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November 17, 2006

***Electronically Filed and
By Fax (718) 613-2518***

Hon. David G. Trager
Senior United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

**Re: *Elektra Entertainment Group, Inc., et al. v. Rae J. Schwartz,*
1:06-cv-03533-DGT-RML**

Dear Judge Trager:

We write on behalf of Plaintiffs in the above matter to request a pre-motion conference regarding a motion under Rule 12(b)(6) to dismiss Defendant's counterclaim. Plaintiffs brought this case against Defendant under the Copyright Act, 17 U.S.C. § 101 *et seq.* (Compl. ¶14.) Defendant filed an Answer and Counterclaim purporting to assert a single counterclaim for attorney fees under Section 505 of the Copyright Act. (Countercl. ¶ 31.) Defendant's counterclaim should be dismissed because no such claim for relief exists.

Rule 12 provides for the dismissal of any claim that "fail[s] to state a claim upon which relief can be granted." F.R.C.P. 12(b)(6); *see also Padavan v. United States*, 82 F.3d 23, 26-30 (2d Cir. 1996) (holding that a complaint seeking reimbursement from the federal government for costs associated with the education, health, and welfare of legal and illegal aliens failed to state a claim for relief under the law). Here, Defendant seeks to assert a stand-alone counterclaim for attorney fees under Section 505 of the Copyright Act. Section 505 provides:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party . . . Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.



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17 U.S.C. § 505 (emphasis added). It is obvious from this language that Section 505 is a cost shifting provision, not a separate claim for relief. The Section states unequivocally that it applies “[i]n any civil action under [the Copyright Act], and allows courts to award attorney fees “to the prevailing party *as part of the costs*” of that action. See Fogerty v. Fantasy, Inc., 510 U.S. 517, 519 (1994) (“The Copyright Act of 1976, 17 U.S.C. § 505, provides in relevant part that *in any copyright infringement action* ‘the court may . . . award a reasonable attorney’s fee to the prevailing party *as part of the costs.*’”) (emphasis added).

Section 505, therefore, establishes no independent claim for relief. Accordingly, Defendant’s purported counterclaim brought under Section 505 should be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard J. Guida", written in a cursive style.

Richard J. Guida

RJG:kc

cc: Ray Beckerman, Esq. (via facsimile 212-763-6810)