

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

UMG RECORDINGS, INC., *et al.* )  
 )  
 Plaintiffs, )  
 ) Case No.: 08-4040-RDR-KGS  
 vs. )  
 )  
 MANDY JOHNSON, )  
 )  
 Defendant. )  
 )

**MOTION TO DISMISS DEFENDANT’S AMENDED COUNTERCLAIMS**

Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiffs UMG Recordings, Inc., *et al.* (“Plaintiffs”), respectfully move to dismiss all of the amended counterclaims asserted against them by Defendant Mandy Johnson (“Defendant”) because Defendant’s counterclaims fail to state claims upon which relief can be granted.

**INTRODUCTION**

Defendant’s Amended Counterclaims (“Am. Counterclms.,” Doc. No. 23) are little more than an unambiguous attempt by the Defendant to hold Plaintiffs liable for their legitimate efforts to enforce their copyrights. That, of course, is not only improper, but is contrary to established public policy of encouraging copyright owners to enforce their copyrights. *See Kebodeaux v. Schwegmann Giant Super Markets, Inc.*, 1994 U.S. Dist. LEXIS 13072, at \*3 (E.D. La. Sept. 14, 1994) (holding that it would be inconsistent with the purposes of the Copyright Act to “deter plaintiffs . . . from bringing suits when they have a reason to believe, in good faith, that their copyrights have been infringed”). In a recent case in Texas involving a similar effort by record company plaintiffs to enforce their rights against another peer-to-peer infringer, the Court considered a similar attack on Plaintiffs’ motives and concluded:

The Court rejects [defendant]'s characterization of this lawsuit, and many others like it, as "predatory." . . . Plaintiffs' attorneys brought this lawsuit not for purposes of harassment or to extort [defendant] as she contends, but, rather, to protect their clients' copyrights from infringement and to help their clients deter future infringement. . . . For now, our government has chosen to leave the enforcement of copyrights, for the most part, in the hands of the copyright holder. See 17 U.S.C. § 101, *et seq.* Plaintiffs face a formidable task in trying to police the internet in an effort to reduce or put a stop to the online piracy of their copyrights. . . . The right to come to court to protect one's property rights has been recognized in this country since its birth.

*Atlantic Recording Corp. v. Heslep*, 2007 U.S. Dist. LEXIS 35824, at \*15-16 (N.D. Tex. May 16, 2007).

Defendant asserts counterclaims for: (1) declaratory judgment for non-infringement; (2) computer fraud and abuse under 18 U.S.C. § 1030; (3) civil conspiracy; (4) invasion of privacy; and (5) declaratory relief on a range of topics that are duplicative of Defendant's defenses to Plaintiffs' infringement claim. As explained below, Defendant's counterclaims fail to state claims upon which relief may be granted and should be dismissed.

First, Defendant's declaratory judgment counterclaim seeking a declaration of non-infringement is a mirror image of Plaintiffs' infringement claim against Defendant. The Declaratory Judgment Act is not designed for this type of mirror image counterclaim and courts routinely dismiss or strike these types of claims under Rule 12 as redundant and unnecessary.

Second, Defendant's Computer Fraud and Abuse Act ("CFAA") counterclaim fails for at least two reasons. To begin with, Defendant's allegations contain a fatal internal contradiction. If Defendant did not use her computer to engage in illegal file sharing, as she alleges in her defense to Plaintiffs' infringement claim, then she cannot complain that Plaintiffs somehow violated the CFAA when they observed her sharing files. Defendant cannot simultaneously allege that she "was" and "was not" sharing files. This counterclaim also fails as a matter of law. Specifically, Plaintiffs never accessed Defendant's computer at all, let alone accessed

Defendant's computer without authorization. Rather, as numerous courts have held, by using an online file sharing program to distribute files over the Internet to other users, Defendant opened her computer to the world.

Third, Defendant's civil conspiracy claim should be dismissed because Defendant fails to allege facts to support the claim. Among other shortcomings, Defendant has not alleged, and could not allege, the existence of any underlying tort necessary to state such a claim. In addition, this claim is barred under the *Noerr-Pennington* doctrine, which holds that actions taken incident to litigation are protected from liability by the First Amendment right to petition. Here, Defendant's civil conspiracy claim focuses entirely on Plaintiffs' activity incident to filing this lawsuit. Accordingly, the claim is barred by *Noerr Pennington*.

Fourth, Defendant's invasion of privacy counterclaim is also barred under *Noerr-Pennington* because it focuses entirely on Plaintiffs' activity incident to this litigation. The claim is also barred under Kansas state law because it is based on privileged communications from judicial proceedings.

Fifth, Defendant's "kitchen sink" declaratory relief counterclaim merely lists an assortment of defenses to Plaintiffs' infringement claim against her. Here again, the Declaratory Judgment Act was not designed as a vehicle for raising duplicative defenses to an already existing claim. Defendant's defenses will be resolved through litigation of Plaintiffs' infringement claim and do not state a claim under the Declaratory Judgment Act.

For all of these reasons and as further explained below, Defendant's Amended Counterclaims should be dismissed.

## BACKGROUND

Plaintiffs are recording companies that own or control exclusive rights to copyrights in sound recordings. As such, Plaintiffs have the exclusive rights (a) to reproduce the copyrighted recordings, and (b) to distribute the copyrighted recordings to the public. Since the early 1990s, Plaintiffs and other copyright holders have faced a massive and exponentially expanding problem of digital piracy over the Internet. Today, copyright infringers use various online media distribution systems to download (reproduce) and unlawfully disseminate (distribute) to others billions of perfect digital copies of Plaintiffs' copyrighted sound recordings each month. The Supreme Court of the United States has characterized the magnitude of online piracy as "infringement on a gigantic scale." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005). As a direct result of piracy over the peer-to-peer ("P2P") networks, Plaintiffs have sustained and continue to sustain devastating financial losses.<sup>1</sup>

Defendant, without Plaintiffs' permission or consent, used an online media distribution system to download and to distribute Plaintiffs' copyrighted recordings. (Compl. at 4.) Doing so constitutes copyright infringement. *See BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) ("[P]eople who post or download music files are primary infringers."); *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (holding that the individuals who make and transmit digital copies of copyrighted music files over the internet are direct copyright infringers); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (holding

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<sup>1</sup> The Department of Justice has concluded 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." *See Report of the Department of Justice's Task Force on Intellectual Property* (October 2004), available at <http://www.cybercrime.gov/IPTaskForceReport.pdf>, at 39.

that users “who upload file names to the search index for others to copy violate plaintiffs’ distribution rights[, and that] users who download files containing copyrighted music violate plaintiffs’ reproduction rights”).

Defendant was found distributing Plaintiffs’ copyrighted sound recordings on a peer-to-peer network. Specifically, on March 9, 2007 at 5:55 a.m. EST, MediaSentry, a company retained by Plaintiffs, detected an individual who was engaged in the unlawful distribution of Plaintiffs’ copyrighted sound recordings using the LimeWire online media distribution system at Internet Protocol (“IP”) address 24.255.164.211. Included among these sound recordings were, for example, sound recordings by artists such as Madonna, Jennifer Lopez, and Luther Vandross. (Compl. at Ex. A.) This individual had 376 audio files on her computer and was distributing them to the millions of people who use P2P networks. In response to a federal court subpoena, Defendant’s Internet Service Provider, Cox Communications, Inc., identified Defendant as the person responsible for IP address 24.255.164.211 at the date and time of infringement. Exhibit A to the Complaint is a subset of the 376 audio files and lists numerous specific sound recordings for which Plaintiffs are, and at all relevant times have been, the copyright owners or licensees of exclusive rights under United States copyright.<sup>2</sup>

After attempting unsuccessfully to resolve this matter with Defendant, Plaintiffs brought this action seeking redress for the infringement of their copyrighted sound recordings pursuant to the Copyright Act, 17 U.S.C. § 101 *et seq.* (See Compl., Doc. No. 1.) On April 28, 2008, Defendant filed her original Answer and Counterclaims (Doc. No. 5). After Plaintiffs filed a

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<sup>2</sup> In addition to the subset of sound recordings listed on Exhibit A to the Complaint, Plaintiffs’ copyrighted recordings also include certain of the sound recordings listed on Exhibit A attached hereto, which represents the entire contents of Defendant’s shared folder on March 9, 2007.

Motion to Dismiss Counterclaims (Doc. No. 19) on June 23, 2008, Defendant filed her First Amended Answer and Counterclaims (Doc. No. 23) on July 16, 2008.

For the reasons set forth below, Defendants' amended counterclaims should be dismissed under Rule 12(b)(6).

## **ARGUMENT**

### **I. Legal Standard for Motion To Dismiss.**

When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, the Court must “accept as true all well-pleaded facts, as distinguished from conclusory allegations, and construe them in the light most favorable to the [nonmoving party].” *Witt v. Roadway Express*, 136 F.3d 1424, 1431 (10th Cir. 1998). However, the allegations found in the complaint “must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (requiring plaintiff to plead “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [her claim]”). Ultimately, a court should dismiss a complaint for failure to state a claim when the complaint fails to include “plausible grounds” for relief. *Id.*; *see also Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007).

As demonstrated below, Defendant's counterclaims fail to include any plausible grounds for relief and should be dismissed.

### **II. Defendant's Claim For Declaratory Judgment (Count 1) Is Redundant Of Plaintiffs' Claim Against Defendant.**

#### **A. Defendant's Counterclaim Is Redundant Because It Mirrors Plaintiffs' Copyright Claim.**

Courts routinely dismiss “mirror image” counterclaims where they merely restate issues already before the court as part of a plaintiff's affirmative case. *See Atlantic Recording Corp. v. Serrano*, 2007 U.S. Dist. LEXIS 95203, at \*11-12 (S.D. Cal. Dec. 28, 2007); *Interscope Records*

*v. Duty*, 2006 U.S. Dist. LEXIS 20214, at \*12 (D. Ariz. April 14, 2006); *Interscope Records v. Kimmel*, 2007 U.S. Dist. LEXIS 43966, at \*15-16 (N.D.N.Y. June 18, 2007) (dismissing a counterclaim for declaratory judgment of non-infringement where the issue is “squarely before the Court” as a result of Plaintiffs’ claims); *Arista Records, LLC v. Tschirhart*, 05-CV-372-OLG, slip op. at 9-10 (W.D. Tex. May 24, 2006) (dismissing a counterclaim for declaratory judgment of non-infringement because the claim was both “redundant and unnecessary”) (attached hereto as Exhibit B); *Green Bay Packaging, Inc. v. Hoganson & Assoc., Inc.*, 362 F. Supp. 78 (N.D. Ill. 1973); *Resolution Trust Corp. v. Ryan*, 801 F. Supp. 1545, 1556 (S.D. Miss. 1992) (dismissing defendant’s counterclaims for declaratory judgment because they were “redundant and moot upon disposition of the claims against defendants”); *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.*, 1990 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 routinely dismiss declaratory judgment counterclaims that are duplicative of a defendant’s own defenses. *See 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 a declaration of non-infringement that is entirely duplicative and a mirror image of Plaintiffs' claim of infringement against Defendant. (*Compare* Compl. at 4 *with* Am. Counterclms. at ¶ 36.) Likewise, Defendant's counterclaim also duplicates her defenses to Plaintiffs' claim. Defendant's counterclaim alleges that she "did nothing improper regarding Plaintiffs' copyrighted materials." (Am. Counterclms. at ¶ 36.) The same denial of infringement is contained in Defendant's Amended Answer (Am. Ans. at 4 ¶ 9) as well as in several of the affirmative defenses set forth therein (Am. Ans. at 7 ¶ 2; at 10-11, ¶¶ 21-23). As the Court held in *Tschirhart*, a case similar to the one at bar that involved a group of record companies suing an individual for copyright infringement on a peer-to-peer network, "[t]he issue of copyright infringement will be decided by this Court regardless of the declaratory judgment claim . . . Therefore, defendant's claim for a declaratory judgment is redundant and unnecessary." *Tschirhart*, 05-CV-372-OLG, slip op. at 9 (Ex. B). Because Defendant's counterclaim is entirely redundant of Plaintiffs' claim for copyright infringement and of Defendant's defenses to Plaintiffs' claim, it is duplicative and unnecessary, and should be dismissed. *See id.*

**B. Defendant's Attempted Use of the Declaratory Judgment Act Here Fails to Comport With the Act's Purpose.**

The Declaratory Judgment Act ("Act") was not intended to allow parties to bring redundant counterclaims like the one proposed by Defendant. The Act was initially intended to dispel difficulties in cases where a party sought to challenge the constitutionality of a statute without having to violate the statute, and now serves to allow courts to declare the rights of adverse parties before they accrue avoidable damages. *See Steffel v. Thompson*, 415 U.S. 452, 466 (1974); *see also Polykoff v. Collins*, 816 F.2d 1326, 1333 (9th Cir. 1987). The Act does not automatically grant the right to have a claim for declaratory relief heard, and the Court should not do so here, because allowing such a claim would only waste judicial resources. *See Kimmel*,

2007 U.S. Dist. LEXIS 43966, at \*15 (dismissing duplicative counterclaim for non-infringement and holding that “[t]he issue of copyright infringement will be decided by this court regardless of the declaratory judgment claim . . . Therefore, [defendant’s] claim for a declaratory judgment is redundant and unnecessary.”); *Tschirhart*, 05-CV-372-OLG, slip op. at 9 (same) (Ex. B).

For the reasons set forth above, Defendant’s counterclaim is entirely redundant of Plaintiffs’ claim for copyright infringement and of Defendant’s defenses to Plaintiffs’ claim, and should be dismissed.

### **III. Defendant Does Not – And Could Not – Plead The Elements Of A Claim Under The Computer Fraud And Abuse Act (Count 2).**

Defendant’s second purported counterclaim alleges violations of the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030 *et. seq.* Defendant’s claim is comprised of nothing more than conclusory allegations that merely recite the elements of a CFAA claim. (Am. Counterclms. ¶¶ 39-45.) In considering the sufficiency of Defendant’s counterclaims, the Court “should dismiss claims which are supported only by vague and conclusory allegations.” *Medlock v. Otsuka Pharm., Inc.*, 2008 U.S. Dist. LEXIS 6648, at \*26-27 (D. Kan. Jan. 29, 2008).

Although Defendant fails to identify the prong under which she brings her purported CFAA claim, she presumably intends to assert a claim pursuant to 18 U.S.C. § 1030(a)(5)(B)(i), which applies in cases of alleged “loss to [one] or more persons . . . aggregating at least \$5,000 in value.” (See Am. Counterclms. at ¶¶ 42, 44). Regardless of which prong she has chosen, however, all of the activities prohibited by the CFAA require the access of another’s computer *without authorization*. See *United States v. Willis*, 476 F.3d 1121, 1124-25 (10th Cir. 2007). Because, as set forth below, Defendant cannot prove any set of facts which would entitle her to relief on this claim, it should be dismissed. *Raynor Mfg. Co. v. Raynor Door Co.*, 2008 U.S. Dist. LEXIS 26932 (D. Kan. Mar. 31, 2008).

Defendant's CFAA counterclaim may recite the language of the statute, but there is no more than "labels and conclusions, and a formulaic recitation of the elements" insufficient under *Twombly*. *Twombly*, 127 S. Ct. at 1964-65. In *Atlantic Recording Corp. v. Serrano*, 2007 U.S. Dist. LEXIS 95203 (S.D. Cal. Dec. 28, 2007), the Court explained that in order to state a claim under the CFAA and to put Plaintiffs on notice of a CFAA violation, Defendant must provide details regarding the alleged unlawful access and how Defendant's computer was harmed. In *Serrano* the Court held that:

Defendant's Counterclaim does not allege facts sufficient to put Plaintiffs on notice of a CFAA violation. *See Swierkiewicz*, 534 U.S. at 512. . . . Defendant fails to allege (1) when or how Plaintiffs allegedly broke into his computer; (2) when or how Plaintiffs allegedly spied on his private information; (3) what private information was spied on; (4) when or how Plaintiffs removed private information; (5) what private information was removed; (6) what files were inspected, copied, or removed; (7) when or how any files were inspected, copied or removed; (8) how Plaintiffs appropriated or profited from Defendant's personal property; and/or (9) how Defendant's data was harmed or compromised. Even viewing the Counterclaim's meager allegations in Defendant's favor, the Court can only speculate as to what may have transpired and how Defendant is entitled to relief.

*Id.* at \*16-17 (dismissing Defendant's CFAA counterclaim). Defendant here likewise fails to assert any of these factual allegations in her Amended Counterclaim. Defendant's conclusory allegation of unauthorized access is unsupported by factual allegations and therefore need not be accepted as true. *See Rider v. Werholtz*, 548 F. Supp. 2d 1188, 1193-94 (D. Kan. 2008).

Defendant cannot show that Plaintiffs and/or MediaSentry accessed her computer without authorization. The LimeWire file-sharing software utilized by Defendant to share files over the Internet has a file-sharing feature that was enabled at the time the infringement was detected. (Am. Counterclms. ¶ 19, acknowledging that the basis for her claim is Plaintiffs' alleged detection of file-sharing via use of LimeWire.) This feature made the digital audio files in Defendant's "shared" folder available to all other users of the peer-to-peer networks. *See United*

*States v. Kennedy*, 81 F. Supp. 2d 1103, 1106 n.4, 1110 (D. Kan. 2000) (explaining detection through file-sharing program and holding that activation of file-sharing mechanism shows no expectation of privacy). Indeed, it was precisely because Defendant was distributing the files from her shared folder that Plaintiffs' investigators were able to detect the infringing conduct at issue. Because Defendant's "shared" folder was open to the world, including Plaintiffs' investigators, Defendant granted exactly the type of authorization contemplated by the CFAA, as numerous courts have held. See *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 267 (D.D.C. 2003) ("[I]f an individual subscriber opens his computer to permit others, through peer-to-peer file-sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world"); see also *Serrano*, 2007 U.S. Dist. LEXIS 95203 at \*11-12 (rejecting similar CFAA claim); *Tschirhart*, 05-CV-372-OG, slip op. at 9 (same) (Ex. B); *International Ass'n of Machinists & Aerospace Workers v. Werner-Matsuda*, 390 F. Supp. 2d 479 (D. Md. 2005) (dismissing claim under CFAA where defendant had authorization to access computer at issue, in virtually identical circumstances); see also *Elektra Entm't Group, Inc. v. Does 1-9*, 2004 U.S. Dist. LEXIS 23560, at \*13 (S.D.N.Y. Sep. 7, 2004) (holding that the defendant had a "minimal expectation of privacy in downloading and distributing copyrighted songs without permission").

Furthermore, Defendant's allegations contain a fatal internal contradiction. Under the equitable doctrine of judicial estoppel, a party is precluded "from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." See *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). Here, Defendant has already denied that she infringed Plaintiffs' copyrights (Am. Ans. at 4 ¶ 9; *id.* at 15 ¶ 19) and contends that she was incorrectly identified as the person responsible for the

infringement at issue in the case (Am. Ans. at 7 ¶ 2). Defendant’s counterclaim under CFAA, however, is premised on her being responsible for the infringement at issue. If Defendant did not use her computer to engage in illegal file sharing, as she alleges in her defense to Plaintiffs’ infringement claim, then she cannot now complain that Plaintiffs somehow violated the CFAA when they observed her sharing files. Defendant cannot simultaneously allege that she “was” and “was not” sharing files. Accordingly, Defendant is judicially estopped from claiming that the record companies’ investigators accessed her computer in violation of her rights without authorization (Am. Counterclms. ¶ 41), as opposed to accessing someone else’s computer, when they located infringing music files. *See Hamilton*, 270 F.3d at 782. Defendant cannot have it both ways. She cannot claim that her computer was not used in the infringement at issue, and then claim that Plaintiffs improperly detected her infringement.

For all of these reasons, Defendant’s purported counterclaim for violations of the CFAA fails as a matter of law and should be dismissed.

**IV. Defendant’s Civil Conspiracy (Count 3) and Invasion of Privacy (Count 4) Counterclaims Are Barred by the *Noerr-Pennington* doctrine.**

The First Amendment guarantees “the right of the people . . . to petition the Government for redress of grievances.” U.S. CONST. amend. I. This right to petition—often referred to as *Noerr-Pennington* immunity—has been extended to afford a party the right to access the courts. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). Consistent with this right to petition the courts, numerous courts have shielded litigants from claims relating to the filing of litigation. *See, e.g., Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 122 (3d Cir. 1999) (“Probable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication . . . the existence of probable cause is an absolute defense.” (citations omitted)); *Video Int’l Prod., Inc. v. Warner-*

*Amex Cable Comm.*, 858 F.2d 1075, 1082-83 (5th Cir. 1988); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983). “While the *Noerr-Pennington* doctrine originally arose in the antitrust context, it is based on and implements the First Amendment right to petition and therefore . . . applies equally in all contexts.” *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000); *California Motor Transp.*, 404 U.S. at 510; *Cheminor Drugs*, 168 F.3d at 128 (“We are persuaded that the same First Amendment principles on which *Noerr-Pennington* immunity is based apply to the New Jersey tort claims.”); *Taliaferro v. Darby Township Zoning Bd.*, 2008 U.S. Dist. LEXIS 39478, at \*23-24 (E.D. Pa. May 15, 2008) (recognizing that both the Supreme Court, this Circuit, and other circuits have expanded the *Noerr-Pennington* doctrine and applied it in other contexts besides antitrust cases); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (“The rule that liability cannot be imposed for damage caused by inducing legislative, administrative, or judicial action is applicable here.”).

The filing of a lawsuit is not the only conduct protected by the *Noerr-Pennington* doctrine. An offer to settle a lawsuit also constitutes “conduct incidental to the prosecution of the suit” that is protected under the *Noerr-Pennington* doctrine. *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991), *aff’d*, 508 U.S. 49 (1993); *see also A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 254 (3d Cir. 2001) (holding that “we see no reason to distinguish between settlement agreements and other aspects of litigation . . . [f]reedom from the threat of antitrust liability should apply to settlement agreements as it does to other more traditional petitioning activities.”) Courts have also extended *Noerr-Pennington* “to encompass concerted efforts incidental to litigation, such as prelitigation ‘threat letters.’” *Primetime 24 Joint Venture v. NBC*, 219 F.3d 92, 100 (2d Cir. 2000) (citing *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992)) (holding

that concerted threats of litigation are protected under *Noerr-Pennington*); *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367-68 (5th Cir. 1983) (same)).<sup>3</sup>

Here, Defendant’s civil conspiracy allegations (Count 3) all concern Plaintiffs’ alleged activity in relation to filing this lawsuit and the “Doe” action, which Defendant alleges were “intended to spread public fear and intimidation by harassment, extortion and coercion.” (Am. Counterclms. ¶¶ 18-20, 34). Defendant’s invasion of privacy allegations (Count 3) likewise focus directly on Plaintiffs’ conduct incident to this lawsuit. (Am. Counterclms. ¶¶ 60-61, 64.) This lawsuit and the “Doe” action, however, were initiated for the sole purpose of protecting Plaintiffs’ copyrights. *Heslep*, 2007 U.S. Dist. LEXIS 35824 at \*4-5. Such action by Plaintiffs—activity related to filing this litigation to protect their copyrights—is protected by the First Amendment as explained through the *Noerr-Pennington* doctrine, and cannot form the basis for a claim of damages. *Video Int’l Prod.*, 858 F.2d at 1082-84. Accordingly, Defendant’s civil conspiracy and invasion of privacy claims are barred and should be dismissed.

**V. Defendant’s Claim for Civil Conspiracy (Count 3) Should Also Be Dismissed Because She Has Not – And Could Not – Plead Any of the Required Elements.**

Under Kansas law, the following elements are required to establish a claim for civil conspiracy: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as a proximate result thereof. *Ingram v. Haase*, 777 P.2d 277, 1989 Kan. LEXIS 148, at \*20 (Kan.

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<sup>3</sup> See also *Oneida Tribe of Indians v. Harms*, 2005 U.S. Dist. LEXIS 27558, at \*8-9 (E.D. Wis. Oct. 24, 2005) (holding that the mere threat by the Plaintiff to protect its rights cannot give rise to a claim by the defendant); *DIRECTV, Inc. v. Personette*, 2003 U.S. Dist. LEXIS 19695, at \*19-20 (W.D. Mich. Oct. 20, 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); *DirectTV, Inc. v. Milliman*, 2003 U.S. Dist. LEXIS 20938, at \*23-24 (E.D. Mich. Aug. 26, 2003) (dismissing deceptive trade practice counterclaim under *Noerr-Pennington*).

1989). To state a claim for civil conspiracy, a party “must plead facts to establish the elements of civil conspiracy and may not rely on conclusory allegations.” *See Jackson v. Kan. County Ass’n Multiline Pool*, 2005 U.S. Dist. LEXIS 5436, at \*21 (D. Kan. Jan. 19, 2005).

A civil conspiracy claim is not actionable “without commission of some wrong giving rise to a cause of action independent of the conspiracy.” *Stoldt v. Toronto*, 234 Kan. 957, 967 (Kan. 1984). Under the second element of civil conspiracy, a defendant must show liability for a “valid, actionable underlying tort.” *Meyer Land & Cattle Co. v. Lincoln County Conservation Dist.*, 29 Kan. App. 2d 746, 753 (Kan. Ct. App. 2001). Unlawful means to a lawful end does not constitute civil conspiracy under Kansas law. *Stoldt*, 234 Kan. at 967 (holding that the Kansas Supreme Court has “consistently held conspiracy turns on an illegal result rather than the means”). Under the fourth element of civil conspiracy, an unlawful, overt act used to support a civil conspiracy claim must “produce an unlawful result.” *Stoldt*, 234 Kan. at 967-68.

Here, Defendant has alleged no underlying tort, thus failing to satisfy the second element of civil conspiracy. Nor has Defendant alleged any facts to demonstrate either a meeting of the minds (third element) or an overt act in furtherance of the alleged conspiracy (fourth element). Therefore, in addition to the *Noerr-Pennington* bar, Defendant’s civil conspiracy claim fails as a matter of law.

**A. Defendant Has Failed to Allege an Underlying Tort As the Object of the Alleged Conspiracy.**

First, Defendant has failed to identify any underlying tort to constitute the unlawful purpose for the alleged conspiracy. Defendant asserts that the purpose of the conspiracy was to “engage in the unlicensed and unlawful acts of private investigation.” (Am. Counterclms. ¶ 47.) Defendant cites to a section of the Kansas Statutes, K.S.A. § 75-7b01 *et seq.*, regarding the licensing requirements for a detective business or private detective agency acting in Kansas (Am.

Counterclms. ¶ 25). However, Defendant does not, and cannot, cite any authority for the proposition that a violation of Section 75-7b01 or any related section constitutes a tortious act or gives rise to any private cause of action under Kansas law, let alone a private cause of action for conspiracy. *See Junior Money Bags, Ltd. v. Segal*, 970 F.2d 1, 11 (5th Cir. 1992) (holding that it is not for the federal courts to adopt novel theories of recovery under state law, “but simply to apply that law as it currently exists”). Similarly, Defendant seems to suggest that an alleged conspiracy may have been premised on “unauthorized access to a protected computer system . . . in violation of 18 U.S.C. § 1030 and 18 U.S.C. § 2701.” (Am. Counterclms. ¶ 48.) However, contrary to Defendant’s allegations, neither the Computer Fraud and Abuse Act (Section 1030) nor a violation of Section 2701 is an actionable underlying tort or wrong on which Defendant can basis her civil conspiracy claim, and Defendant fails to support this argument with any legal basis.

Second, Defendant has failed to allege facts showing a violation of the Kansas Statutes. Kansas’ licensing scheme cannot apply to non-Kansas entities conducting activities in other states, especially where such entities may be subject to other licensing requirements. *See Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989) (a statute that seeks to control commerce occurring wholly outside the boundaries of a State “exceeds the inherent limits of the enacting State’s authority and is invalid.”) Here, Defendant fails to allege a single fact to show that Plaintiffs or anyone acting on Plaintiffs’ behalf conducted any investigation activity (or any activity at all) in the State of Kansas that would subject them to the Kansas Statutes. (Am. Counterclms. ¶¶ 23-29.) Defendant’s assertion of alleged unlawful conduct relates solely to Plaintiffs having obtained “a list of recordings from the peer-to-peer file sharing program” showing the sound recordings and other files that Defendant was distributing over the Internet. (Am. Counterclms.

¶ 22.) There is no allegation that Plaintiffs or MediaSentry conducted any investigation activity in Kansas whatsoever; nor could Defendant make such allegation in good faith.

When a peer-to-peer user engages in file sharing, as Defendant is alleged to have done here, she opens her computer for the world to see and cannot claim that others, whom she invited to view the contents of her shared folder and invited to download the sound recordings she was distributing, somehow acted unlawfully. *See, e.g., Tschirhart*, 05-CV-372-OLG, slip op. at 6 (“A user of a P2P file-sharing network has little or no expectation of privacy in the files he or she offers to others for downloading.”) (Ex. B); *In re Verizon*, 257 F. Supp. 2d at 267 (When an ISP subscriber “opens his computer to permit others, through peer-to-peer file-sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world.”); *Kennedy*, 81 F. Supp. 2d at 1110 (same). To discover the illegal file sharing at issue in this case, MediaSentry logged on to the Gnutella file-sharing network using the LimeWire program, just as any user of the LimeWire program could do. MediaSentry was able to observe all of the sound recordings and other files on Defendant’s computer that Defendant was *publicly* distributing for free to other Gnutella users.<sup>4</sup> Defendant has not—and could not—allege MediaSentry was present in Kansas when they viewed these public files. Simply put, neither MediaSentry nor Plaintiffs conducted any activity in Kansas that would subject them to the licensing provisions of the Kansas Statutes.

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<sup>4</sup> If Defendant were correct in making her licensing argument (which she is not), the impact would be that any individual gathering evidence from a Website or cyberspace would need to obtain a license in Kansas, and every other State with a similar licensing law, without ever having set foot in the State. Obviously, this would be a significant and unwarranted expansion of the contemplated reach of the statute.

**B. Defendant Has Not – And Cannot – Allege a Meeting of the Minds Because Infringement Occurred Over the Internet.**

Under Kansas law, a meeting of the minds requires that the parties have knowledge that the conduct is wrongful at the inception of the unlawful agreement. *See Kan. Waste Water, Inc. v. Alliant Techsystems, Inc.*, 2005 U.S. Dist. LEXIS 8798, at \*70-74 (D. Kan. May 9, 2005). Here, there was no way for MediaSentry or Plaintiffs to know of any alleged harm or wrongful conduct at the time they detected Defendant’s infringement. Infringement over a peer-to-peer network can take place by anyone with access to the Internet anywhere in the world. At the time MediaSentry detected Defendant’s infringement, it had no idea who Defendant was or where she lived. *See Heslep*, 2007 U.S. Dist. LEXIS 35824 at \*6 and n.1 (discussing the anonymous nature of peer-to-peer infringement). Neither MediaSentry nor Plaintiffs, therefore, could possibly have known that Defendant was in Kansas, or that she would claim that MediaSentry somehow violated Kansas’ licensing laws. Absent such knowledge, there can be no conspiracy. *See Alliant Techsystems*, 2005 U.S. Dist. LEXIS 8798 at \*70-74.<sup>5</sup>

**C. Defendant Has Failed to Allege an Overt Act or an Unlawful Result.**

Defendant has alleged no facts demonstrating a single unlawful, overt act. Defendant’s allegation that Plaintiffs “engaged in one or more overt acts of unlawful private investigation in the State of Kansas” (Am. Counterclms. ¶ 29) is precisely the type of conclusory allegation masquerading as factual conclusions that will not suffice to prevent a motion to dismiss. *See Jackson*, 2005 U.S. Dist. LEXIS 5436 at \*21. Moreover, as discussed above, Defendant has not alleged a single fact to show that Plaintiffs or anyone acting on Plaintiffs’ behalf conducted any

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<sup>5</sup> Indeed, if the Court were to accept Defendant’s novel theory of licensing requirements, then MediaSentry and every other entity engaged in the protection of intellectual property on the Internet would be subject to the licensing requirements of not only every state in the United States, but of virtually every country in the world.

investigation activity in Kansas that would subject them to the Kansas Statutes. With no factual allegations supporting the existence of single unlawful, overt act, Defendant's civil conspiracy counterclaim fails. *See Ingram*, 777 P.2d 277, 1989 Kan. LEXIS 148 at \*20.

**D. Defendant's Claim Seeking Exclusion of Evidence Has No Legal Basis.**

Defendant's implied argument that the evidence obtained by MediaSentry should be excluded (Am. Counterclms. ¶¶ 53-54) also fails. No provision of the Kansas Statutes supports the exclusionary rule as a remedy for a purported violation of the licensing requirement. *See* K.S.A. § 75-7b01 *et seq.* Moreover, the instant case is a purely civil matter that does not involve any government action that would invoke the Fourth Amendment, and thus the exclusionary rule should not apply. *See United States v. Rangel De Aguilar*, 308 F.3d 1134, 1138 (10th Cir. 2002) (finding that the exclusionary rule does not apply in a civil proceeding); *James by & Through James v. Unified Sch. Dist. No. 512*, 899 F. Supp. 530, 533 (D. Kan. 1995) (declining to extend exclusionary rule to civil cases); *O'Leary v. Purcell Co.*, 108 F.R.D. 641, 646-47 (M.D.N.C. 1985) (refusing to extend the exclusionary rule to a civil matter because the primary purpose of the rule is to deter illegal governmental conduct). *See also Mejia v. City of New York*, 119 F. Supp. 2d 232, 254 (S.D.N.Y. 2000) ("the Fourth Amendment's exclusionary rule does not apply in civil actions other than civil forfeiture proceedings.") (*citing Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998)).

In addition, no court has interpreted a violation of K.S.A. § 75-7b01 *et seq.* to invoke the exclusionary rule. Indeed, the Federal District Court for the District of Maine, when interpreting a similar licensing statute, held that that failure of a witness to obtain a private investigator's license did not warrant excluding his testimony at trial. In *TNT Road Co. v. Sterling Truck Corp.*, 2004 U.S. Dist. LEXIS 13463, at \*6 (D. Me. July 19, 2004), the Court concluded that:

Assuming that [the expert] was required by Maine law to have a license to conduct his investigation of the vehicle fire in this case, I am not persuaded that his failure to do so justifies the exclusion of his testimony. Nor do I think that his failure to obtain a license prevents the court from considering his expert qualifications or the reliability of his investigatory methods.

*Id.*

**VI. Defendant's Counterclaim (Count 4) for Invasion of Privacy Also Fails to State a Claim and, Moreover, Is Barred Because It is Premised on Privileged Communications From Judicial Proceedings.**

As a threshold matter, Defendant fails to articulate the invasion of privacy theory upon which she is relying to support her claim. Invasion of privacy under Kansas law serves as an umbrella for four separate and distinct torts: (1) intrusion upon seclusion; (2) appropriation of name or likeness; (3) publicity given to private life; and (4) publicity placing a person in false light. *Ratts v. Bd. of County Comm'rs*, 141 F. Supp. 2d 1289, 1323 (D. Kan. 2001). Here, Defendant asserts facts in an attempt to assert an invasion of privacy claim based on placing a person in false light. (See Am. Counterclms. ¶ 62, alleging that Defendant has been placed “in an unattractive light due to the nature of the allegations and the files to have been on her computer.) Based on Defendant's failure to identify a specific tort and her failure to plead facts sufficient to support a false light claim or any one of the other invasion of privacy claims, Defendant's counterclaim should be dismissed for failure to state an actionable claim.<sup>6</sup>

Moreover, in addition to the Noerr-Pennington bar (*see* Section IV, *supra*), Defendant's false light claim is not actionable because it arises directly from a statement made during judicial proceedings, and is, therefore, privileged under Kansas law. “Judicial proceedings are absolutely

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<sup>6</sup> Notably, courts considering similar claims of invasion of privacy under similar circumstances have deemed dismissal appropriate. *See, e.g., Tschirhart*, 05-CV-372-OLG, slip op. at 6 (Ex. B); *Duty*, 2006 U.S. Dist. LEXIS 20214 at \*11-12.

privileged communications, and statements in the course of litigation otherwise constituting an action for slander, libel, or one of the invasion of privacy torts involving publication, are immune from such actions.” *Froelich v. Adair*, 516 P.2d 993, 997 (Kan. 1973). The rationale behind the privilege is due to “the overriding public interest in a free and independent court system.” *Id.* The absolute privilege extends immunity to “parties to private litigation and to anything published in relation to a matter at issue in court, whether said in pleadings, affidavits, depositions or open court.” *Id.* Here, Defendant alleges that Plaintiffs “printed off pages listing the personal and private files” from Defendant’s computer (Am. Counterclms. ¶ 60) and concedes that this listing was “filed . . . as a public court document” (Am. Counterclms. ¶ 61). Based on the fact that Defendant has premised her invasion of privacy counterclaim on the publication of a list of sound recordings attached to a pleading to this lawsuit, her counterclaim is not actionable because it is barred by the absolute privilege for judicial communications.<sup>7</sup>

**VII. Defendant’s Counterclaim (Count 5) for Declaratory Relief Should Be Dismissed Because It Fails to Comport With the Purpose of the Declaratory Judgment Act.**

As discussed above, the Court has discretion to determine whether or not to exercise jurisdiction under the Declaratory Judgment Act. *See Alpatronix, Inc. v. Pinnacle Micro, Inc.*, 814 F. Supp. 455, 456 (M.D.N.C. 1993). Declaratory judgment should not be used to “try a controversy by piecemeal, or to try particular issues without settling the entire controversy.” *Id.* (internal quotations removed) (dismissing a declaratory judgment action as “an improper use of the declaratory judgment procedure” where adjudication would not settle the entire controversy

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<sup>7</sup> Note that this claim also suffers from the same fatal inconsistency as Defendant’s CFAA claim. Specifically, Defendant cannot simultaneously allege (i) that she was not distributing Plaintiffs’ copyrighted works on a peer-to-peer network, and (ii) that Plaintiffs “printed off pages listing the personal and private files” from Defendant’s computer shared folder. *See Hamilton*, 270 F.3d at 782.

between the parties). Courts do not make declarations in advisory settings. *Prudential Prop. & Cas. Ins. Co. v. Beaufort*, 263 F. Supp. 2d 982, 986 (E.D. Pa. 2003) (dismissing declaratory judgment action because courts “are not in business to try to anticipate the allegations and claims that [a party] *may* assert in another lawsuit” (emphasis original)).

The primary purpose of the Declaratory Judgment Act is “*to avoid accrual of avoidable damages* to one not certain of his rights and to afford [her] an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.” *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165, 1167-68 (7th Cir. 1969) (emphasis added); *see also Crown Cork & Seal Co. v. Borden, Inc.*, 779 F. Supp. 33, 36 (E.D. Pa. 1991) (rejecting proposition that “potential litigation costs” in pending lawsuit constitute the type of “accruing damage” under the Declaratory Judgment Act and suggesting that appropriate mechanisms for relief include affirmative defenses or recouping costs under Rule 11) . As the Seventh Circuit found, a declaratory judgment claim which attempts to “try issues or determine the validity of defenses in pending cases” is improper because it would “substitute for the traditional procedures” for adjudication of pending claims. *Cunningham Bros.*, 407 F.2d at 1168.

Courts have refused to entertain declaratory judgment actions on issues that have already been asserted as affirmative defenses in a lawsuit because “the Court will reach all aspects of [those issues] if necessary.” *MGM Studios, Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213, 1226 (C.D. Cal. 2003) (holding that, where an affirmative defense has been asserted, “[s]eparately litigating that defense in a declaratory posture would not serve the purposes of declaratory relief”); *see also Federal Deposit Ins.*, 770 F. Supp. at 500; *Lee*, 81 F. Supp. at 854. The Declaratory Judgment Act is not a vehicle “for establishing the legal relations between declaratory defendants and ‘all the world.’” *Grokster*, 269 F. Supp. 2d at 1226.

Here, Defendant states that the basis of her declaratory judgment counterclaim is to avoid any further alleged harassment “in the form of ‘fishing expeditions’ into her private life by examinations of her [computer] hard drive, depositions of herself and family, and other debilitating pressures of a lawsuit.” (Am. Counterclms. ¶ 73.) Defendant purports to seek declaratory relief on a host of issues including: (i) Plaintiffs’ method of detecting infringement and identifying infringers (Am. Counterclms. ¶¶ 73(a) through (c)); (ii) alleged misjoinder by Plaintiffs (*id.* ¶ 73(d)); (iii) alleged failure to join all known, indispensable parties by Plaintiffs (*id.* ¶ 73(e)); (iv) bar from enforcing copyright claims due to the doctrines of Fair Use, Waiver, and/or Laches (*id.* ¶ 73(f)); and (v) a challenge to the constitutionality of Section 504(c) to the Copyright Act (*id.* ¶ 73(g)).

Defendant’s counterclaim (Count 5) should be dismissed or stricken because Defendant’s attempted use of the Declaratory Judgment Act is improper. First, Defendant fails to allege the accrual of any valid, avoidable damages. Defendant supports her counterclaim by stating she wants to avoid “further harassment” from defending this lawsuit, including depositions and the pressures of a lawsuit. (Am. Counterclms. ¶ 73.) This rationale does not provide a valid basis under the Declaratory Judgment Act because courts have specifically rejected potential litigation costs as the type of accrual of damages required under the Act. *See Crown Cork & Seal*, 779 F. Supp. at 36. Furthermore, to the extent that Defendant seeks to stop or curtail discovery in this case, the proper procedural mechanism is to move for a protective order under the Federal Rules of Civil Procedure and not to seek a preemptive advisory opinion from the Court.

Second, Defendant’s counterclaim attempts to use the Declaratory Judgment Act to substitute for the traditional procedures for adjudication of pending claims. *See Cunningham Bros.*, 407 F.2d at 1168. Defendant’s requested relief in her counterclaim (Am. Counterclms. ¶¶

73(a) through (g)) reads like a collection of affirmative defenses. In fact, Defendant has merely converted many of the affirmative defenses asserted in her Amended Answer as claims for declaratory relief: (i) failure to join an indispensable party (*id.* ¶ 73(e)) appears as Defendant’s Second Affirmative Defense (Am. Ans. at 7 ¶ 2); (ii) the constitutional challenge of Section 504(c) to the Copyright Act (Am. Counterclms. ¶ 73(g)) appears as Defendant’s Third Affirmative Defense (Am. Ans. at 7-9 ¶¶ 3-14); and (iii) the assertion that Plaintiffs cannot enforce copyright claims due to the doctrines of Laches, Waiver, and/or Fair Use (Am. Counterclms. ¶ 73(f)) appears, respectively, as Defendant’s Fourth, Eighth, and Tenth Affirmative Defenses (Am. Ans. at 9 ¶ 15; *id.* at 10 ¶ 19; *id.* at 10 ¶ 21). This recitation of defenses as alleged counterclaims for declaratory relief is an improper use of the Declaratory Judgment Act and a waste of judicial resources since “the Court will reach all aspects of [those issues] if necessary.” *Grokster*, 269 F. Supp. 2d at 1226. Furthermore, Defendant’s claims related to Plaintiffs’ method of detecting infringement and identifying infringers (Am. Counterclms. ¶¶ 73(a) through (c)) already provide the basis for several of Defendant’s other counterclaims (Am. Counterclms. Counts 2, 3, and 4). Because Defendant is attempting to use the Declaratory Judgment Act only to replicate her defenses to Plaintiffs’ claim of infringement, this purported counterclaim should be dismissed.

### **CONCLUSION**

For all of the above reasons, Plaintiffs ask this Court to dismiss each of Defendant’s counterclaims, and for such other relief as the Court deems just and necessary.

Respectfully submitted,

Dated: August 5, 2008

By: s/ Kevin M. Kuhlman

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 5, 2008, a copy of the foregoing **MOTION TO DISMISS DEFENDANT'S AMENDED COUNTERCLAIMS** was filed with an electronic copy automatically being routed via the ECF filing system to the following counsel of record:

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*s/ Kevin M. Kuhlman*

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