

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ATLANTIC RECORDING)
CORPORATION, a Delaware)
corporation; BMG MUSIC, a New York)
general partnership; VIRGIN RECORDS)
AMERICA, INC., a California)
corporation; CAPITOL RECORDS,)
INC., a Delaware corporation; SONY)
BMG MUSIC ENTERTAINMENT, a)
Delaware general partnership; and UMG)
RECORDINGS, INC., a Delaware)
corporation,)

Case No. 4:06-cv-01708-CEJ

Plaintiffs,)

v.)

JENNA RALEIGH,)

Defendant.)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE, OR, IN THE
ALTERNATIVE, MOTION TO DISMISS AMENDED COUNTERCLAIMS**

Plaintiffs respectfully submit this Memorandum in Support of their Motion to Strike and, in the alternative, to Dismiss Defendant's Amended Counterclaims. In support, Plaintiffs state the following:

INTRODUCTION

Defendant's Amended Counterclaims constitute her second attempt to hold Plaintiffs liable for their legitimate efforts to enforce their copyrights. Defendant's amended counterclaims are not only improper and fail to state claims for relief, but are contrary to the public policy desire to allow copyright owners to enforce their rights. First, Defendant failed to seek leave to amend her counterclaims in violation of the clear requirements of Fed. R. Civ. P. 15(a)(2). Therefore, her amended counterclaims should be stricken in their entirety. Second, the Court should strike Defendant's Amended Counterclaims I-V, and the factual allegations

upon which they are predicated, as these counterclaims were previously dismissed in their entirety and it is improper for Defendant to reassert them.

Third, Plaintiffs' amended counterclaims fail to state claims upon which relief can be granted, as they fail to allege necessary elements, do not allege any cognizable damages, and attempt to punish Plaintiffs for their legitimate efforts to enforce their copyrights. *See Kebodeaux v. Schwegmann Giant Super Markets, Inc.*, 33 U.S.P.Q.2d 1223, 1224 (E.D. La. 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").

Plaintiffs anticipate that Defendant will attempt to defeat Plaintiffs' Motion to Dismiss by relying primarily on two decisions by Judge Richard A. Lazzara, in the Middle District of Florida, *UMG Recordings, Inc. v. Del Cid*, No. 8:07-CV-368-T-26 (TGW) (M.D. Fla. Sept. 19, 2007) (hereinafter "Del Cid") and *Atlantic Recording Corp., et al. v. Boyer*, No. 8:08-cv-00147-RAL-EAJ (M.D. Fla. May 6, 2008) (hereinafter "Boyer"). In *Del Cid*, the defendant was permitted to bring claims for trespass to chattels, violation of the CFAA, deceptive and unfair trade practices and civil conspiracy. *Del Cid.*, at 7 (attached as Exhibit A). Then in *Boyer*, based solely on the court's prior decision in *Del Cid*, the defendant was permitted to bring claims for trespass to chattels, violation of the CFAA, deceptive and unfair trade practices, abuse of process and civil conspiracy. *See Boyer*, at 1-2 (attached as Exhibit B). Plaintiffs, however, believe that not only are Judge Lazzara's decisions in *Del Cid* and *Boyer* not binding on this court, but they were also incorrectly decided. Moreover, as set forth herein, there is extensive case law from around the country in which similar counterclaims have been regularly dismissed as improper.

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., et al. v. Heslep, 2007 U.S. Dist. LEXIS 35824, at *15-16 (N.D. Texas May 16, 2007) (attached as Exhibit C).

This Court has already rejected Defendant's meritless efforts to hold Plaintiffs liable for their legitimate efforts to enforce their copyrights. Plaintiffs respectfully request that the Court again hold that Defendant's efforts are without merit and strike and/or dismiss Defendant's amended counterclaims.

PROCEDURAL BACKGROUND

On November 28, 2006, Plaintiffs filed their Complaint, seeking redress for the infringement of their copyrighted sound recordings pursuant to the Copyright Act, 17 U.S.C. § 101 *et seq.* On September 5, 2007, Defendant filed an Answer and Counterclaims against Plaintiffs. "Defendant's counterclaims [were] based on Plaintiffs' investigation of suspected copyright infringement, the filing of a lawsuit against her claiming infringement, and communicating their settlement offer and threatening further litigation proceedings." (Order, Doc. 46, p. 5). Defendant alleged Plaintiffs violated RICO (18 U.S.C. § 1962 (c) and (d)) and committed fraudulent misrepresentation, a prima facie tort, and conspiracy. Plaintiffs moved to

dismiss the counterclaims on October 26, 2007. (Docs. 25 and 26). On August 18, 2008, the Court granted Plaintiffs' Motion, dismissed the counterclaims in their entirety, and denied Defendant's request for leave to file amended counterclaims. (Doc. 46). In its ruling, the Court held that, as a matter of law, Plaintiffs' litigation activities do not constitute predicate acts for purposes of RICO, did not constitute sham litigation, and are protected as a matter of law by the *Noerr-Pennington* doctrine. (*Id.*)

On November 17, 2008, without seeking leave of Court, Defendant filed an Amended Counterclaim for Individual and Class Action Relief. (Doc. 52). In her Amended Counterclaims, Defendant improperly re-pleads – almost verbatim – the previously dismissed counterclaims and predicate factual allegations. In addition, Defendant alleges that Plaintiffs, through their investigation of copyright infringement, committed trespass to chattel, and Computer Fraud and Abuse (18 U.S.C. § 1030), and that they conspired in doing so. (Doc. 52).

BACKGROUND

In the ordinary course of investigating online copyright infringement, on December 3, 2004, MediaSentry located an individual using the screen name “**jenaRal@KaZaA**” on the KaZaA file sharing program to engage in copyright infringement on a massive scale. MediaSentry logged onto the P2P network in the same fashion as any Internet user, then detected the infringement by viewing the files that were being distributed to other users. In observing the infringement, MediaSentry uses the same functionalities that are built into P2P programs that any user of the software can utilize on the network.¹ In fact, MediaSentry does not do anything that other users of a P2P network cannot do; the only information it obtains is the information that is available to anyone who logs onto a P2P network.

¹ See *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1106 n.4 (D. Kan. 2000) (explaining detection through file-sharing program); *Heslep*, 2007 U.S. Dist. LEXIS 35824 (Exhibit A).

MediaSentry found over 1300 audio files being distributed, for free, from the computer's "shared" folder to the millions of people who use similar P2P networks. MediaSentry further ascertained that the sound recordings were being distributed from Internet Protocol ("IP") address 12.218.124.35.

MediaSentry downloaded and listened to a representative sample of the music files that were being distributed and was able to confirm that the sampled files were illegal copies of sound recordings whose copyrights are owned by Plaintiffs.

Subsequently, pursuant to a federal subpoena, Mediacom Communications Corporation ("Mediacom") identified IP address 12.218.124.35 as being associated with an Internet account belonging to Jenny Kopp. After Plaintiffs contacted Ms. Kopp, however, Ms. Kopp signed a sworn affidavit disavowing any involvement in the copyright infringement at issue. *See* Affidavit of Jenny Kopp, Att. No. 1 to Doc. No. 26. Additionally, Ms. Kopp, through her counsel, identified Jenna Raleigh as the individual responsible for the computer through which the infringement occurred. *See* June 10, 2004 Letter of Gregory White, Att. No. 2 to Doc. No. 26. Based on the identification of Defendant as the individual responsible for the computer, as well as on the obvious match between Defendant's name, **Jenna Raleigh**, and the username, **jenaRal@KaZaA**, Plaintiffs brought the present action against Defendant.

ARGUMENT

I. DEFENDANT'S AMENDED COUNTERCLAIMS SHOULD BE STRICKEN IN THEIR ENTIRETY FOR FAILURE TO SEEK LEAVE TO AMEND UNDER RULE 15(a).

Once the initial pleadings have closed, a party may amend its pleadings only with leave of court or written consent of the adverse party. Fed. R. Civ. P. 15(a); *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 715 (8th Cir. 2008) ("[W]here an amendment is not sought 'as a

matter of course’—as defined by the Rule—‘a party may amend its pleading only with the opposing party’s written consent or the court’s leave.’”) (citations omitted).

Here, Defendant neither sought leave of court nor obtained Plaintiffs’ consent before filing her Amended Counterclaims. For this reason alone, her Amended Counterclaims should be stricken. *See Id.* Moreover, the Court denied Defendant’s request to amend her counterclaims in its Order dismissing Defendant’s first set of counterclaims on August 18, 2008. (Doc. No. 46, p. 12.) (“Because Defendant has not indicated the substance of any proposed amendments, the court will deny the request”). As such, Defendant’s Amended Counterclaims should be stricken.

II. DEFENDANT’S AMENDED COUNTERCLAIMS I–V SHOULD BE STRICKEN BECAUSE THE COURT HAS ALREADY DISMISSED THESE COUNTERCLAIMS.

In her Amended Counterclaims I-V, Defendant re-alleges counterclaims which were dismissed by the Court on August 18, 2008. *See* Doc. No. 46. As these counterclaims, and the factual allegations on which they were based, have already been dismissed, they are redundant, immaterial, and impertinent to this case and should be stricken under Rule 12(f).

The Court may strike from a pleading “any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f); *Chrysler Corp. v. Carey*, 1997 U.S. Dist. LEXIS 23819, *19 (E.D. Mo. March 13, 1997). In striking pleadings under Rule 12(f), the Court is entitled to “liberal discretion.” *Assoc. Indemnity Corp. v. Small*, 2007 U.S. Dist. LEXIS 19158, *5 (W.D. Mo. March 19, 2007). Claims and defenses previously rejected by the court should be stricken. *FTC v. Hayes*, 1997 U.S. Dist. LEXIS 7883, at * 1-2 (E.D. Mo. May 7, 1997) (striking allegations and defenses previously rejected by court). Similarly, allegations and claims which have no possible bearing on the subject matter of the litigation should be stricken. *Haynes v. BIS*

Frucon Eng'g, Inc., 2008 U.S. Dist. LEXIS 80762, at *2 (E.D. Mo. Oct. 10, 2008) (striking claim for punitive damages under ERISA); *Resolution Trust Corp. v. Gibson*, 829 F. Supp. 1103, 1107 (W.D. Mo. 1993) (striking affirmative defense of comparative negligence because it is not recognized by Missouri law).

Here, Defendant re-pleads – almost verbatim – the same factual allegations and counterclaims that the Court dismissed by its August 18, 2008 Order. (Doc. No. 46); *Compare* Doc. No. 17 (pp. 8 to 28) *with* Doc. No. 52 (pp. 3 to 27). Once a claim is dismissed, it is no longer part of the pleadings.² These previously dismissed factual allegations and counterclaims confuse the issues and prejudice Plaintiffs because they are forced “to sift through the allegations to ascertain the relevant material” to any new claims that Defendant purports to raise. *Hardin*, 188 F.R.D. at 512. Moreover, Defendant’s “unnecessary prolixity . . . places an unjustified burden on the Court . . . because [it too] is forced to select the relevant material from [Defendant’s] mass of verbiage.” *Id.* at 511. Accordingly, Amended Counterclaims I-V, and the re-pled factual allegations upon which counterclaims I-V are based (§§ 11, 13-16, 18-26, 28-32, 34-45, 47, 50-69, 77-78, 86-87, 89-91), should be stricken.

III. DEFENDANT’S AMENDED COUNTERCLAIMS VI-VIII SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

A. STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court must accept all of the claimant’s material allegations as true and must construe all allegations in the light most favorable to the claimant. *See Pendleton v. St. Louis County*, 178 F.3d 1007 (8th Cir.

² Defendant justifies re-pleading the claims already dismissed by the Court “to preserve such claims for appeal.” (Doc. No. 51 at ¶ 3.) Defendant does not – and indeed could not – cite to a Federal Rule or case law that requires dismissed counterclaims to be reasserted to preserve them for appeal because none exist. Defendant does not need to re-plead the claims in order to preserve them for appeal.

1999) (citing *Doe v. Norwest Bank Minn., N.A.*, 107 F.3d 1297, 1303-04 (8th Cir. 1997) (reciting the standard of review for a motion to dismiss)). However, conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim. *Ludditt-Poehl v. Capital One Auto Fin., Inc.*, 2007 U.S. Dist. LEXIS 61444 (E.D. Mo. 2007) (citing *Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997)). 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).

B. DEFENDANT’S AMENDED COUNTERCLAIM FOR TRESPASS TO CHATTELS (COUNT VI) SHOULD BE DISMISSED BECAUSE DEFENDANT HAS NOT PLED THE ELEMENTS OF THE CLAIM.

A “trespass to chattels involves intentional conduct on the part of one person which interferes with the use of personal property in the possession of another without justification.” *Foremost Ins. Co. v. Pub. Serv. Comm’n of Missouri*, 985 S.W.2d 793, 796-97 (Mo. App. 1998); *see also* RESTATEMENT 2D TORTS § 218 (“One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if, (a) he dispossesses the other of the chattel, or (b) the chattel is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the chattel for a substantial time, or (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.”); *Pearl, LLC v. Standard I/O, Inc.*, 257 F. Supp. 2d 326, 354 (D. Me. 2003) (granting summary judgment on trespass claim where there was no evidence that allegedly unauthorized access to computer network “impaired its condition, quality or value”).

None of the elements of trespass to chattels appear on the face of Defendant’s counterclaim, nor can they be derived from her pleading. Defendant does not and cannot claim that Plaintiffs ever dispossessed Defendant of her computer, or that Plaintiffs deprived Defendant

of the right to possess or use her computer files when MediaSentry detected the infringement by using the same KaZaA software functionalities used by individuals engaged in file swapping.

Elektra Entm't Group Inc. v. Santangelo, No. 7:06-cv-11520, slip op. at 12 (S.D. N.Y. March 4, 2008) (denying motion to add a counterclaim of trespass to chattels in similar copyright infringement case because “possession is a necessary element of a claim” and conclusory allegations regarding “use and possession” and injury were insufficient) (attached as Exhibit D).

Defendant’s entire claim of Trespass to Chattels is based on Defendant’s contention that “Plaintiffs have accessed the computer system of Raleigh and the members of the proposed Plaintiffs’ Class without authorization and obtained information from that computer system in violation of their rights.” (Amended Counterclaim at ¶ 124.) However, contrary to Defendant’s allegations, Plaintiffs simply detected Defendant’s copyright infringement, as any other user of a peer-to-peer network could have done, through publicly shared files. *See, e.g., Arista Records, L.L.C., et al. v. Tschirhart*, 05-CV-372-OLG, slip op. at 7 (W.D. Tex. May 24, 2006) (holding that “there was no ‘wrongful interference’ because plaintiffs’ investigators did not enter the private portion of her computer, but only accessed all publicly shared files.”) (attached as Exhibit E); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 267 (D.D.C. 2003) (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.”); *see also Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, 917 (Fla. 1976) (consent, which may be implied by custom, usage or conduct, “is an absolute defense to an action for trespass.”) Indeed, Defendant herself admits that “peer-to-peer networks are public and the information on them is available to anyone.” (Amended Counterclaim at ¶ 18.)

Defendant also fails to adequately allege any legally cognizable harm “to some person or thing in which [he] has a legally protected interest.” RESTATEMENT 2D TORTS § 218. Defendant does allege that Plaintiffs “proximately caused injury as a result” of the alleged trespass. (Amended Counterclaims at ¶ 127.) However, this is little more than a “formulaic recitation of the elements,” *Twombly*, 127 S. Ct. at 1964-65, that falls far short of adequately pleading a claim of trespass to chattels. Moreover, “it appears unlikely that automated data collection services threaten to overwhelm [her] personal computer. In short, Defendants have merely alleged an electronic communication that neither damages the recipient computer system nor impaired its functioning . . . such conduct is not actionable under trespass to chattels.” *Atlantic Recording Corp. v. Serrano*, No. 07-CV-1824 (S.D. Cal. Dec. 28, 2007) (attached as Exhibit F). Defendant also does not allege how the computers were accessed, what was accessed or what rights of Defendant’s were actually violated.

Defendant’s conclusory allegations of trespass to chattels fail to raise Defendant’s “right to relief above the speculative level.” *Id.* Accordingly, Defendant’s trespass to chattels counterclaim (Count VI) should be dismissed.

C. DEFENDANT’S AMENDED COUNTERCLAIM FOR VIOLATION OF THE COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C. § 1030 (COUNT VII) SHOULD BE DISMISSED BECAUSE IT WAS NOT PROPERLY PLED.

Defendant’s Count VII alleges Plaintiffs violated the Computer Fraud and Abuse Act (“CFAA”) – a criminal statute that authorizes a civil cause of action in limited circumstances. *In re America Online, Inc. Version 5.0 Software Litigation*, 168 F. Supp. 2d 1359, 1368 (S.D. Fla. 2001); 18 U.S.C. § 1030(g). The CFAA prohibits a number of very specific computer activities, from hacking into government computers with classified information to accessing credit report information or the computers of financial institutions.

Although it is far from clear under which specific prongs of the CFAA Defendant's claim is brought, it appears as though Defendant's claims are brought under 18 U.S.C. § 1030(a)(5)(B) - (C) and 18 U.S.C. § 1030(a)(4). (Counterclaims at ¶¶ 132-136.) Regardless of which section of the CFAA Defendant's claims are based, all of the activities prohibited by the CFAA require the access of or intentional damage to another's computer *without authorization*. See, e.g., *In re America Online*, 168 F. Supp. 2d at 1369-72. Here, as a matter of law, Defendant cannot show that Plaintiffs and/or their investigators acted without authorization, nor can Defendant show that Plaintiffs damaged Defendant's computer, let alone that Plaintiffs *intentionally* did so; therefore, Defendant fail to adequately allege facts sufficient to state a CFAA claim under *Twombly*.

Defendant's CFAA counterclaim does nothing more than recite the language of the statute. However, those "labels and conclusions, and a formulaic recitation of the elements," are insufficient to state a claim for relief under *Twombly*. *Twombly*, 127 S. Ct. at 1964-65.

In *Serrano*, No. 07-CV-1824, the Court explained that in order to state a claim under the CFAA and put Plaintiffs on notice of a CFAA violation, Defendant must provide details regarding the alleged unlawful access and how Defendant's computer was harmed. The *Serrano* Court explained:

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.

Serrano, No. 07-CV-1824 W (JMA), slip op. at 9 (dismissing Defendant’s CFAA counterclaim) (attached as Exhibit F). Defendant fails to assert any of these factual allegations in his Counterclaims.³

As previously discussed, the KaZaA file-sharing software utilized by Defendant to trade files over the Internet has a file-sharing feature that was enabled at the time the infringement was detected. As such, the digital audio files in Defendant’s shared folder were being distributed to millions of other users of the P2P network. *See U.S. v. Kennedy*, 81 F. Supp. 2d 1103, 1106 n. 4 (explaining detection through file-sharing program). Indeed, it was precisely because Defendant was distributing the files from her shared folder that MediaSentry was able to detect the infringing conduct at issue. Because Defendant’s shared folder was open to the public, including MediaSentry, Defendant granted exactly the type of authorization contemplated by the CFAA.

While Defendant baldly alleges that Plaintiffs intruded into her computer without authorization and that she did not “configure any computer to ‘share’ files,” (Counterclaim at ¶ 74), she does not deny that KaZaA, or a program that gave her access to KaZaA, was installed on her computer. As explained in *Tschirhart*, any alleged access by Plaintiffs to files on a public share folder, whether intentionally made public or not, cannot be said to be unauthorized.

[A]ssuming that the files in the iMesh folder plaintiffs accessed were made available by defendant to the public for copying and further distribution, plaintiffs’ access of the folder containing those files was not “unauthorized.” Defendant asserts that she did not make any portion of her computer available to the public. She does not, however, contend that the public iMesh folder was not installed on her computer. She merely asserts that if it was there she did not install it. If it was on the computer, access by the public – including plaintiffs’

³ With respect to element number nine (9), Defendant does allege that Plaintiffs conduct “resulted in impairment to the integrity and/or availability of data, a program, a system or information on the computers of Raleigh and the members of the proposed Plaintiff Class.” (Amended Counterclaim at ¶ 134.) However, this conclusory allegation falls far short of adequately pleading even one element of a violation of the CFAA. *See Twombly*, 127 S. Ct. at 1964-65.

investigator – was not “unauthorized.” *See International Ass’n of Machinists and Aerospace Workers v. Werner-Masuda*, 390 F.Supp.2d 479, 498 (D. Md. 2005)(dismissing CFAA claim where defendant had authorization to access computer).

Tschirhart, No. SA-05-CV-372-OG, slip op. at 9 (rejecting similar CFAA claim) (Exhibit E); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d at 267 (D.D.C. 2003).

In short, Defendant’s own actions effectively provided a blanket authorization for others to detect the contents of her shared folder. *See* Amended Counterclaim at ¶ 18 (“Peer to peer networks are public and the information on them is available to anyone.”). As a result, no claim under the CFAA for unauthorized access to Defendant’s computer is available to her and her counterclaim must fail.

Furthermore, Defendant has not and cannot properly allege that Plaintiffs damaged Defendant’s computer in any way, let alone that Plaintiffs *intentionally* damaged her computer. Under the CFAA, damage is defined as “any impairment to the integrity or availability of data, a program, a system, or information,” 18 U.S.C. § 1030(e)(8), and that causes loss in any one year period to one or more individuals aggregating at least \$5,000 in value. *See* 18 U.S.C. § 1030(a)(4); *Miles v. America Online, Inc.*, 202 F.R.D. 297 (M.D. Fla. 2001). There is not a single factual allegation in Defendant’s counterclaims to support this element of damage to Defendant’s computer. Her bald allegations of such simply recite the definition contained in the CFAA verbatim and are a “formulaic recitation of the elements” insufficient to plead a claim under *Twombly*. *Twombly*, 127 S. Ct. at 1964-65. Thus, Defendant’s counterclaim for violations of the Computer Fraud and Abuse Act likewise fail.

D. RALEIGH’S CLAIM FOR CIVIL CONSPIRACY (COUNT VIII) SHOULD BE DISMISSED BECAUSE RALEIGH’S CONCLUSORY ALLEGATIONS ARE INSUFFICIENT AND FAIL TO ALLEGE THE NECESSARY ELEMENTS.

Finally, Defendant attempts to assert another counterclaim for civil conspiracy despite the Court's previous Order dismissing such a counterclaim. (Order Dismissing Defendant's Counterclaims, Doc. No. 46.) Defendant's amended counterclaim for civil conspiracy should fare no better here. Under Missouri law, to plead a claim for civil conspiracy, a plaintiff must allege facts showing "(1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) the plaintiff was thereby injured." *Moses.com Sec., Inc. v. Comprehensive Software Sys.*, 406 F.3d 1052 (8th Cir. 2005) (citing *Phelps v. Bross*, 73 S.W.3d 651, 657 (Mo. Ct. App. 2002) and *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. 1997)). Vague and conclusory allegations will not support a claim for civil conspiracy. *See Ladd v. St. Louis Bd. of Police Comm'rs*, 2006 U.S. Dist. LEXIS 72367 (E.D. Mo. 2006) (plaintiffs who merely plead in a vague and conclusory manner that the named persons have conspired with and among themselves to achieve the allegedly fraudulent objectives fail to plead a claim for civil conspiracy).

Here, Raleigh's claim for civil conspiracy contains nothing more than conclusory allegations. *See* Amended Counterclaims, ¶¶ 138-144. Raleigh does not allege a meeting of the minds, any specific unlawful overt acts by Plaintiffs, or any compensable injury she suffered as a result of Plaintiffs' acts. *See id.* Although Raleigh vaguely alleges that Plaintiffs committed trespass to chattels and violations of the CFAA (*see* Amended Counterclaims, ¶ 139), these claims fail as a matter of law and do not support a conspiracy claim.⁴ *See* Sections III and IV, *supra*. Similarly, although Raleigh claims to have incurred attorneys' fees (*see* Amended

⁴ Defendant's conclusory allegation of conspiracy also overtly disregards the Court's Order Dismissing Counterclaims by stating that Plaintiffs committed acts in furtherance of "sham litigation." (Amended Counterclaim, ¶ 140.) The Court has already ruled that Plaintiffs have sufficient reason to pursue this action for copyright infringement, and that this lawsuit is not "sham litigation." (Order Dismissing Counterclaims, p. 8.)

Counterclaims, ¶ 142), attorneys' fees do not constitute a compensable injury in a tort action. *See, e.g., Rylewicz v. Beaton Services, Ltd.*, 698 F. Supp. 1391, 1396 (D. Ill. 1988), *aff'd*, 888 F.2d 1175 (7th Cir. 1989) (dismissing RICO claim for failing to allege compensable injury where the plaintiff alleged it was damaged by the expenditure of attorneys' fees and costs); *Capasso v. Cigna Ins. Co.*, 765 F. Supp. 839 (S.D.N.Y. 1991) (“[A]ttorney’s fees and costs of investigation incurred as a result of defendants’ allegedly illegal acts do not qualify as RICO injuries.”).

For all of these reasons, Raleigh has failed to plead the necessary elements of a claim for conspiracy, her counterclaim should be dismissed.

CONCLUSION

For all of the above reasons, Plaintiffs respectfully request that the Court strike Defendant’s Amended Counterclaims in their entirety for failure to seek leave to amend, and strike Counterclaims I-IV, and the re-pled factual allegations upon which they are based (¶¶ 11, 13-16, 18-26, 28-32, 34-45, 47, 50-69, 77-78, 86-87, 89-91), pursuant to Fed. R. Civ. P. 12(f). In the alternative, Plaintiffs request that the Court dismiss each of Raleigh’s counterclaims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Respectfully submitted,

Dated: 12-29-08

By: /s/ John D. Ryan

John D. Ryan EDMO # 447
LATHROP & GAGE L.C.
10 South Broadway, Suite 1300
St. Louis, MO 63102-1708
Telephone: (314) 613-2500
Facsimile: (314) 613-2550

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of December, 2008, a true and correct copy of the foregoing Memorandum in Support of Plaintiffs' Motion to Strike, or, in the Alternative, Motion to Dismiss Amended Counterclaims was served via the Court's electronic filing system, as follows:

Jonathon Andres
7733 Forsyth Blvd.
Suite 700
Saint Louis, MO 63105

/s/ John D. Ryan
