UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ATLANTIC RECORDING CORPORATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 4:06-cv-01708-CEJ
JENNA RALEIGH,	)	
Defendant.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE, OR, IN THE ALTERNATIVE, MOTION TO DISMISS AMENDED COUNTERCLAIMS

Plaintiffs respectfully submit this reply in further support of their Motion to Strike, or, in the Alternative, Motion to Dismiss Defendant's Amended Counterclaims ("Motion to Strike and Dismiss," Doc. No. 60).

INTRODUCTION

Defendant opposed Plaintiffs' Motion to Strike and Dismiss on the following grounds: 1) that Defendant does not need to seek leave from the Court to add to or amend her previously dismissed counterclaims, 2) that Defendant makes sufficient allegations to show that Plaintiffs accessed her computer without authorization and thereby caused damage to Defendant's computer, and 3) that Defendant makes sufficient new allegations to support her previously dismissed counterclaim for civil conspiracy. ("Opp. Br.," Doc. No. 67, pp. 2-10.) Defendant's Amended Counterclaims fail for the same reasons the Court denied her previous counterclaims.[1] Defendant can allege no facts to support her

[1] In a well reasoned decision, the Court dismissed Defendant's original counterclaims – including a counterclaim for civil conspiracy that Defendant re-alleges here. (Doc. No. 46.) Plaintiffs respectfully submit that the Court should follow its previous reasoning and dismiss Defendant's Amended Counterclaims.

allegation that Plaintiffs accessed her computer and thereby caused damage to her computer, because no such access occurred. Moreover, Defendant cannot bootstrap the costs of defending a legitimate action for copyright infringement into an element of damages sufficient to support a counterclaim.[2]

Fundamental to Defendant's arguments is the misguided notion that MediaSentry was inside Defendant's computer. This is simply not true. Defendant was distributing Plaintiffs' copyrighted sound recordings, over the Internet, to any member of the general public that was logged on to the KaZaA peer-to-peer ("P2P") network. MediaSentry observed the files that Defendant was offering to distribute, and sent a request to Defendant's computer to have it send the copyrighted sound recordings it was advertising to the network. Once this request was made, Defendant's computer sent the requested file to MediaSentry's computer. Nowhere in this process did MediaSentry ever access Defendant's computer. As such, MediaSentry did not and could not have damaged her computer Defendant has not alleged, and cannot allege, any facts to support the fiction that MediaSentry accessed or damaged Defendant's computer. Defendant's rhetoric likening MediaSentry's actions to "kick[ing] in the door to their neighbor's garage because they have a similar-colored lawnmower" (Opp. Br., p. 2) is inaccurate, misleading, and misguided. Plaintiffs engaged in a legitimate means of enforcing their

[2] In her Opposition Brief, Defendant suggests that the record companies have "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." (Opp. Br., p. 2 n.1.) Defendant's statement has no factual basis and is wholly inaccurate. The article Defendant cites indicates that the record companies are pursuing a new enforcement program in cooperation with Internet service providers, and that they will continue with outstanding lawsuits and lawsuits against major infringers. Nothing in the article suggests the record companies have "recognized the error of their ways." Indeed, a spokesman for the record companies states in the article that litigation against file sharers has been effective and successful.

federally protected copyrights, and Defendant's Amended Counterclaims should be dismissed as a matter of law.

SUMMARY OF THE ARGUMENT

The Court should strike and/or dismiss Defendant's Amended Counterclaims for the following reasons:

Amended Counterclaims I-VIII (Doc. No. 52) should be stricken in their entirety because Defendant failed to seek leave to amend pursuant to Rule 13(f) and 15(a)(2).

Amended Counterclaims I-V should also be stricken because this Court already dismissed these claims in its Order dated August 18, 2008 (Doc. No. 46.)

Amended Counterclaim VI for trespass to chattels should be dismissed because Defendant offered to withdraw and dismiss this counterclaim in her Opposition Brief. (Opp. Br., p. 5 n.3.)

Further, Defendant's allegations in her Amended Counterclaim VII (Doc. No. 52, pp. 38-40) and Opposition Brief are insufficient to establish a claim for a violation of the Computer Fraud and Abuse Act ("CFAA"). In her Opposition Brief, Defendant clarifies that she is asserting her CFAA counterclaim pursuant to 18 U.S.C. § 1030(g), 18 U.S.C. § 1030 (a)(5)(C), and 18 U.S.C. § 1030(c)(4)(A)(i)(1). (Opp. Br. at p. 5.) As a matter of law, Defendant fails to adequately state a claim under these specific prongs of the CFAA because she does not properly plead, 1) that Defendant suffered damages and loss as defined by the CFAA, 2) that MediaSentry accessed Defendant's computer, and 3) that MediaSentry acted without authorization. Amended Counterclaim VII should, therefore, be dismissed under Rule 12(b)(6) for failure to state a claim.

Finally, Defendant's Amended Counterclaim VIII for civil conspiracy (Doc. No. 52, pp. 40-41) must also fail on its merits. The only unlawful acts that Defendant alleges Plaintiffs conspired to commit are violations of the CFAA. Because Defendant's counterclaim under the CFAA fails to state a claim as a matter of law, Defendant's counterclaim for civil conspiracy also cannot stand.

For the foregoing reasons, and as set forth more fully below, Defendant's Amended Counterclaims I-VIII should be stricken and/or dismissed in their entirety.

I. PLAINTIFFS' MOTION TO STRIKE SHOULD BE GRANTED BECAUSE DEFENDANT DID NOT SEEK LEAVE TO ADD TO OR TO AMEND HER COUNTERCLAIMS.

Defendant argues that the Court should deny Plaintiffs' Motion to Strike because the Court granted both parties leave to amend their pleadings up to and including November 17, 2008. (Doc. No. 49.) Defendant's argument fails for two reasons.

First, Defendant did not simply "amend" her counterclaims. Indeed, she alleges two wholly new counterclaims (Doc. No. 52, Counts VI and VII) that arise out of the same transaction or occurrence and that should have been raised in her initial pleading pursuant to Fed. R. Civ. P. 13(a)(1)(A). *Id.* ("A pleading must state as a counterclaim any claim that . . . arises out of the transaction or occurrence that is the subject matter of the opposing party's claim".) In order to add a counterclaim that she previously omitted, Defendant is required to seek leave of the Court, which she failed to do here. Fed. R. Civ. P. 13(f). And, Defendant's reference to the November 17, 2008 date in the Court's Scheduling Order (Doc. No. 49) does not save Defendant. The November 17 date was to add parties or amend pleadings. Defendant's assertion of new counterclaims neither adds new parties nor amends existing pleadings. Thus, Defendant's counterclaims should be stricken.

Second, Defendant ignores the fact that she previously sought leave to amend her counterclaims (Doc. No. 35, p. 32), and that the Court denied her such leave.[3] (Doc. No. 46, p. 12, "Because defendant has not indicated the substance of any proposed amendments, the Court will deny the request.") If the Court had granted Defendant leave to amend her counterclaims, the Court would not have denied Defendant's request for leave.

For the foregoing reasons, Defendant filed her Amended Counterclaims without leave of the Court in violation of Rules 13(f) and 15(a)(2) and her Amended Counterclaims should be stricken.

II. PLAINTIFFS' MOTION TO STRIKE SHOULD BE GRANTED BECAUSE THE COURT HAS ALREADY DISMISSED COUNTERCLAIMS I-V.

As Plaintiffs argued in their Opening Brief (Doc. No. 61), Amended Counterclaims I-V, and the factual allegations on which they are based, are virtually identical to the counterclaims Defendant asserted – and the Court subsequently dismissed – in Defendant's original pleading (Doc. No. 17). (Opening Br., pp 6-7.) Defendant does not dispute this fact in her Opposition Brief. (Opp. Br., p. 2.) Amended Counterclaims I-V, and the factual allegations on which they are based, should therefore be stricken.

III. PLAINTIFFS' MOTION TO DISMISS SHOULD BE GRANTED AS TO COUNTERCLAIM VI BECAUSE DEFENDANT HAS OFFERED TO WITHDRAW OR DISMISS THAT CLAIM.

In her Opposition Brief, Defendant offers to "withdraw and dismiss Counterclaim VI for Trespass to Chattels." (Opp. Br., p. 5.) Plaintiffs support a dismissal of Amended

[3] Defendant states in her Opposition Brief that Plaintiffs failed to comply with Rule 15 by not responding to Defendant's original pleading by December 8, 2008. (Opp. Br., p. 3 n.3.) On December 5, 2008, Defendant consented to Plaintiffs' Motion for an Extension of time to respond to her original pleading, which the Court granted. (Doc. Nos. 55 and 57.) Defendant's statement is inaccurate as Plaintiffs complied with the Federal Rules.

Counterclaim VI pursuant to Rules 41(a)(2) and 41(c).

IV. PLAINTIFFS' MOTION TO DISMISS SHOULD BE GRANTED AS TO COUNTERCLAIM VII BECAUSE DEFENDANT'S COUNTERCLAIM UNDER THE CFAA FAILS TO STATE A CLAIM FOR RELIEF.

A. Defendant Did Not Suffer Damages and Loss as Defined by the CFAA.

Defendant's assertions that Plaintiffs violated § 1030(a)(5)(C) of the CFAA do not adequately allege that Defendant suffered "damages and loss" as a result of Plaintiffs' allegedly unauthorized access of Defendant's computer. (Opp. Br. at p. 5, "The CFAA affords protection against . . . one who 'intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damages and loss;" citing 18 U.S.C. § 1030(a)(5)(C).) By Defendant's own admission, one of the essential elements of her claim is "whether she sustained '*damages and loss*' because of [MediaSentry's alleged] intrusion." Opp. Br. at p. 6 (emphasis added); *see also Garelli Wong & Assocs., Inc. v. Nichols,* 551 F. Supp. 2d 704, 708 (N.D. Ill. 2008) (dismissing the plaintiff's CFAA claim for not properly alleging damages and stating that "[a] thorough reading [of the CFAA] shows that it is necessary for a plaintiff to plead both damage and loss in order to properly allege a civil CFAA violation"). Defendant does not – and indeed cannot – properly allege that she sustained both damage and loss as defined by the CFAA.

The CFAA defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). As previously argued in Plaintiffs' Opening Brief, Defendant's bald allegations of damage to her computer simply recite this definition verbatim (*see* Amended Counterclaim, ¶ 134) and are a "formulaic recitation of the elements" insufficient to plead a claim under *Twombly*. *See* "Opening Br.," Doc. No. p. 13. A claim – such as Defendant's here – that "merely

parrots the 'causing damage' text of the CFAA in conclusory fashion and fails to allege any facts indicating that the completeness, useability, or availability of [Defendant's] data was impaired" will not survive a motion to dismiss under Rule 12(b)(6). *WorldSpan, L.P. v. Orbitz, LLC*, 2006 U.S. Dist. LEXIS 26153, *15 (N.D. Ill. April 19, 2006).

Defendant does not allege any additional facts that support the element of damage in her Opposition Brief. Instead, Defendant argues only that she sustained "losses" under the CFAA in the form of litigation costs. *See* Opp. Br., pp. 8–9. Litigation costs are not an "impairment to the integrity or availability of data, a program, a system, or information." *See* 18 U.S.C. § 1030(e)(8).[4] Thus, Defendant fails to adequately plead "damages" – an essential element of her counterclaim under the CFAA – and she fails to state a claim upon which relief can be granted.

Furthermore, Defendant's counterclaim fails because she does not properly allege "losses" as defined by the CFAA. As a preliminary matter, it is well established that litigation costs are not "losses" under the CFAA. *Wilson v. Moreau*, 440 F. Supp. 2d 81, 100 (D.R.I. 2006) ("[A]s a matter of law, the costs of litigation cannot be counted toward the $5,000 statutory threshold [under the CFAA]."); *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 647 (E.D. Pa. 2007) ("[L]itigation expenses, attorney's fees, and the costs of hiring experts . . . cannot be counted toward the statutory threshold."). Defendant does not cite any authority for her

[4] "The 'damage' contemplated by subsection (a)(5)(A)(i) requires some 'diminution in completeness or useability of data or information on a computer system.'" *Condux Int'l, Inc. v. Haugum*, 2008 U.S. Dist. LEXIS 100949, *23 (D. Minn. Dec. 15, 2008) (citation omitted). Even if Defendant alleged that downloading sound recordings from her shared folder constituted "damages" under the CFAA, her argument would fail. *WorldSpan, L.P. v. Orbitz, LLC*, 2006 U.S. Dist. LEXIS 26153 at *15 (rejecting the plaintiff's argument that the "mere 'taking of information' constitutes 'damage' under the CFAA").

position that litigation costs are "losses" under the statute because no such authority exists. (Opp. Br., p. 8-9.) Accordingly, the Court should reject Defendant's argument that litigation costs are "losses" under the CFAA.

Moreover, Defendant's claim fails because she does not allege that her "loss" was tied to an interruption in service. *See* 18 U.S.C. § 1030(e)(11) (defining "loss" as "any reasonable cost to any victim . . . incurred because of interruption in service"). "Courts have consistently interpreted 'loss' . . . to mean a cost of investigating or remedying damage to a computer . . . incurred because the computer's service was interrupted." *LASCO Foods, Inc. v. Hall and Shaw Sales, Mktg., & Consulting, LLC*, 2009 U.S. Dist. LEXIS 4241, *16 (E.D. Mo. Jan. 22, 2009) (citation omitted). Indeed, this Court's sister court in the Eastern District of Missouri stated that, "under [the] CFAA, any 'loss' must result from an interruption in service." *Id.* Defendant does not allege that Plaintiffs caused an interruption in service here, nor does she allege any "losses" arising from such an interruption in service. Accordingly, Defendant's counterclaim should be dismissed.

For the foregoing reasons, Defendant fails to properly allege both "damages" and "loss" under the CFAA and her purported Amended Counterclaim VII should be dismissed.

B. MediaSentry Did Not Access Defendant's Computer.

Defendant's CFAA counterclaim must also fail because another essential element of a CFAA claim is missing – access to Defendant's computer by Plaintiffs. Defendant asserts that MediaSentry "accessed [Defendant's] computer in an effort to determine what files were there." (Opp. Br., p. 5.) Defendant is incorrect. As Plaintiffs stated in their Opening Brief, MediaSentry detected Defendant's copyright infringement, as any other user of a P2P network could have done, through publicly shared files. (Opening

Br., p. 9.) MediaSentry logged onto a P2P network accessible by any member of the general public and observed and downloaded sound recordings that Defendant was offering to distribute over the Internet. Once MediaSentry requested a sound recording, Defendant's computer made a copy of the sound recording, and sent it to MediaSentry's computer, along with other basic information such as Defendant's IP address. Indeed, all of the information that MediaSentry obtained from Defendant was in Defendant's publicly-shared folder and being offered for distribution over the Internet by Defendant. Plaintiffs, therefore, never accessed Defendant's computer, and the CFAA does not apply.

C. MediaSentry's Alleged Access Of Defendant's Computer Was Not Unauthorized.

Defendant argues that because she allegedly did not personally install the P2P program on her computer, she did not authorize MediaSentry to download the copyrighted recordings that were being offered for distribution from her shared folder. (Opp. Br., p. 6-7.) Importantly, Defendant cites no case law to support her argument. Defendant then likens MediaSentry to a thief that has broken into Defendant's house because she left the deadbolt off the door. (Opp. Br. at p. 8.) Defendant's analogy is misguided and her interpretation of the CFAA is overbroad.

As stated above, MediaSentry never accessed Defendant's computer. To the extent Defendant's claim is based on MediaSentry downloading copyrighted sound recordings, MediaSentry's actions were authorized. *See* Opening Br., pp 12-13. MediaSentry simply logged on to a P2P network accessible to any other member of the general public and observed and downloaded Plaintiffs' copyrighted sound recordings

that were being offered for distribution. Such activity does not give rise to a cause of action under the CFAA.

The opinion in *Healthcare Advocates, Inc.,* 479 F. Supp. 2d 627, is instructive. In *Healthcare Advocates,* the Court addressed the question of whether downloading images from a Website that stored a plaintiff's protected content constituted unauthorized access under the CFAA when the mechanism that was protecting the plaintiff's content failed. Specifically, a law firm used the "Wayback Machine," a Website that stores archived images of websites on the Internet, to download images of the plaintiff's archived Web pages. The plaintiff had previously requested that their archived images not be released, but the software that was protecting the images failed. The plaintiff alleged that the law firm used the "Wayback Machine" to access its content without authorization in violation of the CFAA. *Id.* at 649. The court rejected the plaintiff's claim, holding that the law firm's access was not unauthorized because "[the law firm] was given the power to view the images by the Wayback Machine." *Id.* at 649. Because the law firm simply "requested archived images from [the Wayback Machine's] database, and those requests were filled," the law firm did not violate the CFAA. *Id.* Here, like in *Healthcare Advocates*, MediaSentry simply requested sound recordings from Defendant's publicly available shared folder, and those requests were filled. "[Plaintiffs] need to do something more than merely using a public website in the manner it was intended to be liable under the CFAA." *Healthcare Advocates, Inc.*, 497 F. Supp. 2d at 649.

For the foregoing reasons, Defendant fails to properly plead that MediaSentry accessed her computer without authorization and, again, her CFAA counterclaim should be dismissed.

V. DEFENDANT'S COUNTERCLAIM VIII FOR CIVIL CONSPIRACY SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE A CLAIM FOR RELIEF.

Defendant contends that because she has alleged that "Plaintiffs acted in concert" with MediaSentry "in furtherance of their scheme," therefore, she has adequately alleged a civil conspiracy claim. (Opp. Br. p. 10.) While Plaintiffs disagree, and have already pointed out the conclusory nature of these allegations (*see* Opening Brief, pp. 14-15), the fundamental flaw in Defendant's civil conspiracy claim is that Defendant cannot identify an "unlawful objective." *See Moses.com Sec., Inc. v. Comprehensive Software Sys.*, 406 F. 3d 1052, 1063 (8th Cir. 2005). Defendant fails to adequately plead this critical element of a civil conspiracy claim.

The underlying cause of action identified by Defendant in her civil conspiracy counterclaim is a violation of the CFAA. (*See* Amended Counterclaim, at p. 40). Yet, Defendant has not alleged sufficient facts to support her claim that Plaintiffs' alleged conduct violates the CFAA. *See* Opening Brief, pp. 10-13; Section I, *supra*. There can be no cause of action for civil conspiracy absent sufficient facts to support a showing that Plaintiffs acted with an unlawful objective. *See Kaminsky v. Missouri*, 2007 U.S. Dist. LEXIS 72316, *8 (E.D. Mo. Sept. 27, 2007). Plaintiffs have already established that Defendant cannot adequately allege a violation of the CFAA. Accordingly, Defendant's claim for civil conspiracy should also 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: February 20, 2009

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of February, 2009, a true and correct copy of the foregoing **Reply In Support Of Plaintiffs' Motion To Strike, Or In The Alternative, Motion To Dismiss Defendant's Counterclaims** was served via the Court's electronic filing system, as follows:

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