UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ATLANTIC RECORDING CORPORATION, *et al.*,	)	
Plaintiffs/Counterclaim Defendants,	)	
vs.	)	Cause No. 4:06CV01708 CEJ
JENNA RALEIGH, individually and on behalf of all others similarly situated,	)	
Defendant/Counterclaim Plaintiffs.	)	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE AMENDED COUNTERCLAIM

Plaintiffs have moved pursuant to Fed. R. Civ. P. 15(a)(2) and 12(b)(6) to strike or alternatively dismiss the Amended Counterclaims of Defendant Jenna Raleigh ("Raleigh). Plaintiffs also object to Raleigh's counterclaims and factual allegations which, although previously denied, were included expressly for the sole purpose of preserving them for appeal. As discussed more fully below, Plaintiffs' motion should be denied because Raleigh did not need leave of Court to file her amended counterclaims and Counts VII and VIII properly assert claims upon which relief may be granted her and others similarly situated.

I. ARGUMENT

Plaintiffs' characterization of Raleigh's counterclaims as attempts "to hold Plaintiffs liable for their legitimate efforts to enforce their copyrights," is inaccurate. Raleigh is seeking to hold Plaintiffs liable for the *illegitimate* methods they use to

investigate, oppress and intimidate anyone who may potentially have a connection with online file-sharing. By way of analogy, while it is proper for a person to attempt to recover their stolen lawnmower, that person may not kick in the door to their neighbor's garage because they have a similar-colored lawnmower.[1]

As noted in Defendant's memorandum filed contemporaneously with her Amended Counterclaim [Document 51], Counterclaims I-V were re-asserted only for the purposes of inclusion on any appeal which might be taken.

A. The Court granted the parties until November 17, 2008 to amend their pleadings without leave of Court.

The Court's Case Management Order provides that "[a]ny joinder of additional parties or amendment of pleadings shall be made no later than **November 17, 2008.** Thereafter, the parties must file a motion for leave to join additional parties or to amend pleadings." (Doc. 49, filed Sept. 12, 2008)(emphasis original). Raleigh filed her Amended Counterclaims on November 17, 2008.

Motions to strike are governed by Rule 12(f), and are generally not favored. *Johnson v. Metropolitan Sewer Dist.*, 926 F. Supp. 874, 875 (E.D. Mo. 1996) citing *Lunsford v. United States*, 570 F.2d 221, 229 (8th Cir. 1977). Under Rule 15(a)(2), a party outside the limited period for amendment as a matter of course must seek either written permission from the opposition or the court's leave to amend. The Rule requires

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[1]Interestingly, even the recording industry has recently recognized the error of their ways and announced that they are abandoning the type of heavy-handed, inaccurate and oppressive campaign which gave rise to this suit. "Music Industry to Abandon Mass Suits." Wall Street Journal, December 19, 2008. Available at http://online.wsj.com/article/SB122966038836021137.html

that a court "should freely give leave when justice so requires." Here, the Court granted both parties leave to amend within a certain period, and Raleigh filed her amendment within that period.

Plaintiffs' contention that Raleigh failed to obtain permission to file her Amended Counterclaim is without merit, and therefore the motion to strike should be denied. There is no dispute that Raleigh filed her Amended Counterclaims before November 18, 2008, the first day when leave of court would have been required. Plaintiffs' motion does not challenge provisions of the Scheduling Order, and they have never moved for clarification of that Order. Because Raleigh filed her Amended Counterclaim within the time permitted in the Scheduling Order, striking the counterclaims for this reason would be inappropriate.[2]

B. Plaintiffs' Motion to Dismiss Counterclaims VII and VIII should be denied, because they state grounds upon which relief may be granted.

As Plaintiffs correctly note, when reviewing allegations pursuant to a motion to dismiss, courts assume that all facts alleged in the counterclaim are true and liberally construe the counterclaim in the light most favorable to the non-moving party. *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 (8th Cir. 1999). Pursuant to the recent Supreme Court pronouncement, a claim or counterclaim "does not need detailed factual

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[2] Interestingly, Plaintiffs have failed to comply with Rule 15. Rule 15(a)(3) requires a party to respond to any amended pleading "within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later." Even including the three additional days for mailing, the Plaintiffs' response was due December 8, 2008 at the latest.

allegations," but must simply contain sufficient factual allegations "to raise a right to relief above the speculative level[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (U.S. 2007). In the instant case, Raleigh has pled sufficient factual and legal grounds to entitle her to relief if proven correct, which is all that is required to survive a motion to dismiss.

In an apparently preemptive move, Plaintiffs cite and attempt to distinguish two recent decisions of other United States District Courts on this very same issue, *UMG v. Del Cid*, Case No. 8:07-cv-368-T-26TGW (M.D. Fla. 2007) and its companion case *Atlantic Recording Group v. Boyer*, Case No. 8:08-cv-147-T-26EAJ (M.D. Fla. 2008). In those cases, as in this one, several record companies sued for alleged violations of their copyrights by distribution over peer-to-peer file-sharing networks, discovered by investigators searching for such sharing. Just as in this case, the defendants denied installing the file-sharing software, and asserted that they had no knowledge it was on their computers.

When the defendants in *Del Cid* and *Boyer* filed counterclaims under the Computer Fraud and Abuse Act ("CFAA", 18 U.S.C. §1030) for unauthorized access of their computers, the plaintiffs moved to dismiss those counterclaims. The courts, applying the same standards for a motion to dismiss as applicable in this case, found that the counterclaims were sufficient because a counterclaimant's factual assertions are entitled to an assumption of truth, and these counterclaims were properly pled. While not binding, the reasoning in these cases is instructive and provides a sound basis for allowing Counterclaims VII and VIII to proceed to a determination on the

facts and merits.[3]

1. Raleigh's claim for violation of the Computer Fraud and Abuse Act (Counterclaim VII) is sufficient to form a ground upon which relief may be granted, because she has pled the required elements of the claim.

Raleigh has also pled a cognizable claim under Count VII of the Amended Counterclaim. The CFAA affords protection against a wide array of intruders into computers, defined as one who "intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss;" 18 USCS § 1030(a)(5)(C). Contrary to Plaintiffs' assertion in their Memorandum, there is no requirement that there be any intent to cause damage or loss– rather, it is the access which must be intentional. The statute also provides for civil remedies, stating:

> Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(I).

18 USCS § 1030(g). One of those factors is a "loss to one or more persons during any 1-year period . . . aggregating at least $ 5,000 in value[.]" 18 USCS § 1030(c)(4)(A)(i)(1).

By their own pleadings, Plaintiffs admit that they (through their agent MediaSentry) intentionally accessed Raleigh's computer in an effort to determine what files were there. The issues then become (a) whether Raleigh's computer was "protected" under the statute, (b) whether Plaintiffs' agent acted without Raleigh's

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[3] Upon further consideration, Raleigh will withdraw and dismiss Counterclaim Count VI for trespass to chattels.

authorization, and (c) whether she sustained "damage and loss" because of the intrusion.

First, in an effort to safeguard as many computers from intrusion as possible, Congress has given a broad scope to the CFAA. The statute defines a "protected computer" as one "which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States[.]" There is no question that Raleigh's computer was used in a manner that affects interstate communication– it was through the computer's connection to the internet that MediaSentry (based in New York) gained access. Thus, the computer was "protected" for purposes of the statute.

Second, Plaintiffs have alleged that MediaSentry's accessing of the computer was unauthorized. Raleigh certainly did not give express permission for Plaintiffs or their agents to access files on her computer, which only leaves the possibility of implied authorization. Plaintiffs use flawed logic to argue that any intrusion they conducted into Raleigh's computer was somehow authorized by the fact that a file-sharing program was apparently installed on her computer. For the purposes of this motion to dismiss, the Court must take as true Raleigh's assertion that she did not download or install and peer-to-peer file sharing software on her computer. (See Amended Counterclaim, ¶¶73-76). If she did not install the software, she did not authorize the access the program permitted. The term "authorize" is not defined in the statute, but the common definition is "1. To give legal authority; to empower. 2. To formally

approve, to sanction." Black's Law Dictionary, 7th Ed. at 129. This requires some sort of act on behalf of the person giving the authorization. Since Raleigh took no action to open that portion of her computer to public access, she cannot be said to have authorized the intrusion.

Plaintiffs rely upon a two-and-a-half year old slip opinion from Texas to support their contention that the simple existence of a file-sharing program on a person's computer constitutes authorization for access, even if the person is completely unaware. The problem with that conclusion in *Arista v. Tschirhart* (Exhibit E to Plaintiffs' motion) is that it is poorly reasoned and based upon a misapplication of case law. To support its broad statement that "if it [the program] was on the computer, access by the public– including plaintiffs' investigator– was not unauthorized," *Tschirhart* relies upon *Int'l Ass'n of Machinists & Aero. Workers v. Werner-Matsuda* 390 F. Supp. 2d 479, 498 (D.Md. 2005). The problem is that *Werner-Matsuda* does not say anything like that. In *Werner-Matsua*, the alleged wrongdoer had explicit authorization to access the computer system in question– the issue was simply whether the wrongdoer exceeded that authorization by misusing the information gained from the system.

Using the logic in *Tschirhart* and Plaintiffs' motion, anyone whose computer becomes infected with a virus would be responsible for whatever consequences that virus causes. If there was a security loophole, then a hacker would not be liable for exploiting it to gain personal information. Such a conclusion simply runs contrary to the entire concept of authorization, because there is no act by the owner of the

computer which would confer permission on another. As noted above, Plaintiffs' precise argument was rejected in *Del Cid* and *Boyer*, because a counterclaimant's averments that she did not personally download or install file-sharing software was sufficient to satisfy the "unauthorized access" requirement.

Even if Raleigh is considered negligent for failing to fully police the software installed by others on her computer, the CFAA still affords her protection from intrusion without her authorization. "A causal chain from the thief to the victim is not broken by a vulnerability that the victim negligently leaves open to the thief." *Creative Computing v. Getloaded.com, LLC*, 386 F.3d 930, 936 (9th Cir. 2004).

Finally, Raleigh has sustained losses sufficient to state a claim under the CFAA. As noted above, one of the avenues to maintain a civil action for an intrusion is to show a "loss to 1 or more persons during any 1-year period . . . aggregating at least $ 5,000 in value[.]" 18 USCS § 1030(c)(4)(A)(i)(1). The term "loss" is expansively defined by the statute to include "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. §1030(e)(11). In this instance, Raleigh has incurred well over $5,000 in responding to MediaSentry's unauthorized access of her computer– indeed, all the costs associated with this litigation are directly related to MediaSentry's intrusion.

While Raleigh cannot find any case law regarding the inclusion or exclusion of the cost of defending litigation as a "loss" under CFAA, there is no reason that they

should not be included under the rubrics of "responding to an offense" and "cost incurred." Several courts outside the Eighth Circuit have held that costs of *prosecuting* litigation for a violation of the CFAA are not "losses" for purposes of the $5,000 limit. *see Wilson v. Moreau*, 440 F. Supp. 2d 81, 110 (D.R.I. 2006), *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 647 (E.D. Pa. 2007). However, there is no principled distinction between forcing a company to expend money on measures to recover from an intrusion and forcing an unwitting individual to incur attorneys fees to defend a lawsuit based solely upon information obtained from that unauthorized access.

2. Raleigh's Counterclaim VIII (Conspiracy) should not be dismissed, because it was properly pled and affords her a ground for relief.

Similarly, Counterclaim VIII should not be dismissed, because it properly alleges collective action to violate Raleigh's rights under the CFAA:

> Counterclaim Defendants conspired and agreed to access the computer system of Raleigh and the members of the proposed Plaintiffs' Class without authorization and obtain information from that computer system in violation of their rights.

Amended Counterclaim at ¶ 141

As Plaintiffs properly note, Missouri's cause of action for civil conspiracy requires a claimant to plead that "(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). There is no question that Raleigh has properly pled that two or more parties were involved, or that there was a

meeting of the minds, because the Plaintiffs (through their industry trade group) acted in concert to employ MediaSentry to conduct investigations on their behalf. Raleigh has also properly pled that there was an unlawful objective– unauthorized intrusion upon computers (including Raleigh's) in violation of the CFAA– and that MediaSentry's actions on behalf of Plaintiffs were an act "in furtherance" of their scheme.

Finally, Raleigh has properly pled that she sustained injury as a result of Plaintiffs' scheme. Plaintiffs rely upon two RICO cases for the proposition that legal fees cannot be considered "damages" for tort cases. First and foremost, RICO damages are significantly more limited than general tort damages; the statute limits recovery to an individual "injured in his business or property[.]" 18 U.S.C. § 1964(c). As noted by their own authority, "[t]he phrase 'business and property' excludes personal injuries or political damages." *Rylewicz v. Beaton Services, Ltd.*, 698 F. Supp. 1391, 1395-1396 (N.D. Ill. 1988). The universe of RICO damages is significantly more limited than tort damages in general, and so Plaintiffs' cases are well and truly off point.

Second, attorneys fees are by no means excluded from being counted as damages in tort actions. see *Turman v. Schneider Bailey, Inc.*, 768 S.W.2d 108, 113 (Mo. App. 1988)("Attorney fees are a compensable element of damages in a suit for malicious prosecution.") Raleigh has properly pled that she was injured by Plaintiffs' collective conduct, and therefore the motion to dismiss Counterclaim Count VIII should be denied.

II. CONCLUSION

For the reasons stated above, Plaintiffs' motion should be denied because (a) Raleigh did not need leave of Court to file her amended counterclaims and (b) Counts VII and VIII properly assert claims upon which relief may be granted her and others similarly situated.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on January 28, 2009, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system, upon the following named counsel of record: John D. Ryan, Esq., Shane Cross, Esq.

I certify that on January 28, 2009, copies of the foregoing were mailed to each of the following named non-participants in Electronic Case Filing: None.

/s/ Bradley Schneider