

1 **Lory R. Lybeck**  
Lybeck Murphy, LLP  
2 7525 SE 24<sup>th</sup> Street, Ste. 500  
Mercer Island, WA 98040-2334  
3 206-230-4255 /phone  
206-230-7791 /fax  
4 Lybeck – [lrl@lybeckmurphy.com](mailto:lrl@lybeckmurphy.com)  
**Lybeck – OSB #83276**  
5 Attorney for defendant

6  
7  
8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF OREGON AT PORTLAND

10 Atlantic Recording Corporation, a ) No. CV 05-933 AS  
Delaware corporation; Priority Records, )  
11 LLC, a California limited liability ) Defendant’s Response to Plaintiffs’  
company; Capitol Records, Inc., a ) Brief Regarding The Reasonable  
12 Delaware corporation; UMG Recordings, ) Attorneys’ Fees to Be Awarded to  
Inc., a Delaware corporation; and BMG ) Defendant and to Plaintiffs’ Objections  
13 Music, a New York general partnership, ) to Bill of Costs  
)  
14 Plaintiffs, )  
)  
15 v. )  
)  
16 Tanya Andersen, )  
)  
17 Defendant. )

18  
19 **I. INTRODUCTION**

20 Ms. Andersen was compelled for two years to defend baseless claims prosecuted against  
21 her by multinational corporations with limitless assets as part of a national sham litigation and  
22 intimidation campaign. She prevailed and she is entitled to recover all fees and costs necessarily  
23 incurred in her defense of the sham claims. Contrary to plaintiffs’ argument, this copyright case  
24 was anything but typical or “straightforward”. As the court has previously found, the proceedings  
25 were complicated, prolonged, and made more expensive by the plaintiffs’ unreasonable tactics  
26 throughout the case. The RIAA has hired a respected Portland attorney, David B. Markowitz,

1 and his assistant to review the Andersen fee petition. Perhaps because the litigation was pursued  
2 as a sham and the proceedings were complicated and prolonged, the fee reviewer’s methodology  
3 applied to the record in this matter is flawed and erroneous in numerous respects. The unfortunate  
4 result is the improper categorical exclusion of substantial attorney time that was clearly reasonable  
5 and necessarily incurred. The fee reviewers and plaintiffs have both entirely ignored the available  
6 evidence of appropriate hourly rates charged by copyright litigators in Oregon. This evidence  
7 includes the undisputed fact that plaintiffs’ own counsel charges hourly rates of \$375 in this very  
8 action. Even a brief informal survey would demonstrate that copyright attorneys in Portland  
9 regularly charge \$400 per hour for similar work. Review of published economic surveys of  
10 lawyers litigating copyright disputes further establishes this fact. The rates suggested by  
11 plaintiffs’ fee reviewers based on general litigation practice completely fail to account for the  
12 prevailing rates in this specialized area. Finally, all of the items in the Bill of Costs are properly  
13 awardable under the Copyright Act, and plaintiffs’ argument to the contrary ignores well-  
14 established Ninth Circuit precedent.  
15  
16

## 17 II. ARGUMENT

### 18 A. Plaintiffs’ Tactics and National Scheme of Sham Litigation Made The Defense 19 Anything But “Straightforward”.

20 The goal of the Copyright Act is to encourage innovation and promote creative works for  
21 the public good. The Copyright Act was not enacted to promote sham litigation that abuses and  
22 clogs the federal courts all for purposes of public intimidation and control of a virtual monopoly.

23 In this case, Judge Donald Ashmanskas correctly found that “[w]hatever plaintiffs’ reasons  
24 for the manner in which they have prosecuted this case, it does not appear to be justified as a  
25 reasonable exploration of the boundaries of copyright law.” Docket #151, at 13. He concluded  
26 that “[c]opyright holders generally, and these plaintiffs specifically, should be deterred from  
prosecuting infringement claims as plaintiffs did in this case.” Ibid. Judge Ashmanskas also

1 specifically found that “[w]ithout applying the benefit of hindsight, these facts indicate that, in  
2 significant ways, plaintiffs did not conduct themselves in an objectively reasonable manner...”  
3 Id., at 8-9 (emphasis added). This case was not typical. It was not straightforward. It was  
4 expensive to defend because the RIAA intended it to be.

5 **B. Fees for Efforts Reasonable and Necessary to the Defense Were Improperly**  
6 **Excluded and Reduced.**

7 In an attempt to minimize fees awarded, the RIAA-retained fee reviewer has categorized the  
8 fees charged in an overly simplistic and misleading manner. A close review of the classification of the  
9 entries reveals that the RIAA-retained fee reviewer inconsistently, arbitrarily, and unfairly  
10 “disallowed” numerous clearly appropriate entries, resulting in his argued exclusion of many entries  
11 that are clearly legitimate even applying his own methodology. Examples of this improper  
12 classification are set forth below with respect to each of his contested categories. For this reason, and  
13 others set forth below, the RIAA’s position regarding fees should be substantially disregarded.  
14

15 **1. Time Entries Simply Mentioning Counterclaims Are Not Excludable.**

16 **a. Claims Not Separable**

17 Ms. Andersen may recover fees for time entries identifying and associated in part with her  
18 counterclaims. The 9<sup>th</sup> Circuit has permitted fee awards in copyright actions including costs and fees  
19 associated with litigating counterclaims if the affirmative claims and counterclaims “involve a  
20 common core of facts or are based on related legal theories.” Twentieth Century Fox Film Corp. v.  
21 Entertainment Distributing, 429 F.3d 869, (9<sup>th</sup> Cir. 2005) citing Webb v. Sloan, 330 F.3d 1158, 1168  
22 (9<sup>th</sup> Cir.2003). In Twentieth Century Fox, the fees awarded to the prevailing party included fees  
23 incurred in litigating counterclaims for unfair competition and slander that were related to the  
24 copyright claims. Often, related claims involve both a common core of facts and related legal  
25 theories. See, e.g., Sorenson v. Mink, 239 F.3d 1140, 1147 (9<sup>th</sup> Cir.2001). However, courts have not  
26

1 required commonality of both facts *and* law before concluding that different claims are related. See  
2 Webb, *supra*, 330 F.3d at 1168-1169 (“...the focus is on whether the claims arose out of a common  
3 course of conduct. In short, claims may be related if either the facts or the legal theories are the  
4 same.”)

5  
6 Ms. Andersen’s counterclaims are not “separable” nor are they “independent of Plaintiffs’  
7 copyright claim” (plaintiffs’ brief, Docket #176, at 9). In fact, this argument now is exactly the  
8 opposite of the arguments that the RIAA made to this court throughout this litigation. See, e.g.,  
9 Docket #145, at 6-7 (“All such claims relate to Defendant’s assertion of rights with regard to  
10 Plaintiffs’ investigation and pursuit of their claim for copyright infringement...a review of the facts  
11 alleged in support of Defendant’s counterclaims in this action...reveals that all of these claims arise  
12 out of the same transactional nucleus of facts.”) See also Docket #21, #94, #112. The RIAA  
13 repeatedly argued that the counterclaims were integral and inseparable from its claims and Ms.  
14 Andersen’s direct defenses, and even that additional causes of action related to the same course of  
15 conduct were compulsory counterclaims that *had to be* brought in this action. The RIAA and its fee  
16 reviewer should be estopped from now asserting that the counterclaims were “wholly unrelated to  
17 plaintiffs’ claims”. See Docket #178, Markowitz Decl., ¶16.

18  
19  
20 **b. Claims Involve Common Conduct**

21 Much of the time expended in investigating, asserting, and litigating the direct defenses and  
22 counterclaims was inextricably linked to plaintiffs’ copyright claims. All such claims involved a  
23 common core of facts and arose from a common core of conduct. Ms. Andersen’s counsel were  
24 required to investigate the RIAA’s threat and sham litigation scheme in order to understand the  
25 evidence and legal theories supporting plaintiffs’ copyright claims. When the true nature of the  
26 claims and the motivation behind them disclosed that the RIAA’s investigation protocol was flawed,

1 additional research was performed to determine whether conduct in the course of that protocol was  
2 illegal and unethical and if the copyright claims were therefore subject to laches, estoppel, unclean  
3 hands or misuse of copyright defenses. Naturally, this analysis led to a consideration of whether this  
4 same conduct was actionable under various legal theories. A similarly overlapping legal analysis was  
5 performed with respect to the subsequent activities of plaintiffs' agents, including Settlement Support  
6 Center and their legal counsel.  
7

8 As such, the RIAA fee reviewer has improperly excluded significant time Ms. Andersen's  
9 counsel spent in researching the applicability of various legal theories to plaintiffs' conduct. See, e.g.,  
10 Docket #178, Ex. 3, at 7, Docket #160, Ex. C, at 9 (4/20/07 entry for "legal research regarding privacy  
11 torts; abuse of process; Noerr-Pennington doctrine"; 4/22/07 entry for "legal research regarding fraud;  
12 negligent representation"; 4/23/07 entry for "legal research regarding Oregon RICO; intentional  
13 infliction of emotional distress; deceptive business practices".)  
14

15 **c. Claims Beneficial to Successful Defense and Outcome**

16 Not uncommonly, asserting and litigating viable counterclaims arising out of a common  
17 course of conduct will benefit not only those counterclaims, but is also essential to the successful  
18 defense of related affirmative claims, for purposes of discovery or otherwise. The existence of  
19 potentially viable counterclaims was substantially beneficial to discovering and understanding the  
20 RIAA's illegal tactics resulting in their ultimate abrupt dismissal of their action.  
21

22 The RIAA's fee reviewer has improperly excluded significant time Ms. Andersen's counsel  
23 spent in opposing the dismissal of her counterclaims. See, e.g., Docket #178, Ex. 3, at 7, Docket #160,  
24 Ex. C, at 9 (4/20/07 entry for "Preparation of legal arguments in opposition to plaintiffs' motion to  
25 dismiss counterclaims"; 4/22/07 entry for "Further preparation of legal arguments in opposition to  
26 plaintiffs' motion to dismiss counterclaims.")

1 **d. Error in Analysis**

2 Regardless of the court’s conclusion about the relatedness of the counterclaims to the defense  
3 of the copyright claims, the RIAA’s fee reviewer has not even adhered to his own stated rationale, and  
4 has in numerous instances disallowed an entire time entry apparently just because the word  
5 “counterclaims” appears somewhere in the entry. See, e.g., Docket #178, Ex. 3, at 1, Docket #160, Ex.  
6 C, at 2 (9/22/05 entry for “Revise defenses and counterclaims; legal research; continue drafting  
7 pleadings”; 9/30/2005 entry for “Telephone call to Andersen re verifying facts in pleadings; revise  
8 counterclaims.”); Docket #178, Ex. 3, at 5, Docket #160, Ex. C, at 8 (3/26/2007 entry for “Work on  
9 Second Amended Answer, Affirmative Defenses and Counterclaims for filing”); Docket #178, Ex. 3,  
10 at 10, Docket #160, Ex. C, at 14 (5/31/2007 entry for “Analysis of proposed stipulation, maintenance  
11 of counterclaims, and fee shifting.”)  
12  
13

14 For the reasons discussed above, all of the attorney time entries merely mentioning Ms.  
15 Andersen’s counterclaims are not properly excludable.

16 **2. RIAA Fee Reviewer’s Categorization of “Vague” Entries**  
17 **Inappropriate.**

18 The fee reviewer requested that his assistant exclude time entries categorized as “vague”.  
19 Some of the most egregious abuses of the fee reviewer’s categorization system are included in this  
20 assistant’s work in this regard. These entries are not vague. See, e.g., Docket #178, Ex. 3, at 1,  
21 Docket #160, Ex. C, at 1 (9/13/05 entry for “Telephone call from opposing counsel re extension to file  
22 response; draft stipulation; legal research re motion to dismiss; draft motion for extension to respond  
23 to complaint”); Docket #178, Ex. 3, at 2, Docket #160, Ex. C, at 3 (10/31/2005 entry for “File  
24 objection; telephone conference with Miller”); Docket #178, Ex. 3, at 5, Docket #160, Ex. C, at 7  
25 (3/20/007 entry for “Work on response to motion to dismiss; telephone call from Patton; telephone  
26 call to court regarding sending motions; analyze MediaSentry exclusion argument in Lindor”);

1 Docket #178, Ex. 3, at 6, Docket #160, Ex. C, at 8 (3/28/2007 entry for “Various emails with  
2 opposing counsel; prepare for deposition of client; various telephone calls with client regarding  
3 deposition.”) Especially because each individual entry must be read in context with adjacent entries,  
4 no reasonable court would reasonably find them so vague. All of the attorney time improperly  
5 excluded by the fee reviewer or his assistant as “vague” is properly awardable.  
6

7 **3. Reasonable and Necessary Time Improperly Excluded as “Duplicative”.**

8 The RIAA fee reviewer’s categorization of various entries as “duplicate entries” is erroneous.

9 **a. RIAA Used Multiple Lawyers**

10 Defendants like Ms. Andersen being sued by the RIAA should be allowed to defend  
11 themselves as aggressively as the RIAA prosecutes claims against them. The fee reviewer argues that  
12 it was duplicative to have two attorneys present at a December 12, 2006 hearing on various motions.  
13 See Docket #178, Ex. 3, at 1, Docket #160, Ex. C, at 4 (12/12/2006 entry of James P. Murphy for  
14 “Travel to/from Oregon U.S. District Court and appear at hearing on motion of plaintiffs to compel  
15 deposition and motion of defendants for sanctions; return travel.”) At the same hearing, plaintiffs had  
16 local counsel present, and Denver counsel also appeared by telephone. At a recent hearing, the  
17 RIAA had six lawyers present, some of whom had traveled from Denver and Maryland. Also, the  
18 RIAA plaintiffs had two lawyers present at Ms. Andersen’s deposition. However, they now assert  
19 that it was duplicative for Ms. Andersen to have two lawyers participate in subsequent depositions.  
20 See Docket #178, Ex. 3, at 8-9, Docket #160, Ex. C, at 12-13 (15/15/2007 entries of Benjamin R.  
21 Justus for “Attend deposition of A. Bruns”, “Attend deposition of Kylee Andersen”, and  
22 “Participation in deposition of L. Anderson.”)  
23  
24  
25  
26

1                                   **b. RIAA Fee Reviewer Allows No Defense Counsel**

2                   Surprisingly, the fee reviewer felt that Ms. Andersen should not have had any counsel attend  
3 these depositions, as the time for her lead counsel was also excluded by the reviewer. See Docket  
4 #178, Ex. 3, at 8-9, Docket #160, Ex. C, at 12-13 (15/15/2007 entries of Lory R. Lybeck for  
5 “Deposition of Kylee Andersen”, and “Deposition of Lindsay Andersen”, and “Deposition of Bruns.”)  
6

7                                   **c. Error In Analysis**

8                   The RIAA fee reviewer also erred in categorizing as duplicative entries for activities  
9 performed by only one attorney. See, e.g., Docket #178, Ex. 3, at 9, Docket #160, Ex. C, at 12  
10 (15/15/2007 entry of Benjamin R. Justus for “Review exhibits and relevant discovery in preparation  
11 for depositions of L. Andersen, Kylee Andersen, and Ania Bruns.”) For these reasons, all of the  
12 attorney time improperly excluded by the fee reviewer as “duplicative” is properly awardable.  
13

14                                   **4. Reasonable and Necessary Travel Time Improperly Excluded.**

15                   Contrary to the RIAA’s erroneous assertion, Ms. Andersen tried her best to obtain local  
16 counsel. Except for counsel who suggested her only course was to allow a default, then seek  
17 bankruptcy, no lawyer was available to assist her. See Declaration of Tanya Andersen in Support of  
18 Motion to Fix Amount of Attorney’s Fees. This fact and the fact that cross country travel by the  
19 RIAA’s lawyers was common demonstrates the error of the RIAA fee reviewer’s analysis and opinion  
20 on this issue.  
21  
22

23                                   **5. Reasonable and Necessary Time Improperly Reduced as Related to  
24 Attorney’s Fees and Costs.**

25                   The RIAA fee reviewer also erroneously suggests that the total amount of awardable time  
26 spent in order to recover fees should be reduced by 48.45%. This is based on his erroneous  
suggestion that all awardable time should be reduced by the exact same percentage. For the reasons

1 set forth above this arbitrary suggestion is not supported by the record.

2           Additionally, plaintiffs have filed lengthy briefs and supporting exhibits in support of serial  
3 objections on the issue of attorney’s fees and costs. These include their briefs in opposition to the  
4 original motion for fees (Docket #146), and their objection to Judge Ashmanskas’ Findings and  
5 Recommendation on the issue (Docket #151). Each of these objections were denied in their entirety.  
6  
7 The present response on the issue of the amount of fees, including a brief, the lengthy declaration of  
8 the RIAA’s fee reviewer with various exhibits, and a separate objection to the bill of costs (Docket  
9 #176, #177, #178) requires evaluation and this reply.

10           Each of these filings required time for review, analysis and a reasonable response as was  
11 necessary to advance and protect Ms. Andersen’s interests. In view of plaintiffs’ voluminous filings,  
12 it is disingenuous to suggest any reduction of these requested fees. The RIAA plaintiffs cite no legal  
13 support or logical basis for a “percentage-based” reduction. All of the time spent pursuing attorney’s  
14 fees and costs was time reasonably and necessarily incurred, and is properly awardable.  
15

16  
17           **C. Paid Fee Reviewer Opinion Is Not Required To Support Ms. Andersen’s Fee  
18           Petition.**

19           Plaintiffs’ opposition to the amount of fees requested by Ms. Andersen mistakenly argues that  
20 a party must retain a third-party expert in order to support a fee petition. See Plaintiffs’ Brief, Docket  
21 #176, at 2, 7. Obviously, this is untrue, occurs in relatively few fee petition cases, and plaintiffs have  
22 cited no law requiring expert testimony. If such a requirement existed, the vast majority of fee  
23 petitions, which are typically supported by a declaration of counsel and appropriately detailed billing  
24 records, would be rejected from the outset.

25           Plaintiffs’ baseless suggestion that outside opinion is required is especially inappropriate here,  
26 where Ms. Andersen has no resources, is on disability, and could not personally afford to respond to

1 false, vexatious underlying claims brought by the RIAA. With effectively limitless financial  
2 resources, it was not difficult for plaintiffs to retain a paid fee reviewer to scrutinize Ms. Andersen’s  
3 fee petition. Their argument in this regard epitomizes the arrogance of the RIAA and its complete  
4 disregard for the individuals harmed by its sham litigation.

5  
6 Requiring a hired “fee reviewer” is also contrary to the basic purpose of the fee-shifting  
7 provision of the Copyright Act, 17 U.S.C. §505. This provision serves to encourage parties to litigate  
8 meritorious defenses. In Assessment Technologies of Wi, LLC v. Wire Data, Inc., 361 F.3d 434,  
9 437 (7<sup>th</sup> Cir. 2004), the court held that “[w]hen the prevailing party is the defendant...the  
10 presumption in favor of awarding fees is very strong.” Judge Posner, writing for the majority,  
11 expressed his concern that “without the prospect of such an award, the party might be forced into  
12 a nuisance settlement or deterred altogether from enforcing his rights”. Id.

13  
14 Imposing a requirement of retaining a third-party fee reviewer at significant cost in order  
15 to recover reasonable and necessary attorney’s fees would only further deter economically  
16 disadvantaged defendants like Ms. Andersen from asserting bona fide defenses to copyright  
17 claims. Economic disparity is a basic and obvious tenet of the well-funded RIAA plaintiffs’ sham  
18 litigation scheme.

19  
20 **D. RIAA Fee Reviewer Ignores Appropriate Copyright Litigation Rates.**

21 **1. RIAA Lawyers Charge \$375 Per Hour.**

22 The RIAA’s fee reviewer neither responds to nor disputes the fact that the RIAA’s lawyers  
23 charge at a rate of \$375 per hour in actions such as this one. The fee reviewer ignores the fact that  
24 other RIAA lawyers on these cases charge \$345 per hour and that paralegals are charged at \$140 to  
25 \$150 per hour. No explanation is given why these lawyers’ rates can be reasonable but non-RIAA  
26 lawyers should be required to charge only 75% of their billing rate. See Docket #160, Exhibit D.



1 awardable to Ms. Andersen.

2 **III. CONCLUSION**

3 For the reasons discussed above, and those stated in the original motion to fix fees and  
4 supporting documents, the attorney time for which an award is requested were reasonably and  
5 necessarily incurred and should be awarded to Ms. Andersen in full at the hourly rates requested.  
6 The expenses set forth in the Bill of Costs should also taxed against plaintiffs and awarded to Ms.  
7 Andersen.  
8 Andersen.

9  
10 Respectfully submitted this 11<sup>th</sup> day of March, 2008.

11 Lybeck Murphy, LLP

12  
13 By:  /s/ Lory R. Lybeck  
14 Lory R. Lybeck (OSB #83276)  
15 Benjamin R. Justus, admitted *pro hac vice*  
16 Attorneys for defendant  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1 **IN THE UNITED STATES DISTRICT COURT**  
2 **FOR THE DISTRICT OF OREGON**

3 **AFFIDAVIT OF SERVICE**

4 State of Washington )  
5 ) ss.  
6 County of King )

7 I hereby certify and declare that on the 11th day of March, 2008, I electronically filed the foregoing  
8 Defendant's Response to Plaintiffs' Brief Regarding The Reasonable Attorneys' Fees to Be Awarded to Defendant  
9 and to Plaintiffs' Objections to Bill of Costs with the Clerk of the Court using the CM/ECF system, which will send  
10 notification of such filing to the following:

11 **Atty/Plaintiffs:**

12 Kenneth R. Davis, II  
13 [davisk@lanepowell.com](mailto:davisk@lanepowell.com)  
14 William T. Patton  
15 [pattonw@lanepowell.com](mailto:pattonw@lanepowell.com)  
16 Lane Powell PC  
17 601 SW Second Avenue, Suite 2100  
18 Portland, OR 97204  
19 503-778-2100/phone  
20 503-778-2200/fax

21 Tim Reynolds, *Admitted Pro Hac Vice*  
22 [timothy.reynolds@hro.com](mailto:timothy.reynolds@hro.com)  
23 James Ruh, *Admitted Pro Hac Vice*  
24 [james.ruh@hro.com](mailto:james.ruh@hro.com)  
25 Amy Bauer, *Admitted Pro Hac Vice*  
26 [amy.bauer@hro.com](mailto:amy.bauer@hro.com)  
HOLME, ROBERTS & OWEN LLP  
1700 Lincoln Street, Ste. 4100  
Denver, CO 80203  
Telephone: (303) 861-7000  
Facsimile: (303) 866-0200

27 All parties are registered as CM/ECF participants for electronic notification.

28 DATED at Mercer Island, Washington, this 11th day of March, 2008.

29 By:           /s/ Lory Lybeck  
30 Lory R. Lybeck (OSB #83276)  
31 Attorneys for defendant  
32 Lybeck Murphy, LLP  
33 7525 SE 24<sup>th</sup> Street, Ste. 500  
34 Mercer Island, WA 98040  
35 (206) 230-4255 /phone  
36 (206) 230-7791 /fax  
[lrl@lybeckmurphy.com](mailto:lrl@lybeckmurphy.com)