UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LONDON-SIRE RECORDS, INC., et al.,	)	
Plaintiffs,	)	
	)	
v.	)	**No. 04CV12434-NG**
	)	**LEAD DOCKET NO.**
DOE 1 et al.,	)	
Defendants.	)	
ARISTA RECORDS LLC, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	No. 07CV10834-NG
	)	ORIGINAL DOCKET NO.
DOE 1 et al.,	)	
Defendants.	)	

GERTNER, D.J.:

OMNIBUS ORDER AND MEMORANDUM ON MOTIONS

January 9, 2009

This case is one for copyright infringement under 17 U.S.C. § 106. The Plaintiffs are some of the nation's largest record companies; they seek subpoenas to uncover the identities of individual computer users -- college students -- who are using peer-to-peer software to share copies of the plaintiffs' copyrighted musical recordings. One Defendant in the case originally titled Arista Records LLC v. Doe 1, No. 07CV10834, moved to quash the subpoena. This Court granted the Motion, see Order on Motions to Quash (document # 167), 542 F.Supp.2d 153 (D. Mass. 2008), ordering the subpoena to be quashed and re-served as modified. The facts and law in the case are laid out in detail in that Order, and familiarity with it is presumed.

The Court now has before it a number of motions challenging affidavits and subpoenas derived from evidence gathered by MediaSentry, Inc. ("MediaSentry"). MediaSentry is an organization that searches for possible copyright infringement on peer-to-peer networks on the Plaintiffs' behalf. Doe 1, whose name is unknown, seeks to strike the Declaration of Carlos Linares (docket no. 07-cv-10834, document # 5), in part based on evidence gathered by MediaSentry, Inc. Mot. to Strike Decl. of Carlos Linares (document # 170). This motion concerns the substantive evidence provided by the Plaintiffs and relied upon by the Court in its previous Order. The Plaintiffs oppose the Defendant's motion, and further seek to quash a subpoena addressed to the Massachusetts State Police Keeper of Records. Mot. to Quash (document # 185).

In addition, a second unnamed defendant, Doe 16, has now moved to quash a subpoena issued to Boston University ("the University") seeking individual computer user information that would identify the Defendant. Am. Mot. to Quash (document # 218). Doe 16 challenges the subpoena primarily because it is based on evidence allegedly obtained by MediaSentry illegally or improperly. The movant also argues that compliance would impose an undue burden on the University, and that any infringement was unintentional and thus is not actionable.

However troubling the accusations are against MediaSentry, they cannot, as a matter of law, serve as the basis for striking the affidavit or quashing the subpoena at issue. Neither the rules of evidence nor the Fourth Amendment bar the use of evidence arguably unlawfully obtained by private parties in their private suits. Rather, state law provides avenues for the Doe defendants to proceed against MediaSentry directly if they believe they have been the subject of unlawful invasions of privacy. See Mass. Gen. Laws ch. 272, § 99; id. ch. 147, § 23; id. ch. 214, § 1B.

I. MOTIONS TO STRIKE[1]

Doe 1 has argued that the Linares Declaration, Exh. A to Pl. Mot. Leave to Take Immediate Disc. (docket no. 07-cv-10834, document # 5), should be stricken from the record because it is materially false and is based on illegal evidence. Pl. Mot. to Strike (document # 170). According to defense counsel, the declaration contains material misstatements pertaining to who retained MediaSentry to gather the evidence at issue and to the nature of that evidence. Furthermore, defense counsel has supplied a cease-and-desist letter from the Commonwealth of

[1] Defendant Doe 1 has moved to strike the Declaration of Carlos Linares (document #170, 172). In the course of their response, the Plaintiffs have moved to strike the Defendant's reply to their opposition to these motions, noting that the movant failed to comply with Local Rule 7.1(b). The Court **GRANTS** the Defendant's Motion for Leave to File Nunc Pro Tunc (document # 186), although counsel is cautioned to comply with the Local Rules in the future. The Plaintiffs' Motion to Strike the Defendant's Reply (document # 184) is consequently **MOOT**.

Massachusetts's Department of State Police, addressed to one Chris Steven Fedde, Jr., as an operator of Safenet, Inc. and MediaSentry. The letter informs Fedde that he does not appear to be licensed as a private investigator in Massachusetts, as required by state law. See Mass. Gen. Laws ch. 147, §§ 22-23. According to the movant, this demonstrates that the evidence upon which the Linares Declaration is based was illegally obtained. For the following reasons, the Motion must be denied.

Even assuming Doe 1 is correct that MediaSentry's evidence was illegally obtained, that is not enough to strike it. In a criminal prosecution, evidence seized in violation of state law, but not in violation of federal law, is admissible in federal court. See, e.g., United States v. Wilson, 36 F.3d 205, 208 (1st Cir. 1994). Similarly, evidence seized by a private citizen in violation of the Fourth Amendment is admissible. See United States v. Jacobsen, 466 U.S. 109, 114-15 (1984). Where one private citizen or private entity illegally searches another, it might give rise to a criminal prosecution, see Mass. Gen. Laws ch. 272, § 99 (providing criminal penalties for interception of wire communications); id. ch. 147, § 23 (providing criminal penalties for acting as private investigator without a license), or a civil suit, see id. ch. 214, § 1B (providing for civil action for "unreasonable, substantial, or serious interference

with . . . privacy"). Those, not exclusion of evidence, are the proper deterrents.

Second, it is plain that alleged factual inaccuracies -- even material ones -- do not constitute a basis for striking the evidence from the record. Doe 1's countervailing evidence may well diminish the weight to be given to the Linares Declaration; it is not enough to render the Declaration inadmissible. Nor can the Court determine on this record, at this stage of the litigation, that the information in the Linares Declaration is hearsay.

Doe 1's Motion to Strike (document # 170) is **DENIED.** Because Doe 1's Motion to Vacate Expedited Discovery Orders (document # 171) is predicated on the Linares Declaration being stricken from the record, see Mem. Supp. Mot. Strike & Vacate 3 (document # 172),[2] the Motion to Vacate is **MOOT**.

[2] This document is styled as a motion and listed as a motion under the District of Massachusetts Electronic Case Filing system, but it is plainly a memorandum of law supporting the movant's other two motions, and the Court will consider it as such. Insofar as it asserts grounds for reconsidering the Court's Order on Motions to Quash, see Mem. Supp. Mot. Strike & Vacate 4, 8-12 (document # 172), it is without merit. As explained in the Order on Motions to Quash, only a prima facie case of infringement is necessary to proceed. The plaintiffs have alleged that the defendants actually did distribute copyrighted material. They have provided a partial list of the songs allegedly distributed, alleged that a greater number of copyrighted songs were also distributed, and demonstrated that downloads were technically feasible. They have sufficiently alleged, and provided prima facie evidence to support, a claim for copyright infringement. Moreover, the Court notes that much of the same evidence may pertain to the plaintiffs' claim that the defendants received, as well as provided, infringing copies of the plaintiffs' music recordings. See Order on Motions to Quash 19 n.16 (document # 167).

Furthermore, in light of the Court's denial of the Motion to Strike, it need not reach the issue of whether MediaSentry's downloads constitute direct evidence of infringement. It notes, however, that Resnick v. Copyright Clearance Center, 422 F.Supp.2d 252, 259 (D.Mass. 2006), is inapposite. Resnick analyzed a claim for contributory or vicarious copyright infringement.

Furthermore, the defendant has sought to follow up on MediaSentry's alleged violation of Massachusetts state law by seeking to subpoena the Massachusetts State Police Keeper of Records. Doe 1 seeks evidence pertaining to whether the evidence obtained by MediaSentry was legally gathered or not. The plaintiffs have moved to quash the subpoena. See Mot. Quash (document # 185). Because the subpoena was issued before discovery has formally commenced -- indeed, before the complaint has been served on the plaintiffs -- it is untimely without prior approval by the Court or stipulation by the parties. See Fed. R. Civ. P. 26(d)(1). Moreover, for the reasons explained above, the information sought is not currently relevant. The Motion to Quash (document # 185) is therefore **GRANTED**, and the subpoena is **QUASHED** without prejudice to its timely renewal upon a showing of relevance.

II. **DOE 16'S MOTION TO QUASH**

Doe 16 moves to quash the Plaintiffs' subpoena seeking individual computer user information from Boston University for reasons similar to those discussed above. See Am. Mot. to Quash

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See id. at 257-58. Relying on Venegas-Hernandez v. Associacion De Compositores v. Editores De Musica Latinoamericana, 424 F.3d 50, 57 (1st Cir. 2005), the court rejected the plaintiffs' argument that liability arose where the defendants merely authorized a directly infringing act, see Resnick, 422 F.Supp.2d at 259 -- as this Court did in its Order on Motions to Quash. But as the plaintiffs explicitly did not plead a claim for direct copyright infringement, see id., the court did not need to discuss, and did not discuss, whether a copy made by the plaintiffs' authorized agent could constitute direct infringement by the distributor.

(document # 218). As before, the Plaintiffs have only an IP address associated with the alleged distribution of copyrighted sound files. See Compl., Exh. A at 18(case no. 08-cv-11080, document # 1-2). Pursuant to the Court's Order permitting expedited discovery, they seek the "name, address, telephone number, e-mail address, and Media Access Control address[]" for Doe 16. Am. Order re: Expedited Disc. 1 (May 9, 2007) (case no. 07-cv-10834, document # 8). Importantly, in the case of Doe 16, the IP address matches only a single computer; this is not an instance where the service-provider is unable to identify the individual user with a reasonable degree of technical certainty. See Order on Motions to Quash (document # 167), 542 F.Supp.2d 153 (D. Mass. 2008).

The movant now challenges the subpoena on four grounds: (1) MediaSentry improperly obtained the underlying evidence of file-sharing, on which the subpoena is based, by violating the Gnutella Terms of Service ("TOS"); (2) MediaSentry illegally obtained the underlying evidence of file-sharing because it is not licensed as a private investigator in Massachusetts; (3) compliance with the subpoena would be unduly burdensome for the University; and (4) any distribution of the copyrighted works was inadvertent and unintentional, resulting from the default software configuration, and therefore not actionable. None of these arguments are availing.

A. **MediaSentry's Investigation**

Defendant Doe 16 has sought to quash the Plaintiffs' subpoena on the basis of MediaSentry's investigation, alleging that the company obtained his or her IP address in violation of the Gnutella TOS[3] as well as the ground described above, that it operated in violation of state licensing requirements for private investigators. See Mass. Gen. L. ch. 147, §§ 22, 23. Doe 16 argues that this investigation breached both an established privacy interest and state law, and therefore that the resulting subpoena should be invalidated. Neither objection to the conduct of Plaintiffs' investigation supplies a basis for quashing the subpoena.

In assessing Doe 16's motion to quash, the Court's approach is somewhat different than in evaluating the motion to strike above. In this context, the Court adheres to the analysis set forth in its earlier Order (document # 167), 542 F.Supp.2d 153 (D. Mass. 2008). There, this Court applied the five-factor test described in Sony Music Entm't v. Does 1-40, 326 F.Supp.2d 556, 564-65 (S.D.N.Y. 2004), to conduct the balancing analysis required by Fed. R. Civ. P. 45(c)(3). This inquiry considers:

[3] According to Doe 16's submission, the Gnutella terms of service provide that a user "may not impersonate another person or entity, misrepresent your affiliation with a person or entity, including (without limitation) federal, state, or municipal government, or a political candidate; or create or use a false identity; collect, manually or through an automatic process, information about other users without their express consent." Mem. in Supp. of Mot. to Quash 2 (document # 219).

(1) a concrete showing of a prima facie claim of actionable harm; (2) the specificity of the discovery request; (3) the absence of alternative means to obtain the subpoenaed information; (4) a central need for the subpoenaed information to advance the claim; and (5) the party's expectation of privacy. 542 F.Supp.2d at 164. Defendant's objections to the manner in which his or her IP address and evidence of file-sharing were obtained have no bearing on the first four factors. The Court previously resolved each of these in the Plaintiffs' favor for exactly this type of subpoena. See 542 F.Supp.2d at 164-179.

Only the fifth factor -- the party's expectation of privacy -- is potentially implicated by MediaSentry's alleged violation of the Gnutella TOS. In its Order, the Court noted that the University's terms of service, if any, "would be extremely helpful in analyzing the privacy interests at issue." Accordingly, it granted the Defendants' motion to quash while providing that the Court would review, in camera, any renewed subpoena for individual user information together with the University's terms of service. Id. at 180. Doe 16's objections based on the Gnutella TOS present a somewhat different issue. The movant does not argue that execution of the subpoena would violate an existing privacy interest, but that MediaSentry obtained its IP address -- which supplies the basis for the

subpoena -- in violation of a former privacy interest. It claims that this fact should invalidate the subpoena.

Because the Gnutella TOS prohibit any user from "collect[ing], manually or through an automatic process, information about other users without their express consent," they might arguably establish an expectation of privacy. See United States v. Polizzi, 549 F.Supp.2d 308, 390 (E.D.N.Y. 2008) (noting that "[t]erms of service agreements between customers and businesses have been considered relevant to characterization of privacy interests"); cf. United States v. Maxwell, 45 M.J. 406, 417-18 (C.A.A.F. 1996), aff'd, 46 M.J. 413 (C.A.A.F. 1996) (holding that the defendant had a limited privacy interest in sent email messages in light of the ISP's privacy policy, while noting that "implicit promises or contractual guarantees of privacy by commercial entities do not guarantee a constitutional expectation of privacy"). But the Court need not resolve the asserted privacy interest here, because even if established it would not support quashing the subpoena.[4]

For reasons substantially stated above, the nature of MediaSentry's investigation has little bearing on the validity of Plaintiffs' effort to obtain evidence by subpoena. To be sure,

[4] The Court notes that it has not been supplied with the full Gnutella TOS, but only the excerpt provided by the Defendant. Whether other TOS provisions diminish, or enhance, the asserted privacy interest thus remains an open question, and must be examined together with Gnutella users' actual use of the file-sharing application and network. As noted, however, this question is one that the Court does not reach here.

as reflected in its previous Order, the Court is extremely wary of sponsoring any unwarranted invasions of privacy through its subpoena power. See 542 F.Supp.2d at 179-80. But this was a private investigation that pre-dated the subpoena now at issue. Again, as described above courts regularly admit privately obtained evidence notwithstanding the Fourth Amendment exclusions that apply to government searches and seizures. Compare United States v. Jacobsen, 466 U.S. 109, 114-15 (1984) (refusing to apply Fourth Amendment strictures to a private search), with Gelbard v. United States, 408 U.S. 41, 52 (1972) (holding that a federal grand jury witness may refuse to answer questions, or to respond to requests to produce testimonial evidence, derived from illegal wiretapping by public officials); In re Grand Jury 11-84, 799 F.2d 1321 (9th Cir. 1986) (grand jury subpoena may be quashed where it was issued on the basis of evidence illegally obtained by the government). If such materials can be admitted into evidence at trial, certainly there is no bar to their use in guiding civil discovery.

Moreover, even if Doe 16 has a privacy interest protected by the Gnutella TOS, MediaSentry's intrusion on that interest does not halt this litigation. The same principles apply to any violation of state licensing requirements for private investigators. Indeed, to quash the subpoena on either ground would be to non-suit the Plaintiffs altogether, because they

would be unable to identify Doe 16. See 542 F.Supp.2d at 179 (finding that the information sought is central to the Plaintiffs' claims and that they have no other, less-intrusive way of obtaining it). But exclusion is not the Defendant's remedy. Rather, as noted in the preceding section, any invasion of privacy may be grounds for a prosecution or counterclaim under applicable state law. See Mass. Gen. Laws ch. 147, § 23 (providing criminal penalties for acting as private investigator without a license); id. ch. 214, § 1B (providing for civil action for "unreasonable, substantial, or serious interference with . . . privacy"). Whether the investigation giving rise to the subpoena was conducted improperly or illegally, as alleged, these acts carry separate remedies. They do not invalidate a subpoena that satisfies the requirements of Fed. R. Civ. P. 45.

B. **The Burden On The University**

The only substantial objection the Defendant has raised within the scope of Rule 45(c)(3) is that compliance with the subpoena would be "unduly burdensome" for the University. Rule 45(c)(3)(A)(iv) permits the Court to quash a subpoena where it "subjects a person to undue burden." Doe 16 argues that compliance with the subpoena would require the University to (1) interview all four occupants of the dormitory where the alleged offense took place, as well as anyone else who may have used the computer at the time in question; and (2) interview all the

students in its Computer Science Department to determine who, if anyone, was capable of "spoofing" their Media Access Control ("MAC") addresses in order to conceal their online identity. [FN: The Court has previously described "spoofing," whereby a sophisticated computer user can mask his or her true MAC address, and its relation to the claims in this litigation. See 542 F.Supp.2d at 178 n.34.]. Doe 16's objections are misplaced, and do not justify quashing the Plaintiffs' subpoena.

Whether Doe 16 may even raise another party's burden in its motion to quash is doubtful. While third-parties are often entitled to challenge a subpoena based on an asserted privilege or privacy interest that they possess, this standing rule does not plainly entitle that third-party to raise the burden borne by the subpoena's target. See Langford v. Chrysler Motor Co., 513 F.2d 1121, 1126 (2d Cir. 1975) ("In the absence of a claim of privilege, a party usually does not have standing to object to a subpoena directed to a non-party witness."); In re Stone & Webster, Inc. Securities Litigation, 2006 WL 2818489 at *2 (D. Mass. 2006) (citing Langford, 513 F.2d at 1126); McKenna v. CDC Software, Inc., 2008 WL 4097464 at *1 (D. Colo. 2008) ("The general rule is that a party has no standing to quash a subpoena served upon a third party, except as to claims of privilege relating to the documents being sought."). Importantly, the

University itself has not objected to the burden posed by compliance with the subpoena.

Even if Doe 16 has standing to raise this challenge, his objection fails. The subpoena seeks only to put a name with an IP address; it does not require the University to identify the actual infringer or even to interview any students about their file-sharing activities or familiarity with spoofing. The fact that other individuals may have been using the computer in question is a matter beyond the scope of the subpoena; indeed, this is not a case where multiple individuals potentially match the targeted IP address. See Order on Motions to Quash (document # 167), 542 F.Supp.2d 153 (D. Mass. 2008). Here, the University is asked only to identify the person who registered the computer that was allegedly used to share the copyrighted files -- i.e., the sole computer user associated with the IP address named in the subpoena. The Plaintiffs' will have to establish the identity of the actual infringer, if any, through their own investigation and proof.

C. **Inadvertent Infringement**

Finally, the Defendant argues that this Court should quash the subpoena because any copyright infringement was inadvertent and the consequence of default software settings. Whatever the merits of this claim, it is premature. As the Court stated before, claims that any infringement was unknowing or

unintentional "are substantive defenses for a later stage. Plaintiffs need not prove knowledge or intent in order to make out a prima facie case of infringement." 542 F.Supp.2d at 176-77 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1160 n.19 (1st Cir. 1994)). The Court applies the same analysis to Doe 16's motion to quash.

III. **CONCLUSION**

In summary, Doe 1's Motion to Strike (document # 170) is **DENIED.** Because Doe 1's Motion to Vacate Expedited Discovery Orders is predicated on the Linares Declaration being stricken from the record, the Motion to Vacate (document # 171) is **MOOT**.

Separately, the Court **GRANTS** the Defendants' Motion for Leave to File Nunc Pro Tunc (document # 186), although counsel is cautioned to comply with the Local Rules in the future. The Plaintiffs' Motion to Strike the Defendant's Reply (document # 184) is consequently **MOOT**.

Because the information sought by the Defendant Doe 1's subpoena is not currently relevant, the Plaintiffs' Motion to Quash (document # 185) is **GRANTED**, and the subpoena is **QUASHED** without prejudice to its timely renewal upon a showing of relevance.

Finally, for the foregoing reasons, Doe 16's Motion to Quash (document # 203) and Amended Motion to Quash (document # 218) are

DENIED. Nonetheless, if Plaintiffs' Rule 45 subpoena did not conform to this Court's previous Orders, they are directed to reserve in keeping with the existing provisions for issuance of subpoenas in this case. See Order on Motions to Quash (document # 167), Order on Expedited Disc. (case no. 08-cv-11080, document # 6).

SO ORDERED.

Date: January 9, 2009

/s/Nancy Gertner
NANCY GERTNER, U.S.D.C.