.

Accordingly, Doe #5's argument that Plaintiffs' subpoena should be quashed because MediaSentry engaged in illegal activities proscribed by the PDLA fails, and the Court should deny her motion.

CONCLUSION

For the reasons stated above, Defendant's Letter and the PILA support Plaintiffs' Opposition to Defendant Doe #5's Motion to Quash (Doc. No. 22).

Respectfully submitted,

SOBLE ROWE KRICHBAUM, LLP

Dated: August 26, 2008

By: s/Matthew E. Krichbaum
Matthew E. Krichbaum (P52491)
Attorney for Plaintiffs
221 N. Main Street, Suite 200
Ann Arbor, Michigan 48104
(734) 996-5600
E-mail: matthew@srkllp.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANT DOE #5'S AUGUST 13, 2008 LETTER TO THE COURT AND OBJECTION TO SUPPLEMENTARY AUTHORITY** has been served upon the following non-CM/ECF participants by United States mail, properly addressed and postage prepaid, on this 26th day of August, 2008:

Doe #5
22 Hull Road
Coldwater, MI 4936

s/Matthew E. Krichbaum
Matthew E. Krichbaum (P52491)