

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

MOTOWN RECORD COMPANY,	:	
L.P. a California limited partnership;	:	
UMG RECORDINGS, INC., a	:	
Delaware corporation; SONY BMG	:	CIVIL ACTION NO. 2:07-cv-04702-AB
MUSIC ENTERTAINMENT, a	:	
Delaware general partnership;	:	
ZOMBA RECORDING LLC, a	:	
Delaware Limited Liability	:	
Company; and ELEKTRA	:	
ENTERTAINMENT GROUP INC.,	:	
a Delaware corporation,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	DOCUMENT FILED ELECTRONICALLY
	:	
JOHN C. KOVALCIK,	:	JURY TRIAL DEMANDED
	:	
Defendant.	:	

**AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND
COUNTERCLAIMS OF JOHN C. KOVALCIK**

Defendant JOHN C. KOVALCIK ("Kovalcik") submits his amended answer to the initial complaint, affirmative defenses and counterclaims as follows.

GENERAL DENIAL AND ANSWER

Kovalcik generally denies each and every allegation in the Complaint that requires a response except those items specifically admitted herein.

1. Admitted that this Court has subject matter jurisdiction; denied as to all other allegations of paragraphs 1-2 of the Complaint.
2. Paragraph 3 admitted that Defendant is physically in this District during the school year but denies that Defendant was in this District on the one day of Plaintiffs allege infringement. Defendant denies the allegations of infringement and denies that this District has personal jurisdiction over him. Defendant is a resident of the State of Massachusetts which Plaintiffs realize because they served their complaint upon Defendant's Father at the family home in the State of Massachusetts.
3. Kovalcik is without knowledge as to the allegations of paragraphs 4-8, 11-13, and 17 of the Complaint, and therefore denies them.
4. Kovalcik denies that he was in Philadelphia, Pennsylvania on the date of the alleged infringement.
5. Admitted that paragraph 10 restates Plaintiffs' prior allegations. Substantive responses thereto are restated and incorporated by reference.
6. Kovalcik denies the allegations of paragraphs 14-16 and 18-20.

AFFIRMATIVE DEFENSES

1. Plaintiffs' claims fail for lack of subject matter jurisdiction.
2. Plaintiffs have failed to allege the existence of a valid copyright registration(s) as required by 17 U.S.C. § 411(a). No registration certificates have been provided nor have any registration numbers been identified.
3. Plaintiffs' Complaint fails to state a claim upon which relief can be granted, because it fails to identify any specific acts of infringement. The Plaintiffs neither observed downloading nor distribution activity.
4. Plaintiffs' claims are barred by the doctrine of fair use.
5. Plaintiffs' claims are barred by license.
6. Plaintiffs' claims are barred by 17 U.S.C. § 512.
7. Plaintiffs' claims are barred by 17 U.S.C. § 1008.
8. Plaintiffs' claims are barred by the equitable defense of copyright misuse based upon doctrine of unclean hands.
9. Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.
10. Plaintiffs' claims are barred, in whole or in part, by the doctrine of waiver
11. Plaintiffs' claims are barred, in whole or in part, by the doctrine of estoppel.
12. Plaintiffs failed to mitigate their damages, if any.

13. Defendant asserts that the statutory damages sought by Plaintiffs are unconstitutionally excessive as applied. Upon information and belief the actual damages to Plaintiffs would be approximately \$1.70 per song. Statutory damages are recognized as punitive in nature and should bear a reasonable relation to the alleged infringement.
14. Plaintiffs' suit is against the wrong party. Kovalcik was not in the Commonwealth of Pennsylvania, nor was he using his computer on the date alleged. Kovalcik's school internet login passwords were saved on his computer and it was accessible by anyone in his fraternity house on the date Plaintiffs' allege infringement.
15. Plaintiffs' claims are barred by the applicable statute of limitations.
16. Plaintiffs have not provided any evidence linking Defendant to the alleged screen shot, nor will they be able to because Kovalcik was not in the Commonwealth of Pennsylvania on that date.
17. Plaintiffs' claims are barred because any alleged act giving rise to liability was committed by third parties beyond Defendant's control and without Defendant's knowledge, including the "online media distribution system" identified in Plaintiffs' complaint.
18. Plaintiffs' claims are barred because they have failed to join indispensable parties, namely, the "online media distribution system" referred to in the Complaint.

19. Plaintiffs' claims are barred by settlement. Upon information and belief Plaintiffs have already entered into a settlement with the makers of the "online media distribution system" mentioned in the Complaint, which settlement fully compensated them for any damages caused by use of the "online media distribution system". Although Kovalcik denies the factual and legal allegations in Plaintiffs' Complaint, such settlement bars Plaintiffs' ability to recover damages from Kovalcik and full satisfies any liability from the alleged infringement.
20. Plaintiffs' claim for injunctive relief is barred because Plaintiffs have an adequate remedy at law.
21. Plaintiffs' claims are barred by federal law prohibiting unfair and deceptive trade practices.
22. Defendant is entitled to an offset for damages caused by Plaintiffs' illegal activity.
23. Plaintiffs' are not entitled to statutory damages of attorney's fees under 17 U.S.C. § 412.
24. Defendant is entitled to attorney's fees pursuant to 17 U.S.C. § 505.
25. Defendant specifically denies all allegations, if any, and conclusions of law, if any, to which he did not specifically reply in the Answer to Plaintiffs' Complaint.

26. Defendant reserves his right to plead additional defenses that may be identified during investigation and/or course of discovery.

COUNTERCLAIMS

FACTS COMMON TO ALL COUNTERCLAIMS

1. This court has jurisdiction for counterclaims in the instant suit, if the court finds that it has personal jurisdiction over Defendant.
2. Defendant Kovalcik is physically in the Commonwealth of Pennsylvania during the school year, otherwise he is a resident of Massachusetts and in fact Plaintiffs served their complaint upon Defendant's father in the State of Massachusetts.
3. Plaintiffs are corporate entities purporting to hold a copyright ownership in certain musical works and/or musical sound recordings.
4. Plaintiffs, through various concerted efforts and cartels, control or attempt to control the channels of creation, distribution, and sale of musical works throughout the United States and the world. They are not artists, songwriters, or musicians. They did not write or record the songs. They have not demonstrated copyright registration or ownership.
5. For a number of years, a group of large, multinational, multi-billion dollar record companies, including these Plaintiffs, have been abusing the federal court judicial system for the purpose of waging a public relations

and public threat campaign targeting digital file sharing activities. As part of this campaign, these record companies hired unlicensed private investigators – in violation of various state laws – who receive a bounty to invade private computers and private computer networks in an attempt to obtain information – in the form of Internet Protocol (“IP”) addresses. These unlicensed investigators perform these investigations in Pennsylvania and other states.

6. Using information obtained from this illegal invasion, the record companies have filed so-called “John Doe” lawsuits – reportedly against more than 15,000 anonymous “John Does.” Routinely, the record companies target university students who, because of their financial circumstances, cannot defend themselves. The “John Doe” lawsuits are filed for the sole purpose of activating the discovery powers of the court system – notably, the subpoena power – to obtain records from Internet service providers to attempt to connect IP addresses to the names of individual account holders allegedly using those IP addresses at the time of the alleged invasion. However, service providers have no way of knowing the identities of the person or persons who may be using the computer or computer network at the time the records companies invade it. The record companies cannot verify what computer was in fact

invaded and the record companies are aware that the invasions have often resulted in mistaken identifications.

7. After harvesting the names of account holders through these subpoenas, the record companies then provide the personal information to their agent, the "Settlement Support Center," which engages in deceptive and illegal practices aimed at extorting money from people allegedly identified from the secret lawsuits. Most of the people subjected to these secret suits do not even know that they have been sued until a demand for payment is made by lawyers for the record companies or by the Settlement Support Center operatives.
8. The Settlement Support Center is a company organized for the sole purpose of contacting prospective defendants and demanding that they pay thousands of dollars each to avoid the prospect of a federal lawsuit against them. This demand takes no account of the merits of any prospective claim against the putative defendant, but instead relies upon the inherent inequality in resources and litigation power between Plaintiffs and their individual victims.
9. As part of this campaign of extortion, Plaintiffs enhance the intimidation factor by actually filing suit in a number of instances. These suits are designed to attract media attention, and often do, as stories emerge of Plaintiffs' suits against the elderly, disabled, technologically clueless,

homeless and other vulnerable victims. Many of these victims have no idea how to operate a computer, let alone how to install and use peer-to-peer networking software to exchange music they would not likely be listening to anyway. Actual innocence is rarely a consideration to Plaintiffs.

10. The instant suit is just one example of the Plaintiffs' extortion campaign. As a result, it is but one affirmative action out of thousands taken by the Plaintiffs in furtherance of their criminal extortion campaign.
11. Plaintiffs' litigation campaign, and its preceding extortionate demands and illegal investigations, are part of a concerted pattern of sham litigation.
12. Plaintiffs' true purpose is not to obtain the relief claimed in its sham litigation, but to intimidate, harass, and oppress the Defendants and other users of computer networks.
13. Upon information and belief, Plaintiffs have filed suit against more than thirty thousand individuals alleging virtually identical claims using the same boilerplate complaint.
14. Kovalcik was not physically present in the Commonwealth of Pennsylvania on the date and at the time Plaintiffs allege infringement.
15. Plaintiffs have not observed any specific instance of Kovalcik illegally downloading any sound recording.

16. Plaintiffs have not observed any specific instance of Kovalcik illegally uploading any sound recording.
17. Plaintiffs have not observed any specific instance of Kovalcik illegally distributing any sound recording to anyone not authorized to receive it.
18. Kovalcik did not authorize any person to obtain information from his computer via the “online media distribution system” alleged by Plaintiffs.
19. Kovalcik did not configure any computer to “share” files.
20. Neither Plaintiffs nor their agents contacted Kovalcik to obtain his permission to obtain information from his computer.
21. Neither Plaintiffs nor their agents contacted any person with authority to obtain permission for Plaintiffs to invade the computer identified in Plaintiffs’ Complaint.
22. Kovalcik has committed no infringement.

COUNT I – TRESPASS TO CHATTELS

23. Kovalcik re-states and incorporates herein the allegations identified as “Facts Common to All Counterclaims.”
24. As an investigative precursor to their sham litigation, Plaintiffs have accessed a computer system without authorization and obtained information from that computer system in violation of Kovalcik’s rights.

25. Plaintiffs intentionally and without authorization, intruded into a personal computer to obtain information.
26. Plaintiffs' unlawful intrusion deprived Kovalcik of the use and possession of the computer.
27. Plaintiffs proximately caused injury as a result.
28. Kovalcik is entitled to recover those damages from Plaintiffs.

COUNT II – COMPUTER FRAUD AND ABUSE (18 U.S.C. § 1030)

29. Kovalcik re-states and incorporates herein the allegations identified as “Facts Common to All Counterclaims.”
30. As an investigative precursor to their sham litigation, Plaintiffs have accessed a computer system without authorization and obtained information from that computer system in violation of Kovalcik's rights.
31. In violation of 18 U.S.C. § 1030, Plaintiffs have intentionally accessed a protected computer without authorization, and as a result of such conduct, caused damage to Kovalcik in an amount exceeding \$5,000.00.
32. In violation of 18 U.S.C. § 1030, Plaintiffs have knowingly and with intent to defraud, accessed a protected computer without authorization, or exceeding any authorized access, and by means of that access furthered the intended fraud and obtained information of value.

33. Kovalcik is entitled to recover damages from Plaintiffs, along with injunctive relief for such loss that cannot be remedied by an action at law, and to prevent further unauthorized access.

COUNT III – ABUSE OF PROCESS

34. Kovalcik re-states and incorporates herein the allegations identified as “Facts Common to All Counterclaims.”

35. Plaintiffs filed a “John Doe” action against Kovalcik.

36. Plaintiffs filed their “John Doe” action for the sole purpose of obtaining an *ex parte* subpoena to force his university to disclose federally-protected educational information about him.

37. Plaintiffs knew that their flawed manner of “investigation” (1) could not identify who was engaged in any infringing activity, (2) could not determine whether any files contained copyrighted sound recordings and (3) had led on numerous to mistaken identifications of “infringers.”

38. At the same time Plaintiffs maintained their “John Doe” action, they used it to harass and threaten Kovalcik to surrender money in the form of settlement.

39. Plaintiffs pursued their “John Doe” action for an illegitimate purpose, rather than the proper purpose of a civil action – namely, to seek

judgment against another party, rather than abuse the court system as a surrogate investigative agency.

40. Kovalcik has suffered damage as a result of the Plaintiffs' abuse of process and is entitled to recover those damages from Plaintiffs.

COUNT IV – DEFAMATION OF CHARACTER

41. Kovalcik re-states and incorporates herein the allegations identified as "Facts Common to All Counterclaims."

42. Plaintiffs made materially false representations to the University of Pennsylvania thereby exposing Kovalcik to disciplinary action.

43. The Plaintiffs have listed certain recordings that not only would Kovalcik never play but if connected to him would subject him to embarrassment and ridicule.

44. Kovalcik has suffered damage as a result of Plaintiffs' defamatory statements and is entitled to recover damages plus attorneys' fees and court costs from Plaintiffs.

COUNT V – DECLARATORY JUDGMENT

45. Kovalcik re-states and incorporates herein the allegations identified as "Facts Common to All Counterclaims."

46. Plaintiffs have a pattern and practice that, once their sham litigation has commenced, they will voluntarily dismiss, without prejudice, claims against defendants who contest them.
47. Plaintiffs' practice of dismissing claims without prejudice, after accusing defendants of civil and criminal wrongdoing, deprives those defendants of a final judicial resolution of the matters that Plaintiffs have brought into this Court's concern and the public eye.
48. An actual case and controversy exists between Plaintiffs and this defendant.
49. Kovalcik is entitled to a positive judicial declaration of non-infringement along with costs and attorney's fees.

COUNT VI – CIVIL CONSPIRACY

52. Kovalcik re-states and incorporates herein the allegations identified as "Facts Common to All Counterclaims."
53. Plaintiffs have conspired among themselves and with others to commit illegal acts and to use the illegal methods described in Counts I, II, III, IV, and V of these Counterclaims.
54. Plaintiffs have conspired among themselves and with others to commit the following illegal acts to further the ends of their conspiracy: (a) unauthorized access to a protected computer system, in interstate

commerce, for the purpose of obtaining information in violation of 18 U.S.C. § 1030; and (b) extortion and attempted extortion in violation of the Hobbs Act, 18 U.S.C. 1951.

55. Plaintiffs have taken numerous overt acts to further the conspiracy.
56. Plaintiffs have acted in conscious disregard of and indifference to Kovalcik's rights, and intending to cause him harm.
57. Kovalcik has been damaged by the acts of the conspiracy and is entitled to recover those damages from Plaintiffs jointly and severally.
58. Kovalcik is also entitled to recover punitive damages from Plaintiffs, jointly and severally.

JURY TRIAL DEMAND

Kovalcik asserts his rights under the Seventh Amendment to the U.S. Constitution and demands, in accordance with Federal Rule of Civil Procedure 38, a trial by jury on all counts so triable.

PRAYER FOR RELIEF

WHEREFORE, Kovalcik demands relief as follows:

1. Judgment against Plaintiffs for all damages in an amount to be proven at trial;
2. Judgment for punitive damages, as awarded by the jury;

3. Declaratory judgment of non-infringement;
4. Injunctive relief, pursuant to 18 U.S.C. 1030 to prevent further violations of law and to remedy those losses for which no adequate remedy at law exists;
5. Costs of suit, including attorneys' fees to the maximum extent allowed under law; and,
6. Such other relief as this Court deems required by justice.

Dated: May 29, 2008

By: /s/ Richard J. Bove
Richard J. Bove (No. 45289)
Hausch & Bove, LLP
1828 Spruce St., Suite 400
Philadelphia, PA 19103
Telephone 215.545.6006
Facsimile 215.732.7859
Richard@bovanova.com

COUNSEL FOR DEFENDANT
JOHN C. KOVALCIK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 29, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Jennifer K. Welsh, Counsel for Plaintiffs

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

Dated May 29, 2008

By: s/ Richard J. Bove
Richard J. Bove, PAB # 45289
Hausch & Bove, LLP
1828 Spruce St., Suite 400
Philadelphia, PA 19103
215.545.6006
Fax: 215.732.7859
Richard@bovanova.com