

United States District Court
Western District of Michigan
Southern Division

LaFace Records LLC, et al
Plaintiffs.

Case No. 2:07-cv-187

-v-

HONORABLE PAUL L. MALONEY
MAGISTRATE: Timothy P. Greeley

DOES 1-5
Defendants.

Amended
**Defendants Response to Plaintiffs' Objection to
Supplemental Authority, Michigan Professional
Investigators Act amended (Public Act 146 of
2008)**

Doe # 5, a College Student at Northern Michigan University, Defendant herein, and in pro se, burdened by the expenses of College, and without the deep pockets and learned resources of plaintiff, respectfully responds to Plaintiffs' Objection to the use of the supplemental Authority of the Michigan's Professional Investigators Law (MCL 338.821 to 338.851).

**APPLICATION OF THE MICHIGAN PROFESSIONAL INVESTIGATORS ACT
AS AMENDED AS A SUPPLEMENTAL AUTHORITY**

Plaintiffs claim they and their investigative agent, MediaSentry, are not bound by the terms of the Michigan Professional Investigators Act as amended. A straightforward reading of the act indicates clearly that even before the 2008 amendments, the broad language of the statute clearly regulates private

investigators AND investigations within the State of Michigan. The Act also sufficiently profiles the actions of Plaintiffs "Third Party Investigator".

As described to the Court in Plaintiffs' Declaration of Carlos Linares, Plaintiffs' Trade Group, the Recording Industry Association of America ("RIAA") has retained "a **Third Party Investigator** MediaSentry, Inc. ("MediaSentry"), to conduct searches of the Internet, as well as file-copying services..." (emphasis added) This company, MediaSentry, by its own admission, and as declared by its employee, Elizabeth Hardwich (*see Declaration of Elizabeth Hardwich, Capital Records Inc. v. Noor Alaujan and Sony BMG Music Entertainment et al., v. Joel Tenenbaum USDC District of Massachusetts re. Paragraph 7) has entered the computers of private citizens and gathered evidence on the identity, habits, conduct and activity of those citizens. A Supplemental Declaration by Plaintiffs' counsel in other proceedings also confirms this behavior (see Supplemental Declaration of Richard L. Gabriel, esq. In Support of Plaintiffs' Motion for Protective Order, UMG Recordings, Inc., et al., v. Marie Lindor USDC Eastern District of New York re. Paragraph 3).

MediaSentry's investigations have been used as the "linchpin" in at least 8 "John Doe" Lawsuits filed in the Michigan District involving ninety-nine individuals. In each action MediaSentry has initiated a contact with a device that had some form of a Peer to Peer ("P2P") program associated with it. The investigations conducted under the direction of the "RIAA" are massive and involve potentially millions of individuals.

MediaSentry, posing as some "Common Joe" on the Internet, seeks and initiates contact with computers using a "P2P" program. MediaSentry then connected to the computers through the network specific to the "P2P" program over the Internet. During the course of its investigation MediaSentry would, "download data files that show for each music file the source IP address, user logs that include a complete listing of all files in the individual's share folder at the time", and download "additional data that tracks the movement of the files thought the internet." re. Declaration of Carlos Linares in Support of Ex Parte Application for Leave to Take Immediate Discovery (emphasis added).

Each Lawsuit is accompanied by a nearly identical declaration by Mr. Carlos Linares who claims "I am Vice President, Anti-Piracy Legal Affairs for the Recording Industry Association of America, Inc. ("RIAA)". Mr. Linares, then explains that "For each *suspected infringer*, MediaSentry downloads a number of the music files that the *individual is offering* to other users on the P2P network." During the investigative process, files of "*suspected infringers*" and "*additional evidence for each individual...*" is also collected by MediaSentry. (How Mr. Linares can identify an *individual* based upon an automated process performed hundreds of miles away from the site of the device is beyond comprehension, and needs to be explained).

The declaration usually contains the following wording, "MediaSentry has downloaded a number of the music files that the *individual is offering* to other users on the P2P network. MediaSentry assigns an identification number to *each individual* for which it detects copyright infringement and *gathers additional evidence* for each *individual*, such as metadata accompanying each file being disseminated that demonstrates that *the user* is engaged in copyright infringement. That evidence includes download data files that show for each music file the source IP address. User logs that include a complete listing of all files in the *individual's share folder* at the time, and additional data that track the movement of the files through the Internet." (Emphasis added). The habits and acts of the "infringers" are recorded.

The fruits of these secret investigations are then used as evidence in court. MediaSentry's actions are specifically engaged in "[s]ecuring evidence to be used before a court, board, officer, or investigating committee." (MCL 338.822).

In Plaintiffs zeal to secure "evidence to be used before court of law", the RIAA's retained "Third Party investigator, MediaSentry Inc. ..." has ignored the laws of various states requiring licensing for investigative activities. MediaSentry by counsel's admission in this case, has been "Put on Notice" in Michigan by the Michigan Department of Labor and Economic Growth ("DLEG"). In several other states where laws similar to Michigan's Professional Investigators Licensing Act exist, MediaSentry has also been "put on notice". MediaSentry has received a Cease and Desist letter from the Massachusetts State Police. In Maine, Detective David Pelletier of the Maine State Police has notified MediaSentry in a similar Cease and Desist letter stating "Therefore it would be illegal to continue acting in the capacity of a Private Investigator in Maine unless licensed." Finally, the North Carolina Private Protective Services Board has also scheduled MediaSentry for review of its investigative activities in November. Now Plaintiff's find their hands in the "Cookie Jar".

REPLY TO PLAINTIFFS ARGUMENT

"Plaintiffs do not agree that the provisions of the PILA pertaining to "computer forensics" apply to the nature of activities conducted by MediaSentry. "

Plaintiff's "Investigator" (MediaSentry) clearly meets the criteria of a Professional Investigator. MediaSentry's actions fall squarely into the realm of the new law. In fact, MediaSentry's actions fell squarely into the requirements of the Law before it was revised. As early as May 22, 2006, the Michigan Department of Labor and Economic Growth was notifying businesses and individuals that a firm could NOT operate within the state of Michigan as a private detective agency without first securing a license. (See letter of Vito J. Danzo, Michigan Department of Labor and Economic Growth. to Michael G. Kessler. of

Kessler International, dated May 22, 2006, indicating those who worked FOR such a detective agency (for example, as CPAs) did NOT need a license, but the detective agency itself most certainly did! Mr. Danzo's letter also refers to the "very broad definition (in Michigan statute) of work that constitutes that of a private detective ..." (Kessler International advertises itself as specializing in Forensic Accounting, Brand Protection, Special Investigations, Risk Management and Corporate Investigation. See attached web page). In short, the Michigan Law covered the activities of MediaSentry both before and after the 2008 amendments, **and prior to its investigation of January 17, 2007**. The 2008 amendments were simply one step in bringing the language of the statute into the age of automation.

In a letter written to the Michigan Department of Labor and Economic Growth ("DLEG") dated March 17th, 2008, Attorney Thomas M. Mullaney representing "SafeNet, Inc., f/k/a MediaSentry Inc.", to DLEG "...Safe-Net provides a litigation-support service to the Recording Industry Association of America (RIAA)", and would play a **limited role in the eventual litigation** that the RIAA members might bring against infringers of copyrights in certain music being illegally distributed over the Internet." Mr. Mullaney's statement is contrary to the Declaration of Mr. Linares. (See attached Letter from Law Office of Thomas M. Mullaney to DLEG, March 17, 2008). His misrepresentation to the State Licensing authority has not gone unnoticed. Mr. Mullaney's reply to DLEG was prompted by a complaint and Notification from DLEG of the requirements of the PDLA (PA 285, MCL 338.823 (1) & (2), naming MediaSentry as performing unlicensed investigations.

PLAINTIFFS RELIANCE UPON LEGISLATIVE ANALYSIS IS UNSOUND

Plaintiffs' reliance upon "Legislative History" is unsound at best. Justice Scalia has made several references to reliance upon legislative history, and suggests that reliance upon legislative history, or the history of legislation-that-never-was is beyond all reason.

"Today, however, the Court's fascination with the files of Congress (we must consult them, because they are there) is carried to a new silly extreme. Today's opinion ever-so-carefully analyzes, not legislative history, but the history of legislation-that-never-was. If we take this sort of material seriously, we require conscientious counsel to investigate (at clients' expense) not only the hearings, committee reports, and floor debates pertaining to the history of the law at issue (which is bad enough), but to find, and then investigate the hearings, committee reports, and floor debates pertaining to, later bills on the same subject that were never enacted. This is beyond all reason, and we should say so."
(*Re Blanchard v. Bergeron*, 489 U. S. 87, 98-100 (1989) SCALIA, J., concurring in part and concurring in judgment).

The Professional Investigators Licensing Act specifically states:

(b). "Computer forensics" means the collection, investigation, analysis, and scientific examination of data held on, or retrieved from, computers, computer networks, computer storage media, electronic devices, electronic storage media, or electronic networks, or any combination thereof.

The Linares Declaration gives a point by point evaluation of MediaSentry's activities, including but not limited to:

- 1). Searches of the Internet
- 2). Assigning an identification number to each individual...
- 3). Gathers additional evidence for each individual...
- 4). Downloads data files from the individual
- 5). Capture the Internet Protocol address of the device connected to the P2P network.
- 6). Collects Metadata.
- 7). Compiles a listing of all files in the individual's share folder.

Additionally, the Declaration of Elizabeth Hardwich, a MediaSentry employee, as referred to previously, provides further insight into the activities of MediaSentry. Ms. Hardwich explains that MediaSentry's services include:

- 1). Receiving basic information about the user from whom it downloads files from. (Paragraph 5)
- 2). Connecting to a P2P user's computer to seek to determine what other files the individual is distributing for download. (Paragraph 6)
- 3). Taking "screen shots" which are actual pictures of the screens that MediaSentry can see when reviewing the files on a P2P users computer. (Paragraph 7)
- 4). Capturing as a "text file" all of the contents of the user's shared directory...(Paragraph 7)
- 5). Detecting the User Name of the person logged onto a P2P network. (Paragraph 9)

Plaintiffs contend that "Media Sentry does not conduct "computer forensic" examinations of *this nature*."

What *nature* of "computer forensics" does MediaSentry conduct, as MediaSentry advertises it used "proprietary" software during its file searching process?

Both the PILA and the PDLA use the same stipulations that "...who, for a fee, reward, or other consideration, engages in business or accepts employment to furnish, or subcontracts or agrees to make, or makes an investigation for the purpose of obtaining information with reference to any of the following:

As the "Third Party Investigator", what types of investigations does MediaSentry perform for a fee, reward, or other considerations that **are not** investigations for hire?

The identity, habits, conduct, business, occupation, honesty, integrity, credibility, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person.
PILA section (e)(ii) & PDLA section (b) (ii)

Securing evidence to be used before a court, board, office4r, or investigating committee. PILA section (e)(v) & PDLA section (b) (v)

Plaintiffs claim that MediaSentry agents are located outside of the state of Michigan and not subject to Michigan laws. Plaintiffs also boldly remark that "the Michigan Legislature does not have the authority to regulate the behavior of an entity located outside of its boundaries..."

Plaintiffs would have us believe that MediaSentry plucks information out of some vaporous and insubstantial form of ether called cyberspace, which has no hearth or home. This is ingenuous and inaccurate. All data here was lifted from the hard drive of Defendant's computer for the **eventual** purpose of litigation. For example, the IP address of defendant's computer was located only on her computer, and certainly not projected "onto" the Internet. The files allegedly containing the music files were on the hard disk of a computer. MediaSentry obviously made contact with Defendant's hard drive and lifted files that were carried back to MediaSentry's computers through the "P2P" protocol. MediaSentry's searches were not some fortuitous wanderings among the loose electrons of some worldwide scattering of documents floating aimlessly and awaiting some handsome electronic date to arrive on the scene. These were not some ghostly writings floating around in the ether like some disembodied spirits lost between Salvation and Perdition. Additionally, many of the computers that MediaSentry has accessed fall under the qualifications of "Protected Computers" as defined by law.

If Plaintiffs agent were to fire a handgun carelessly into the air from outside of the state's boundaries, and the projectile fell into Michigan, striking a victim, would not Plaintiffs' Agent be responsible of a Crime? If someone having no valid Michigan hunting license stands outside the state of Michigan but fires a gun across the border, killing a deer, that person is guilty of a crime and can be prosecuted in Michigan.

Software programs such as Symantec Antivirus and Web Root Anti-Spyware are designed to FRUSTRATE the entry-and-snoop process of "computer virus". They protect the intrusion of damaging programs that enter a vulnerable

computer and make some unwanted change on the hard drive. Similarly, these protective programs do not perform their functions far out in some nebulous region known as cyberspace; they carry out their functions on the hard drive of the local computer.

The same is true here. Plaintiff's Agent may have initiated a contact from outside of the State of Michigan. [We only have the Plaintiffs' unsubstantiated and unsworn claim as to what their agent was involved in and not any actual admission of statement of MediaSentry directly]. The investigative contact had a physical focus and a physical termination that started and stopped at the personal computer files on the hard drives of Michigan residents. Plaintiffs insist in their original filing that the "Venue in this District" is proper, claiming that "...on information and belief, personal jurisdiction in this District is proper because each Defendant, without consent or permission of the copyright owner, disseminated over the Internet copyrighted works owned and/or controlled by Plaintiffs." If the Venue is proper, the applicable Michigan Laws should apply. Plaintiff's investigator is required by law to be licensed.

Plaintiffs' agents behavior is a Class "F" Public Trust felony. Class "F" felonies, conviction and extradition is an established practice. Similar Class "F" felonies in Michigan include Bribing a Public Officer or Bribing a Juror or other person. Criminal prosecutions of out-of-state crime against Michigan residents have been upheld.

Additionally, the PDLA and the PILA both contain provisions for reciprocal agreements with other States, which would not limit Plaintiff's agent from working in Michigan provided it were licensed in another state with an equitable law. This would guarantee that Plaintiffs investigator would meet the requirement that statute law was established to regulate. Had they investigated the legal requirements of the Law, rather than "hack" the computers of private citizens, perhaps they would have been aware of this.

Defendant Doe # 5 would request that the Honorable Court order Plaintiffs "Third Party Investigator" MediaSentry to produce for the Court any licenses or permits it may hold as a Private, or Professional Investigator, that would meet the requirements of the PDLA or the PILA. Defendant Doe believes that Plaintiffs Agent MediaSentry has not applied for, nor does it hold, any Private Investigator or Professional Investigator licenses in any jurisdiction.

The State Legislature has the responsibility to protect its citizens and the general public against unauthorized unlicensed and unethical operations by unlicensed professional investigators ... hence the establishment of the Act. Unlicensed behavior of this type has a chilling effect on all concerned.

Sound reasoning exist to consider the Current Statute (PILA) as a supplemental authority. The Act is the later statute, the more specific and comprehensive statute, reflecting a clear statement as to the policy intentions of the Legislature

of the State of Michigan. The PILA represent the legislature's detailed judgment as to what is required of a Professional Investigator, and fortifies the original Act (PDLA). The types of investigations undertaken, the scopes of the investigator actions, and the consequences for non-compliance to the licensing requirement are made clear. The PILA enhances the PDLA and dries up any perceived loopholes. Neither Act limits or restricts out of state investigators who meet the requirements of the Act. Only the plainest inconsistencies would warrant an implied exception of such a clear and concisely written law, and as we all know, it is illegal to hunt doe in Michigan without a license.

Plaintiffs have know or should have known the requirements of the law prior to their pursuit of any of their scheme litigation, and should *not* be permitted to benefit in any way from the felonious conduct of their agent.

For the reasons and supporting documentation supplied, Plaintiffs opposition to the supplemental authority of the PILA is without merit and Defendant Doe #5's Motion to Quash (Doc. No. 22) and (Doc No.28) should be Granted.

Thank you for your time and consideration.

Doe # 5

Doe # 5