

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ATLANTIC RECORDING CORP., <i>et al.</i> ,	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO. 2:06-cv-00482
vs.	§	
	§	
MICHAEL BOGGS,	§	JUDGE JANIS GRAHAM JACK
	§	
Defendant.	§	

PLAINTIFFS’ MOTION TO DISMISS COUNTERCLAIMS

Plaintiffs respectfully submit this motion under Rule 12(b)(6) to dismiss Defendant’s Counterclaims, and state as follows:

INTRODUCTION

Plaintiffs bring this action seeking redress for the infringement of their copyrighted sound recordings pursuant to the Copyright Act, 17 U.S.C. § 101 *et seq.* On March 10, 2007, Defendant filed his Answer and Counterclaims. Defendant seeks the following declarations: (1) a declaration that Plaintiffs’ settlement with the creators and distributors of the KaZaA online media distribution system (“KaZaA”) bars Plaintiffs’ claims against Defendant for copyright infringement; (2) a declaration that the statutory damages established by Congress under the Copyright Act are unconstitutional; and (3) a declaration that Plaintiffs’ copyrights and copyright registrations are unenforceable due to Plaintiffs’ purported misuse of their copyrights. As explained below, Defendant’s counterclaims are duplicative and redundant of Defendant’s defenses in this case. They also fail to state claims upon which relief may be granted. As a result, these counterclaims should be dismissed under Rule 12(b)(6).

First, Defendant’s counterclaims should be dismissed on the grounds that the counterclaims are redundant and duplicative of Plaintiffs’ claims against Defendant.

Defendant's counterclaims seek declaratory judgments on issues identical to Defendant's affirmative defenses to Plaintiffs' copyright claims. Courts routinely dismiss such "mirror image" counterclaims that merely restate issues before the court as part of Plaintiffs' affirmative case. Furthermore, the Declaratory Judgment Act was never intended to allow parties to bring redundant counterclaims as Defendant has asserted in this case. Allowing such duplicative claims would cause a waste of judicial resources.

Second, Defendant's counterclaims should be dismissed because each counterclaim fails as a matter of law. Defendant's first counterclaim seeking a declaration that Plaintiffs' settlement with KaZaA bars Plaintiffs' claims fails because Defendant has not satisfied the basic legal requirements for application of res judicata. Defendant cannot escape liability for his own actions based on a settlement agreement that has nothing to do with Plaintiffs' claims against Defendant. Defendant's second counterclaim seeking a declaration that statutory damages established by Congress are unconstitutional has been rejected by numerous courts and fails because the Congressional intent behind allowing a plaintiff to elect statutory damages is to achieve a variety of goals beyond compensating copyright holders for actual harm. Defendant's third counterclaim seeking a declaration that Plaintiffs' copyrights and copyright registrations are unenforceable due to Plaintiffs' purported misuse of copyrights fails because Defendant has failed to plead any facts to support an antitrust claim against Plaintiffs. Furthermore, the Judicial Proceedings Privilege and the First Amendment protect Plaintiffs' actions in bringing claims for copyright infringement against Defendant.

For all of these reasons, Defendant's counterclaims should be dismissed.

BACKGROUND

Since the early 1990s, Plaintiffs and other copyright holders have faced a massive and exponentially expanding problem of digital piracy over the internet. Plaintiffs are recording

companies who own or control exclusive rights to copyrights in sound recordings. Every month, copyright infringers unlawfully disseminate billions of perfect digital copies of Plaintiffs' copyrighted sound recordings over peer-to-peer ("P2P") networks. See Levi Grossman, *It's All Free*, Time, May 5, 2003. Indeed, the Supreme Court recently characterized the magnitude of online piracy as "infringement on a gigantic scale." See *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster Ltd., et al.*, 125 S. Ct. 2764, 2782 (2005).

Peer-to-peer networks involve the use of online media distribution systems (also known as file-sharing programs) that allow users to transform their computers into interactive Internet sites for swapping copyrighted sound recordings with other users. The most infamous P2P network was the Napster system, which was enjoined by a federal court. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Other P2P networks, however, have arisen in Napster's wake, and the Supreme Court has held that these P2P networks are liable for the infringement of Plaintiffs' copyrighted works. See, e.g., *Grokster*, 125 S. Ct. at 2764.

As a direct result of piracy over the P2P networks, Plaintiffs have sustained and continue to sustain devastating financial losses. Indeed, the Department of Justice states that online media distribution systems are "one of the greatest emerging threats to intellectual property ownership," estimated that "millions of users access P2P networks," and determined that "the vast majority" of those users "illegally distribute copyrighted materials through the networks." Report of the Department of Justice's Task Force on Intellectual Property, available at <http://www.cybercrime.gov/IPTaskForceReport.pdf> at 39 (October 2004). As the Seventh Circuit recently held, "[m]usic downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying the originals." *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005). In addition, downloads

from P2P networks compete with licensed broadcasts and undermine the income available to authors. *Id.* at 891. Plaintiffs' losses from on-line music piracy have resulted in layoffs of thousands of employees in the music industry. Unfortunately, infringing users of peer-to-peer systems are often "disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement," rendering this serious problem even more difficult for copyright owners to combat. *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

P2P users who disseminate (upload) and copy (download) copyrighted material violate the Copyright Act. *See Grokster*, 125 S. Ct. at 2770-72 (noting that users of peer-to-peer networks share copyrighted music and video files on an enormous scale and as such even the providers of those networks "concede infringement" by the individual users); *Aimster*, 334 F.3d at 643. A copy downloaded, played, and retained on one's hard drive for future use is a direct substitute for a purchased copy – and without the benefit of the license fee paid to the broadcaster. *See Gonzalez*, 430 F.3d at 891.

On November 1, 2005, investigators detected an individual using the KaZaA peer-to-peer file sharing program to engage in online copyright infringement. This individual had 765 music files on his computer and was distributing them to millions of persons who use peer-to-peer networks. The investigators, a third party known as MediaSentry, determined that the individual used Internet Protocol ("IP") address 24.243.117.211 to connect to the internet.

After filing a "Doe" lawsuit against the individual using the IP address, Plaintiffs subpoenaed his internet service provider to determine his identity. The internet service provider, Time Warner Cable, identified Defendant Michael Boggs as the individual in question. After attempting to settle or otherwise resolve their claims informally before filing a lawsuit, on

September 31, 2006, Plaintiffs filed their Complaint against Defendant for copyright infringement. Defendant was served with the Complaint on December 2, 2006.

On March 10, 2007, Defendant filed an Answer and Counterclaims against Plaintiffs. As previously explained, Defendant asserts counterclaims seeking declarations that the Plaintiffs' settlement with KaZaA precludes Plaintiffs from recovering any damages against Defendant for copyright infringement, that the statutory damages established by Congress under the Copyright Act are unconstitutional, and that Plaintiffs' copyrights and copyright registrations are unenforceable due to Plaintiffs' purported misuse of their copyrights.

ARGUMENT

A. Legal Standards for a Motion to Dismiss.

A motion to dismiss under Rule 12(b)(6) should be granted where it appears beyond doubt "that the [claimant] can prove no set of facts in support of [his] claim which would entitle [his] to relief." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). Although the district court must accept the well-pleaded factual allegations of the complaint as true, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

Courts in the Fifth Circuit routinely dismiss complaints for failure to state a claim upon which relief can be granted if an affirmative defense appears on the face of the pleading. *Kansa Reins. Co., v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994) (holding that "when a successful affirmative defense appears on the face of the pleadings, dismissal under Rule 12(b)(6) may be appropriate"); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1255 (5th Cir. 1986) (holding that "a complaint that shows relief to be barred by an

affirmative defense, such as the statute of limitations, may be dismissed for failure to state a cause of action”).

B. Defendant’s Counterclaims Should Be Dismissed Because They Are Redundant and Duplicative of Plaintiffs’ Claims Against Defendant.

(1) Defendant’s Counterclaims Merely Recite Identical Affirmative Defenses to Plaintiffs’ Complaint.

Courts routinely dismiss “mirror image” counterclaims where they merely restate issues already before the court as part of plaintiff’s affirmative case. *See, e.g., Aldens, Inc. v. Packel*, 524 F.2d 38, 53 (3d Cir. 1975) (dismissing Attorney General’s counterclaim for declaratory relief where counterclaim presented the “identical issues posited by the complaint”); *Veltman v. Norton Simon, Inc.*, 425 F. Supp. 774, 776 (S.D.N.Y. 1977) (dismissing counterclaim for declaratory relief as “redundant” and “moot”); *GNB Inc. v. Gould, Inc.*, 1190 WL 207429, *5 (N.D. Ill. 1990) (dismissing counterclaim as “duplicative” where it was “essentially a restatement” of plaintiff’s claim from defendant’s perspective).

Similarly, courts also will dismiss declaratory judgment counterclaims that are duplicative of defendant’s own allegations in its defenses. *See, e.g., Arista Records, LLC v. Tschirhart*, Case No. SA-05-CA-372 (W.D. Tex. May 24, 2006) (dismissing duplicative declaratory judgment counterclaim) (App. at Section A); *Virgin Records Am. v. Thompson*, Cause No. SA-06-CA-592 (W.D. Texas Sep. 21, 2006) (same) (App. at Section B); *Interscope Records v. Duty*, Case No. 05-CV-3744-PHX-FJM at 5 (D. Ariz. April 14, 2006) (same) (App. at Section C); *Federal Deposit Ins. Corp. v. Bancinsure, Inc.*, 770 F. Supp. 496, 500 (D. Minn. 1991) (dismissing counterclaim that “seeks the same result as defendant’s denials and affirmative defenses” as “redundant”); *Lee v. Park Lane Togs, Inc.*, 81 F. Supp. 853, 854 (S.D.N.Y. 1948) (dismissing defendant’s counterclaim seeking declaration of invalidity of trademark as unnecessary where allegations of counterclaim were already before court as a defense).

Here, Defendant seeks three declaratory judgment counterclaims that are duplicative of Defendant's answers and defenses in this case. Defendant's first counterclaim seeking declaratory judgment on the preclusive effect of Plaintiffs' settlement with KaZaA (Countercl., ¶¶ 14-16) merely restates Defendant's affirmative defense for Accord and Satisfaction (Answer, ¶ 47). Similarly, Defendant's second counterclaim challenging the constitutionality of the Copyright Act (Countercl., ¶¶ 17-23) directly asserts Defendant's affirmative defense regarding the constitutionality of asserted statutory damages under the Copyright Act (Answer, ¶¶ 35-40). Finally, Defendant's third counterclaim seeking declaratory judgment of the misuse of the Copyright Act (Countercl., ¶¶ 24-28) mirrors Defendant's affirmative defense regarding the misuse of the Copyright Act (Answer, ¶¶ 31-34). Defendant's counterclaims, therefore, are entirely redundant and duplicative of Defendant's defenses. A decision on Defendant's defenses will moot his counterclaims for declaratory judgment of the identical propositions. The Court, therefore, should dismiss Defendant's claims for declaratory relief because they are duplicative and unnecessary.

(2) Defendant's Attempted Use of the Declaratory Judgment Act Here Fails to Comport with the Act's Purpose.

The Court should decline to exercise jurisdiction over Defendant's declaratory judgment counterclaims in this case. The Declaratory Judgment Act does not automatically grant the right to have the claim heard. Rather, the district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites. *Quackenbush v. Allstate Ins. Co.*, 515 U.S. 277, 282 (1995). Here, the Court should decline to exercise jurisdiction over Defendant's counterclaim because doing so would serve no legitimate purpose and would only waste judicial resources. As demonstrated above, Defendant's counterclaims are entirely duplicative of

Defendant's defenses, which are already before the Court. It serves no purpose to address the same defenses a second time under the guise of declaratory judgment counterclaims. Doing so would only cause a waste of judicial resources.

Furthermore, the Declaratory Judgment Act was not designed to allow such duplicative counterclaims. The Act was initially intended to dispel difficulties involved with respect to injunctive relief against unconstitutional state statutes and now serves to allow courts to declare the rights of adverse parties before they accrue avoidable damages. *Steffel v. Thompson*, 415 U.S. 452, 466 (1974); *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 933 F. Supp. 246, 250 (S.D.N.Y. 1996). The Act was not intended to allow parties to bring redundant counterclaims like the one offered by Defendant here, and allowing such claims would cause a waste of judicial resources.

C. Defendant's Counterclaims Should Be Dismissed Because Each Counterclaim Fails As a Matter of Law.

(1) Plaintiffs' Settlement With KaZaA Does Not Act as a Bar to Plaintiffs' Claims Against This Defendant.

(a) Defendant Has Failed to Satisfy the Required Elements for Application of Res Judicata.

Defendant's first counterclaim seeks a declaratory judgment that Plaintiffs' settlement with KaZaA precludes Plaintiffs' claims against Defendant for copyright infringement. By asserting that the settlement has preclusive effect, Defendant relies upon the theory of res judicata, though he never specifically uses this legal theory. Res judicata treats a judgment between parties as "the full measure of relief to be accorded between the same parties on the same 'claim or 'cause of action.'" *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 436 (5th Cir. 2000). Application of res judicata requires the existence of four elements: (1) the parties to the respective actions are identical; (2) the prior judgment was rendered by a court of

competent jurisdiction; (3) the prior action resulted in a final judgment on the merits; and (4) the same cause of action is involved in both cases. *Liberto v. D.F. Stauffer Biscuit Co.*, 441 F.3d 318, 326 (5th Cir. 2006). The Fifth Circuit has held that when “reasonable doubt exists as to what was decided in the first action, the doctrine of res judicata should not be applied.” *Id.* A settlement agreement is entitled to full res judicata effect only where the agreement is “approved and embodied in a final judgment of the court.” *Id.*; see also *Hughes v. Santa Fe Int’l Corp.*, 847 F.2d 239, 241 (5th Cir. 1988) (holding that a consent judgment ordinarily does not give rise to preclusive effect unless the parties manifest such an intention).

Defendant asserts that the copyright infringement at issue in this case has already been resolved through a separate settlement between Plaintiffs and KaZaA, specifically in *MGM v. Grokster*, Civil Action Number 2:01-cv-08541 in the United States District Court for the Central District of California, Western Division – Los Angeles. (Countercl., ¶¶ 15, 16.) Defendant, however, fails to satisfy the requisite elements of res judicata when arguing that the Plaintiffs’ settlement with KaZaA precludes Plaintiffs’ recovery of damages from Defendant. First, the threshold element for res judicata is entirely absent in this matter. The Defendant in this case was never party to the litigation between Plaintiffs and KaZaA. As a result, the parties to the respective actions are not identical. Second, the settlement agreement itself between Plaintiffs and KaZaA was never incorporated into the final judgment of the court. Indeed, the Stipulation and Consent Judgment and Permanent Injunction (“Judgment”) entered into between the Plaintiffs and KaZaA states that “[t]he settlement agreement between the parties resolving the underlying action shall not be merged into or extinguished by the entry of this Consent Judgment and Permanent Injunction.” See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, Case No. 01-08541 SVW (FMOx) at ¶ 4 (Jul. 27, 2006). (App. at Section D.) The parties specifically

manifested an intent not to have the terms of the settlement incorporated into the consent judgment. Thus, the terms of the settlement agreement identified by Defendant in his counterclaim (Countercl., ¶ 15) cannot constitute a final judgment between Plaintiffs and KaZaA. For these reasons, res judicata cannot apply to Plaintiffs' claims against Defendant in this case.

(b) Defendant Fails to Satisfy the Legal Threshold for Asserting That Plaintiffs' Settlement with KaZaA Precludes Plaintiffs' Claims Against Defendant.

As a matter of law, Defendant cannot prove that Plaintiffs' settlement with KaZaA in any way precludes Plaintiffs' copyright infringement claim against Defendant. In the Fifth Circuit, courts ascertain the effect of a settlement agreement by considering the parties' intent behind forming the agreement. *See Transamerican Natural Gas Corp. v. Zapata Partnership*, 12 F.3d 480, 485 (5th Cir. 1994); *see also Lx Cattle Co. v. United States*, 1979 U.S. Dist. LEXIS 13966, at *16 (N.D. Texas 1979). Courts will look to the settlement agreement "as a whole to determine the intent of the parties." *Wilhite v. Schendle*, 92 F.3d 372, 375 (5th Cir. 1996).

Here, Defendant asserts that the settlement agreement entered into between Plaintiffs and KaZaA precludes Plaintiffs' claims against Defendant for copyright infringement. This settlement agreement, however, never contemplated Plaintiffs' claim against Defendant nor was it intended to encompass this claim. Not only was Defendant never a party to the lawsuit between Plaintiffs and KaZaA, but Plaintiffs' claim against Defendant seeking statutory damages for copyright infringement was never at issue in that case. For these reasons, Defendant's counterclaim seeking a declaratory judgment on the preclusive effect of this settlement must be dismissed as a matter of law.

(c) **Defendant's Liability for Copyright Infringement Exists Separate and Independent from Copyright Infringement Perpetrated by KaZaA.**

Defendant's liability for copyright infringement exists separately and independently from that of the creators of KaZaA. Indeed, the Defendant never argues in his counterclaim that Defendant's liability is joint and several with that of KaZaA. A copyright infringer can be held separately liable for distinct, though interconnected, instances of copyright infringement. *See Galiano v. Harrah's Operating Co.*, 2004 U.S. Dist. LEXIS 8265, at *34 (E.D. La. 2004) ("direct infringement, contributory infringement and vicarious liability are separate causes of action and each requires separate elements of proof"); *see also Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162-63 (2d Cir. 1971) (upholding a district court's finding of vicarious copyright infringement independent from contributory copyright infringement); *see also Axelrod v. Cherveney Architects, P.C. v. Winmar Homes*, 2007 U.S. Dist. LEXIS 15788, at *20, n. 7 (E.D.N.Y. 2007).

Here, Plaintiffs' claims for copyright infringement against Defendant exist independently from their prior claims against KaZaA. The copyright infringement at issue in this case stems from direct copyright infringement that occurred on November 1, 2005 from an IP Address registered directly to Defendant. In contrast, KaZaA was responsible for direct and contributory infringement stemming from the creation of an online media distribution system that facilitated illegal peer-to-peer file sharing among and between other direct infringers. Because the copyright infringement claims exist independent from one another, the KaZaA settlement in no way precludes Plaintiffs' claim against Defendant for copyright infringement.

(2) Defendant’s Counterclaim Seeking Declaratory Judgment of the Unconstitutionality of Statutory Damages Runs Contrary to Established Legal Precedent.

(a) The Copyright Act Demonstrates Congress’ Intent to Allow a Plaintiff to Elect Actual or Statutory Damages.

Under the Copyright Act, the plaintiff copyright owner in a civil case may recover “the copyright owner’s actual damages and any additional profit of the infringer” or “*instead . . .* statutory damages.” 17 U.S.C. § 504(a) (emphasis added). The copyright remedy of statutory damages is a central element of modern copyright law. “Because awards of statutory damages serve both compensatory and punitive purposes, a plaintiff may recover statutory damages whether or not there is adequate evidence of the actual damages suffered by plaintiffs or of the profits reaped by defendant, in order to sanction and vindicate the statutory policy of discouraging infringement.” *Los Angeles News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998). Indeed, “[s]tatutory damages have been made available to plaintiffs in infringement actions precisely because of the difficulties inherent in proving actual damages and profits, as well as to encourage vigorous enforcement of the copyright laws.” *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 462 (S.D.N.Y. 2000).

Congress has revised section 504(c) several times since 1976 to increase the ranges of damages. In the most recent amendments, Congress increased the minimum and maximum awards by 50%, with the maximum award for non-willful infringement increasing from \$20,000 to \$30,000. The Report of the Committee on the Judiciary explained that increases were needed to achieve “more stringent deterrent to copyright infringement and stronger enforcement of the laws.” H.R. Rep. No. 106-216, at 2 (1000). The House Report elaborated in a way that resonates strikingly with the facts of this case:

Many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their

conduct. Also, many infringers do not consider the current copyright penalties a real threat and continue infringing even after a copyright owner puts them on notice. . . . In light of this disturbing trend, it is manifest that Congress respond appropriately with updated penalties to dissuade such conduct. H.R. 1761 increases copyright penalties to have a significant deterrent effect on copyright infringement.

In sum, the statutory damages provisions in the Copyright Act reflect a carefully considered and targeted legislative judgment intended not only to compensate the copyright owner, but also to punish the infringer and deter other potential infringers. The wisdom of Congress' regime and the amounts set forth therein is not within the province of this Court (or any other) to second guess. *See Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (“[T]he Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the [Copyright] Clause . . . [and] [t]he wisdom of Congress’ action . . . is not within [the Supreme Court’s] province to second guess.”).

As the Court explained in *ABC, Inc. v. PrimeTime 24, J.V.*, 17 F. Supp. 2d 478, 489 (D.N.C. 1998):

The Constitution commits to Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8. In the exercise of that authority, Congress passed the Copyright Act of which SHVA [Satellite Home Viewer Act] is a part. If Congress can create the right, it follows that it can also create the remedy.

Congress was given the power to create a statutory scheme of copyright protection, including appropriate damages. Congress has done so, and it is not within the power of the courts to second guess.

(b) Defendant’s Argument That Statutory Damages Must Be Proportionate To Actual Damages Has Been Considered, And Rejected, By Numerous Courts.

In his counterclaim, Defendant claims that the statutory damages sought by Plaintiffs are unconstitutionally excessive and disproportionate. (Countercl., ¶ 22.) In *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186 (9th Cir. 2001), the Court affirmed the district court’s decision holding that a defendant “cannot argue that the award was overly punitive, or violated due process, since the award amount fell squarely within the statutory range provided by the statutory damages provision of section 504(c).” *Columbia Pictures Television, Inc. v. Feltner*, Case No. CV 91-6847 ER (CTx) (C.D. Cal. June 10, 1999). Similarly, in *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455 (D. Md. 2004), the defendant argued that an award of copyright statutory damages should be limited to four times actual damages and subject to due process review. The court rejected the defendant’s “four times actual damages formula” and held that “[s]tatutory damages are ‘not fixed or readily calculable from a fixed formula,’” and that “there has never been a requirement that statutory damages be strictly related to actual injury.” *Id.* at 458.

In *SESAC, Inc. v. WPNY*, 327 F. Supp. 2d 531 (W.D. Pa. 2003), the district court sustained a \$1.26 million verdict where actual damages (the cost of a license) were \$6,000. Specifically rejecting the defendant’s argument, also made by Defendant here, that statutory damages should be proportionate to damages sustained by Plaintiffs, the court concluded its opinion with an observation that applies equally here:

[I]t is Congress’ prerogative to pass laws intended to protect copyrights and to prescribe the range of punishment Congress believes is appropriate to accomplish the statutory goal. The Court should not interfere lightly with a carefully crafted statutory scheme by substituting its judgment for that of the legislature. In essence, that is what the defendants ask us to do.

Id. at 532.

Finally, the purpose behind statutory damages is to achieve a variety of goals, extending beyond merely compensating copyright holders for actual harm that is caused. Other goals include deterring the defendant and other would be infringers from infringing in the future, providing an incentive for a copyright owner to protect his/her rights, and punishing for improper conduct. *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952); *On Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001); *N.A.S. Import, Corp. v. Chenson Enterprises, Inc.*, 968 F.2d 250, 252 (2d Cir. 1992); *National Football League v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458, 478 n. 17 (S.D.N.Y. 2001); *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 78 (S.D.N.Y. 1982).

Here, Defendant attempts to support its counterclaim by alleging unverified retail values for sound recordings at issue in this case. (Countercl., ¶¶ 20, 21.) Yet legal precedent indicates it is not possible to break down a statutory damages award to determine which portion goes towards actual damages, as opposed to deterrence of copyright infringement or incentives for copyright protection. Plaintiffs are aware of no case in which a court has reduced or set aside as excessive an award that fell within the range permitted by the Copyright Act. For all of these reasons, Defendant's counterclaim seeking declaratory judgment that statutory damages under Section 504(c) of the Copyright is insufficient as a matter of law and the counterclaim should be dismissed.

(3) Defendant's Counterclaim Seeking a Declaration of the Unenforceability of Plaintiffs' Copyrights Must Be Dismissed As a Matter of Law.

(a) Defendant's Claim for Misuse of Copyright Fails to Adequately Plead Facts to Support Allegations that Plaintiffs Violated Antitrust Laws.

Defendant's counterclaim seeking a declaration of the unenforceability of Plaintiffs' copyrights attempts to invoke purported misuse of copyrights by Plaintiffs. The affirmative defense of misuse of copyright is recognized only in limited factual circumstances where the

copyright holder is alleged to be “restraining competition; imposing restrictions on the use of copyrighted [material] that extend beyond the permissible bounds of the exclusive rights granted by the copyright laws.” *Electronic Data Systems Corp. v. Computer Assoc. Int’l, Inc.*, 802 F. Supp. 1463, 1466 (N.D. Texas 1992). In other words, the copyright misuse affirmative defense is recognized only when the defendant presents antitrust allegations restraining competition. *See Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1200 (7th Cir. 1987). A prerequisite to any antitrust claim requires an allegation of “a relevant market in which the anticompetitive effects of the challenged activity can be assessed.” *Geddie v. Seaton*, 2006 U.S. Dist. LEXIS 55106, at *18 (N.D. Texas 2006); *see also Apani Southwest, Inc. v. Coca-Cola Enters.*, 300 F.3d 620, 628 (5th Cir. 2002) (dismissing antitrust claims because “[w]ithout a definition of the relevant market, there is no way to measure a company’s ability to act as a monopolist”). Furthermore, an antitrust claim “must include ‘allegations covering all the elements that comprise the theory for relief’ to survive a Rule 12(b)(6) challenge.” *Geddie*, 2006 U.S. Dist LEXIS 55106, at *17 (*citing United States v. Employing Plasterers Ass’n*, 347 U.S. 186, 189 (1954)).

Here, Defendant attempts to paint Plaintiffs’ efforts to protect their copyrights in a negative light and states in conclusory fashion that these efforts somehow justify this Court granting a declaration of Plaintiffs’ misuse of copyright. Defendant offers a series of allegations in an attempt to create an appearance of impropriety under the antitrust laws. (Countercl., ¶ 25.) Defendant asserts buzzwords ranging from “cartel” to “monopoly power” to “tying” in that effort (*id.*), yet he never actually pleads any facts to support the elements of any antitrust allegation. *See Geddie*, 2006 U.S. Dist LEXIS 55106, at *17. As a result, the Court should dismiss Defendant’s counterclaim as Defendant has failed to allege sufficient facts to support for any

declaration of misuse of copyright by Plaintiffs. *See Electronic Data Systems*, 802 F. Supp. at 1466.

Furthermore, Defendant asserts another series of unverified allegations ranging from conspiracy to extortion in an attempt to cast negative light on Plaintiffs' efforts to protect their copyrights from illegal file sharing. (Countercl., ¶ 26.) Defendant also contends Plaintiffs have engaged in litigation misconduct in this case by seeking a default judgment against Defendant. (Countercl., ¶ 27.) Defendant fails to point out, however, that Plaintiffs moved for default judgment against Defendant only after Defendant failed to file an answer as required under the Federal Rules of Civil Procedure. Defendant was deemed to have answered in this case on February 1, 2007 – a month after Plaintiffs moved for default judgment against Defendant. Plaintiffs were justified under the Federal Rules in moving for default judgment due to Defendant's own failure to file a timely answer in this case. Nonetheless, these assertions by Defendant do not constitute grounds on which courts have found misuse of copyright. *See Saturday Evening Post Co.*, 816 F.2d at 1200. No court has recognized a purported "misuse" defense based on the facts alleged here, and for good reason. To do so would effectively chill the ability of copyright holders to protect their copyrights.

Therefore, Defendant's allegations fail to state a defense of misuse of copyright as a matter of law, and this counterclaim should be dismissed.

(b) Defendant's Attempt to Prove Misuse of Copyright, Even If It Existed, Would Be Barred Under the Judicial Proceedings Privilege.

Not only does Defendant's counterclaim fail as a matter of law, but such a claim would also be barred by the judicial proceedings privilege. Defendant claims that Plaintiffs wrongfully brought an action against Defendant and accused him of acts that allegedly do not constitute

copyright infringement. (Countercl., ¶ 27.) Defendant further claims that Plaintiffs acted collusively in bringing and litigating cases similar to this one. (Countercl., ¶¶ 25, 26.)

Under Texas law, “any communication, oral or written, uttered or published in the due course of a judicial proceeding” is privileged and not actionable so long as it is pertinent to the controversy. *Intel Corp. v. Intel-Logistics, Inc.*, 2006 U.S. Dist. LEXIS 34361, at *3 (S.D. Texas 2006) (granting plaintiff’s motion to dismiss counterclaims where defendant’s claims arose from filing a complaint and issuing subpoenas to third parties in discovery). Courts have held that the “test of ‘pertinency’ is extremely broad and embraces ‘anything that may possibly or plausibly be relevant or pertinent with the barest rationality, divorced from any palpable or pragmatic degree of probability.’” *Singh v. HSBC Bank USA*, 200 F. Supp. 2d 338, 340 (S.D.N.Y. 2002).

Here, the acts underlying Defendant’s counterclaim are not only pertinent to the controversy but, in fact, form the controversy’s very core. As a result, these acts are privileged oral and written statements under the judicial proceedings privilege, and are thus immune from liability. For this reason as well, Defendant’s counterclaim seeking a declaration of the unenforceability of Plaintiffs’ copyrights stemming from a purported misuse of copyright should be dismissed.

(c) Plaintiffs Also Are Immune From Liability Under The First Amendment Right To Petition.

The First Amendment guarantees “the right of the people . . . to petition the Government for a redress of grievances.” *U.S. Const. Amend. I*. The Supreme Court has declared the right to petition to be “among the most precious rights of the liberties safeguarded by the Bill of Rights.” *United Mine Workers v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967). This right to petition has been extended to afford a party the right to access the courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

Consistent with this right, sometimes referred to as *Noerr-Pennington* immunity, numerous courts have shielded litigants from claims relating to the filing of litigation. *See, e.g. T.F.T.F. Capital Corp. v. Marcus Dairy, Inc.*, 312 F.3d 90, 93 (2d Cir. 2002); *Chemicor Drugs, Ltd. v. Ethvl Corp.*, 168 F.3d 119, 128-129 (3d Cir. 1999); *Video Int'l Prod., Inc. v. Warner-Amex Cable Comm.*, 858 F.2d 1075, 1082-83 (5th Cir. 1988); *Am. Mfg. Servs., Inc. v. Official Comm. of Unsecured Creditors of the Match Elecs. Group, Inc.*, 2006 U.S. Dist. LEXIS 22987, at *15 (N.D.N.Y. 2006) (“The Noerr-Pennington doctrine generally immunizes from liability a party’s commencement of a prior court proceeding.”); *DIRECTV, Inc. v. Personette*, 2003 U.S. Dist. LEXIS 19695, at *19-20 (W.D. Mich. 2003) (holding that actions such as sending out pre-suit letters and making threats of litigation are the type of litigation activities covered by the Noerr-Pennington doctrine, and thus dismissing counterclaims); *DirecTV, Inc. v. Milliman*, 2003 U.S. Dist. LEXIS 20938, at *23-24 (E.D. Mich. 2003) (stating that *Noerr-Pennington* immunity extends beyond antitrust claims to acts related to the right to seek redress for wrong from the Courts, and dismissing deceptive trade practice counterclaim under Noerr-Pennington).

Defendant here alleges that Plaintiffs have acted collusively in bringing and litigating cases similar to this one, have engaged in a conspiracy by bringing lawsuits in federal court, and have acted wrongfully by moving for default judgment when Defendant failed to answer Plaintiffs’ Complaint. (Countercl., ¶¶ 25, 26, 27.) Such allegations seek to prevent the commencement of this litigation and others like it and, therefore, are contrary to the First Amendment Right to Petition and established precedent holding the commencement of a lawsuit to be immune from such claims. For this additional reason, Defendant’s counterclaim seeking a declaration of the unenforceability of Plaintiffs’ copyrights should be dismissed.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court dismiss Defendant's counterclaims, and for such other relief as the Court deems just and necessary.

Respectfully submitted,

/s/Lisa L. Honey *by permission*

Stacy R. Obenhaus
Attorney-In-Charge
State Bar No. 15161570
Lisa L. Honey
State Bar No. 24048550
Gardere Wynne Sewell LLP
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201
Tel: 214-999-3000
Fax: 214-999-4667
sobenhaus@gardere.com
lhoney@gardere.com

OF COUNSEL:

Geoffrey H. Bracken
State Bar No. 02809750
Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
Tel: 713-276-5555

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS was forwarded in accordance with the Federal Rules of Civil Procedure on this 30th day of March, 2007, via First Class United States mail, postage prepaid, as follows:

Charles J. Rogers
CONLEY ROSE, P.C.
600 Travis Street, Suite 7100
Houston, Texas 77002-2912

/s/Lisa L. Honey
Lisa L. Honey