

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

SONY BMG MUSIC ENTERTAINMENT,	§	
<i>et al.</i>	§	
	§	CIVIL ACTION 1:06 CV 0567
Plaintiffs,	§	JURY
	§	
Vs.	§	
	§	
RHONDA CRAIN	§	
	§	
Defendant.	§	

**DEFENDANT’S MOTION FOR LEAVE TO
AMEND COUNTERCLAIM**

Comes now Rhonda Crain, defendant herein, and for her Motion for Leave to Amend Counterclaim, states as follows:

I.

Defendant requests leave to amend her Original Answer and Counterclaim to raise additional counterclaims, the basis of which are facts that have only become known to Defendant during the pendency of this case. Specifically, Defendant has become aware upon information and belief that Plaintiffs have illegally employed unlicensed investigators in the State of Texas and used the information thereby obtained to file this and other similar actions across the country, acting in concert with other parties as joint plaintiffs. Defendant only seeks to add counterclaims which address these facts, and does not seek to amend her Answer or Affirmative Defenses. The original Counterclaim is now “First Counterclaim”, and the additional counterclaims which arise out of the facts

mentioned above are “Second Counterclaim” through “Fourth Counterclaim”. The original and only copy of her First Amended Answer and Counterclaim is attached hereto.

II.

As this Court is aware, Federal Rule of Civil Procedure 15(a) provides that “leave shall be freely given when justice so requires.” The Fifth Circuit has emphasized likewise that absent untoward prejudice to a party, the opposing party should be freely accorded the right to amend. *Lone Star Inv. Club v. Schlotzsky’s Inc.*, 238 F.3d 363, 367-68 (5th Cir. 2001). In the present case, Plaintiffs were aware that their actions were in contradiction of Texas law, and therefore Plaintiffs would not be subject to undue prejudice if held accountable for those actions.

PRAYER

WHEREFOR, premises considered, Defendant prays that this Court grant her leave to file her Amended Counterclaim, and for all other relief to which she may be justly entitled.

Respectfully Submitted,

/S/ John M. Stoneham
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Lead Attorney for Defendant

CERTIFICATE OF SERVICE

The foregoing Motion for Leave to Amend Counterclaim was served by the Court's electronic case management system on Stacy Obenhaus and Lisa Honey, Attorneys for Plaintiffs, on the 2nd day of July, 2007.

/S/ John Stoneham
John M. Stoneham
Attorney for Defendant

**IN THE UNITED STATES DISTRICT COURT
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SONY BMG MUSIC ENTERTAINMENT,	§	
<i>et al.</i>	§	
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Plaintiffs,	§	JURY
	§	
Vs.	§	
	§	
RHONDA CRAIN	§	
	§	
Defendant.	§	

DEFENDANT’S FIRST AMENDED ANSWER AND COUNTERCLAIM

Comes now Rhonda Crain, defendant herein, and for her answer, defenses and counterclaims to Plaintiffs’ Complaint filed in this cause, states as follows:

ANSWER

The paragraph numbering which follows corresponds to paragraph numbers in the Plaintiffs’ Complaint.

Jurisdiction And Venue

1. ADMITTED.
2. ADMITTED.
3. ADMITTED that Defendant resides in this District; DENIED that Defendant committed any act of infringement.

Parties

4. Defendant has insufficient information to admit or deny the allegations contained in Paragraph 4.
5. Defendant has insufficient information to admit or deny the allegations contained in Paragraph 5.
6. Defendant admits that she resides in this District.

Alleged Infringement of Copy Rights – Count I

7. Paragraph 7 contains no assertion.
8. Defendant has insufficient information to admit or deny the allegations contained in Paragraph 8. Plaintiffs assert that there are valid Certificates of Copyright Registration for the songs listed in Exhibit A, but none are attached to the Complaint. Furthermore, Plaintiffs assert that they are the “owners or licensees” with respect to those songs listed in Exhibit A, but have offered no exhibits to show such ownership or licensing. Plaintiffs also assert that they are the owners or licensees of “certain of the sound recordings listed on Exhibit B”, but that Exhibit contains a listing of over 500 items, some of which are not sound recordings at all, and none of which has been identified in any way as being possibly owned or licensed by Plaintiffs. To the extent Paragraph 8 of the Complaint associates Defendant with any of the items set forth in Plaintiffs’ Exhibits A or B, Defendant denies these allegations and demands strict proof thereof.
9. Defendant has insufficient information to admit or deny the allegations contained in Paragraph 9.

10. Defendant has insufficient information to admit or deny any assertion regarding Plaintiffs' information and belief. However, Defendant DENIES each and every assertion of alleged infringement and demands strict proof thereof. Furthermore, Plaintiffs have failed to identify which of the "Copyrighted Recordings" are involved in the alleged infringement, nor have the Plaintiffs alleged a time and place on which any infringement may have occurred.
11. Defendant DENIES the allegation that "each of the published copies of the sound recordings identified in Exhibit A was accessible by Defendant" and demands strict proof thereof. Defendant has insufficient information to admit or deny any assertion regarding the placement of notices of copyright.
12. Defendant DENIES any act of infringement, willful, intentional, or otherwise, and requires strict proof thereof.
13. Because Defendant has done nothing to infringe the copyrights asserted by Plaintiffs, Defendant DENIES that Plaintiffs are entitled to any kind of damages, attorney's fees, or costs.
14. Because Defendant has done nothing to infringe the copyrights asserted by Plaintiffs, Defendant DENIES that Plaintiffs will be caused "great and irreparable injury" and Defendant as such DENIES that Plaintiffs are entitled to injunctive relief. Defendant further DENIES that Plaintiffs are entitled to an Order directing Defendant to "destroy all copies of sound recordings" as asserted in Paragraph 14.

15. The Court should DENY any and all relief sought by Plaintiffs against Defendant.

AFFIRMATIVE DEFENSES

Defendant asserts the following additional defenses to Plaintiffs' Complaint.

1. Plaintiffs' Complaint fails to state a claim against Defendant on which relief can be granted.
2. The alleged claims made by Plaintiffs against Defendant are neither well grounded in fact nor warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. Fed. R. Civ. 11.
3. Plaintiffs have failed to mitigate their damages, if any, as required by law. Plaintiffs made no attempt to contact Defendant before filing their Complaint, nor did they request that she cease any alleged infringing activity prior to filing the Complaint.
4. Plaintiffs' claims against Defendant are barred by acquiescence.
5. Plaintiffs' claims against Defendant are barred by the doctrine of unclean hands.
6. Plaintiffs' claims against Defendant are barred by the doctrine of laches.
7. Plaintiffs' claims against Defendant may be barred by the statute of limitations, 17 U.S.C. § 507(b), which provides that no civil action may be maintained under the Federal Copyright Act unless the same is commenced within three (3) years after the claim accrued.
8. Plaintiffs' claims against Defendant are barred because Plaintiffs have failed to join an indispensable party or parties, including but not limited to the

“online media distribution system” identified in Plaintiffs’ Complaint Paragraph 10, and the person or persons, also identified in Paragraph 10, who obtained copies of the works allegedly distributed by Defendant.

9. Plaintiffs’ claims against Defendant are barred due to a settlement agreement reached with Sharman Networks, creators and distributors of the KaZaA software of which Plaintiffs have attached a screenshot (Plaintiffs’ Exhibit B). Upon information and belief, this settlement was in the amount of \$115,000,000.00. Although Plaintiffs in their Complaint do not specifically allege the media network they are accusing Defendant of using, they have clearly identified KaZaA in the Exhibit B screenshots. Through the settlement with Sharman Networks, the Plaintiffs have elected to accept a settlement that fully compensates them for the injuries allegedly caused by Defendant, among others. This settlement fully compensates the Plaintiffs for any alleged infringement by Defendant, and therefore bars the Plaintiffs from recovering any damages a second time for the same alleged infringements.
10. Plaintiffs’ Complaint has failed to properly identify any defendant.
 - a. The Complaint fails to identify the user or users of the name “kcrain@KaZaA” in Plaintiffs’ Exhibit B.
 - b. The Complaint fails to show any time, date, or place of any copyright infringement allegedly committed.
 - c. The Complaint fails to identify the IP address or addresses for any user identified with any item in either Exhibit.

- d. The Complaint fails to identify a MAC address for any computer identified with any item in either Exhibit.
- e. The Complaint fails to state a causal connection between any item in either exhibit and any individual.

WHEREFORE, Defendant prays that this Court find judgment for Defendant, DENY Plaintiffs' request for injunctive relief, DENY Plaintiffs' request for statutory damages, DENY Plaintiffs' request for costs, DENY Plaintiffs' request for attorney's fees, and DENY Plaintiffs' request for any relief whatsoever.

Defendant prays that this Court hold that Defendant is the prevailing party, award her relief under Section 505 of the Copyright Act and dismiss with prejudice. 17 U.S.C. §505.

FIRST COUNTERCLAIM

1. Rhonda Crain is an individual residing within this District.
2. On information and belief, Sony BMG Music Entertainment is a Delaware general partnership, with its principal place of business in the State of New York.
3. On information and belief, Arista Records LLC is a limited liability company duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of New York.
4. This action arises under the Copyright Laws of the United States for a declaratory judgment of non-infringement pursuant to the Declaratory

Judgment Act, 28 U.S.C. §§2201, 2002, to the extent that any actual controversy exists between Defendant and Plaintiffs.

5. Jurisdiction in this Court is proper under 28 U.S.C. §1338(a) by reason that the claim arises under the Copyright Laws of the United States, and Supplemental Jurisdiction under 28 U.S.C. §1367.
6. Venue is proper in this District under 28 U.S.C. §1391(a) in that a substantial part of the events or omissions giving rise to the claims occurred in this District.
7. On information and belief, Plaintiffs' only evidence to support their claims against Defendant is (a) her status as an account holder with her Internet Service Provider, and (b) a screenshot of a peer-to-peer file sharing program.
8. Plaintiffs' actions amount to extortion. Plaintiffs did not seek to mitigate their damages, if any; instead, they filed their Complaint which was served upon Defendant with a cover letter offering to enter into settlement negotiations.
9. Defendant contacted Plaintiffs' counsel regarding the above-mentioned settlement letter, and was told she could settle the case for a total of \$4,500.00, an amount grossly disproportionate to the amount claimed in the settlement letter that could be entered against Defendant if she did not agree to settle (\$150,000.00 per song).
10. Plaintiffs have a pattern and practice of the action complained of by Defendant in her counterclaim. See, for example:
 - a. Arista Records v. Greubel (Fort Worth, TX)
 - b. Arista v. Lime Wire (New York, NY)

- c. Arista v. Tschirhart (San Antonio, TX)
- d. Atlantic v. Andersen(Oregon)
- e. Atlantic v. Does 1-25(New York, NY)
- f. Atlantic v. Huggins(Brooklyn, NY)
- g. Atlantic v. Zuleta (Atlanta, GA)
- h. BMG v. Conklin (Houston, TX)
- i. BMG v. Doe (Canada)
- j. BMG v. Does (E. D. Pa. CV 04-650)
- k. BMG v. Gonzalez (USCA 7th Cir.)
- l. Capitol Records v. Foster (Oklahoma)
- m. Elektra v. Barker (New York, NY)
- n. Elektra v. Harless (Detroit, MI)
- o. Elektra v. McCall (Minnesota)
- p. Elektra v. Santangelo (White Plains, NY)
- q. Elektra v. Santangelo II (White Plains, NY)
- r. Elektra v. Schwartz (Brooklyn, NY)
- s. Elektra v. Werry (Providence, Rhode Island)
- t. Elektra v. Wilke (Chicago, IL)
- u. Fonovisa v. Alvarez (Dallas, TX)
- v. Foundation v. UPC Nederland (Netherlands, District Court of Utrecht)
- w. Interscope v. Does (New York, NY)
- x. Interscope v. Duty (Arizona)
- y. Interscope v. Leadbetter (Seattle, WA)

- z. Loud v. Does (New York, NY)
 - aa. Maverick v. Goldshteyn (Brooklyn, NY)
 - bb. MGM v. Grokster (C.D. California)
 - cc. Motown v. Does 1-99 (New York, NY)
 - dd. Motown v. Nelson (Detroit, MI)
 - ee. Priority v. Chan (Detroit, MI)
 - ff. Priority v. Chan II (Detroit, MI)
 - gg. SONY v. Arellanes (Sherman, Texas)
 - hh. SONY v. Does 1-40(New York, NY)
 - ii. SONY v. Scimeca (Newark, NJ)
 - jj. UMG v. Heard (Birmingham, Alabama)
 - kk. UMG v. Hummer Winblad (San Francisco, CA)
 - ll. UMG v. Lindor (Brooklyn, NY)
 - mm. Virgin v. Marson (Central Dist. California, Western Divis.)
 - nn. Virgin v. Morgan (Pensacola, FL)
 - oo. Warner v. Cassin (White Plains, NY)
 - pp. Warner v. Does 1-149 (New York, NY)
 - qq. Warner v. Payne (Waco, TX)
 - rr. Warner v. Scantlebury (E.D. Michigan, Southern Division)
 - ss. Warner v. Stubbs (Oklahoma City, OK)
11. Pursuant to Copyright Act §505, Defendant is entitled to be awarded costs in defending this frivolous suit.

SECOND COUNTERCLAIM

1. Paragraphs 1 through 6 of FIRST COUNTERCLAIM are incorporated herein.
2. In Texas, an investigations company must hold a license to accept employment to secure evidence to be used before a court. V.T.C.A., Occupations Code §1702.101, 104(2), 104(3) *et. seq.*
3. On information and belief, counterclaim defendants entered into an agreement with a private investigations company to provide investigative services which led to the production of evidence to be used in court against counterclaim plaintiff, including the identification of an IP address on the basis of which counterclaim defendants filed their suit.
4. On information and belief, counterclaim defendants were at the time of this agreement aware that the aforementioned private investigations company was unlicensed to conduct investigations in the State of Texas specifically, and in other states as well.
5. On information and belief, counterclaim defendants agreed between themselves and understood that unlicensed and unlawful investigations would take place in order to provide evidence for this lawsuit, as well as thousands of others as part of a mass litigation campaign.
6. On information and belief, the private investigations company hired by plaintiffs engaged in one or more overt acts of unlawful private investigation.
7. Such actions constitute civil conspiracy under Texas common law. *Ins. Co. of North America v. Morris*, 981 S.W.2d 667, 675 (Tex. 1998).

8. Counterclaim plaintiff has suffered damages as a result of this civil conspiracy, as she has suffered emotional distress and been forced to spend the resources and time necessary to defend such an ill-conceived lawsuit.
9. Counterclaim plaintiff seeks relief in the form of an Order prohibiting counterclaim defendants from employing any unlicensed investigative firm for the purpose of conducting discovery in the State of Texas in this or any other suit, or in any other capacity, now and in the future, and the exclusion of evidence obtained thereby in this and any other trial, and all other relief as the court may deem equitable and proper including an award of damages.

THIRD COUNTERCLAIM

1. Paragraphs 1 through 6 of Defendant's FIRST COUNTERCLAIM and paragraphs 2 through 4 of Defendant's SECOND COUNTERCLAIM are incorporated herein.
2. On information and belief, counterclaim defendants specially hired an unlicensed private investigations company to supply evidence it hoped to use in this lawsuit and thousands of others, creating a special relationship between counterclaim defendants and said private investigations company.
3. On information and belief, the counterclaim defendants encouraged, promoted, or incited unlicensed and unlawful private investigations on Texas residents.
4. On information and belief, the counterclaim defendants could foresee the possibility of harm as a result of promoting an unlawful activity.

5. Such actions constitute the tort of negligent promotion. *Weirum v. RKO General, Inc.*, 539 P.2d 36 (Cal. 1975).
6. Counterclaim plaintiff has suffered damages as a result of counterclaim defendants' conduct, as she has suffered emotional distress and been forced to spend the resources and time necessary to defend an ill-conceived lawsuit.
7. Counterclaim plaintiff seeks relief in the form of an Order prohibiting counterclaim defendants from employing any unlicensed investigative firm for the purpose of conducting discovery in the State of Texas in this or any other suit, or in any other capacity, now and in the future, and the exclusion of evidence obtained thereby in this and any other trial, and all other relief as the court may deem equitable and proper including an award of damages.

FOURTH COUNTERCLAIM

1. Paragraphs 1 through 6 of Defendant's FIRST COUNTERCLAIM and paragraphs 2 through 4 of Defendant's SECOND COUNTERCLAIM are incorporated herein.
2. On information and belief, counterclaim defendants knew that utilizing an unlicensed private investigations company would be in breach of its duty to the State of Texas and its residents, as such is in direct violation of the laws of the State.
3. On information and belief, counterclaim defendants, by virtue of employing and paying an unlicensed private investigations company, offered substantial assistance and encouragement to the investigations company to so conduct itself without a license.

4. Such actions constitute the tort of concerted action. *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996).
5. Counterclaim plaintiff has suffered damages as a result of counterclaim defendants' conduct, as she has suffered emotional distress and been forced to spend the resources and time necessary to defend an ill-conceived lawsuit.
6. Counterclaim plaintiff seeks relief in the form of an Order prohibiting counterclaim defendants from employing any unlicensed investigative firm for the purpose of conducting discovery in the State of Texas in this or any other suit, or in any other capacity, now and in the future, and the exclusion of evidence obtained thereby in this and any other trial, and all other relief as the court may deem equitable and proper including an award of damages.

WHEREFORE, Defendant demands judgment (a) dismissing the Complaint; (b) awarding her costs; (c) all relief requested in the foregoing counterclaims; and (d) such other and further relief as the Court seems proper.

Defendant requests that this case be tried before a jury.

Respectfully Submitted,

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Lead Attorney for Defendant

CERTIFICATE OF SERVICE

The foregoing Answer and Counterclaim was served by the Court's electronic case management system on Stacy Obenhaus and Lisa Honey, Attorneys for Plaintiffs, on the 2nd day of July, 2007.

/S/ John Stoneham
John M. Stoneham
Attorney for Defendant