UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, LLC; CAROLINE RECORDS, INC.; EMI CHRISTIAN MUSIC GROUP INC.; PRIORITY RECORDS LLC; VIRGIN RECORDS AMERICA, INC.; BEECHWOOD MUSIC CORP.; COLGEMS-EMI MUSIC INC.; EMI APRIL MUSIC INC.; EMI BLACKWOOD MUSIC; EMI FULL KEEL MUSIC; EMI GOLDEN TORCH MUSIC CORP.; EMI LONGITUDE MUSIC; EMI VIRGIN MUSIC, INC.; EMI VIRGIN SONGS, INC., *Plaintiffs*, v. MP3TUNES, LLC, *Defendant.*	No. 07 Civ. 9931 (WHP) **COUNTER-DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS AND STAY DISCOVERY ON THE COUNTERCLAIMS OF COUNTER-CLAIMANT MP3TUNES, LLC**
MP3TUNES, LLC, *Counter-Claimant*, v. CAPITOL RECORDS, LLC; CAROLINE RECORDS, INC.; EMI CHRISTIAN MUSIC GROUP INC.; PRIORITY RECORDS LLC; VIRGIN RECORDS AMERICA, INC.; BEECHWOOD MUSIC CORP.; COLGEMS-EMI MUSIC INC.; EMI APRIL MUSIC INC.; EMI BLACKWOOD MUSIC; EMI FULL KEEL MUSIC; EMI GOLDEN TORCH MUSIC CORP.; EMI LONGITUDE MUSIC; EMI VIRGIN MUSIC, INC.; EMI VIRGIN SONGS, INC., EMI GROUP, LTD.; EMI GROUP NORTH AMERICA, INC.; EMI GROUP NORTH AMERICA HOLDINGS, INC.; AND EMI MUSIC NORTH AMERICA, LLC., *Counter-Defendants.*	

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Throughout the litigation between the parties, MP3tunes has repeatedly attempted to distract attention from the central issues presented — whether the operations of the Sideload and MP3tunes websites constitute massive copyright infringement — and instead litigate the bona fides of the takedown letters sent by EMI. One court has already rejected MP3tunes' tactics. This Court should as well.

Shortly after several EMI entities sent MP3tunes, LLC ("MP3tunes") a takedown letter on September 4, 2007, attaching a representative list of the EMI works that were being made available for copying through MP3tunes' websites, MP3tunes sought to select the forum for the impending litigation by *suing EMI* in the Southern District of California. Its complaint in that action sought a declaration that MP3tunes' activities did not constitute infringement and affirmative relief on the theory that EMI had violated the Digital Millennium Copyright Act ("DMCA") by claiming that certain works listed in EMI's takedown letter as infringing material on MP3tunes sites were in fact authorized for public distribution. The takedown letter contained 364 works. MP3tunes' allegations related to 7 of those works.

MP3tunes' California declaratory judgment claim was dismissed because the court concluded that MP3tunes' action was an improper anticipatory lawsuit, filed only for procedural posturing. Significantly, for purposes of the instant motion, MP3tunes' claims under the DMCA were dismissed on the merits as the court held that allegations of *de minimis* mistakes in the takedown notice could not, even if true, support a claim under the DMCA.

In its counterclaims in this action, MP3tunes goes back to the same well. However, the counterclaims have no more merit than the claims it proffered in California. That is because, in large part, they are *identical* to those claims. MP3tunes brings three sets of counterclaims. First, it asserts a claim under the DMCA, 17 U.S.C. § 512(f) (1999), alleging that EMI made knowing,

material misrepresentations in its takedown letters. This counterclaim is identical to the claim that the California court correctly dismissed, except that MP3tunes has identified five more works from the September 4, 2007 takedown letter and one more work from two October 25, 2007 takedown notices. Collateral estoppel and law of the case bar MP3tunes from relitigating the issues the California court decided. In any event, MP3tunes has failed to identify a "material" or "knowing" misrepresentation or any cognizable harm under the DMCA. The first counterclaim must be dismissed. *See* Part II.

Second, MP3tunes brings three state law claims that derive from the same set of facts as the Section 512(f) claim. Because MP3tunes uses those state laws to manufacture an alternate basis for liability in a field Congress has fully regulated, and in a manner that would impair the operation of Congress's scheme, those state law claims are preempted by Section 512(f). Even if they were not preempted, MP3tunes has failed to state a claim under these laws. *See* Part III.

Finally, MP3tunes asserts the same declaratory judgment claim that the California court refused to hear. The declaratory judgment MP3tunes seeks adds nothing to the case. Because the declaratory judgment would be entirely redundant with issues that will already be addressed in EMI's affirmative case and MP3tunes' affirmative defenses, the counterclaim should be dismissed under Rules 12(f) and 8(c)(2). *See* Part IV.

BACKGROUND

EMI is among the best-known and most well-respected record companies in the United States and the world. EMI Music's labels own the copyrights to some of the world's most popular sound recordings. EMI Publishing is among the leading music publishers in the United

States and the world. With its catalogs, it is in the business of acquiring, protecting and administering rights in musical compositions in the United States.[1]

MP3tunes operates the websites MP3tunes.com and Sideload.com. Through these sites, MP3tunes engages in (and also facilitates, encourages and profits from) massive infringement of musical works, including sound recordings owned by EMI Music labels and musical compositions owned by EMI Publishing catalogs. It is readily apparent from the face of MP3tunes' websites that copyright infringement is part and parcel of MP3tunes' business plan.

In order to put a stop to infringement of its labels' sound recordings, EMI Music sent MP3tunes a takedown letter on September 4, 2007. The letter advised that MP3tunes "is copying and storing to its servers, indexing, publicly performing, and making available for download hundreds (if not thousands) of our client's copyrighted recordings in violation of the Copyright Act." Counterclaims Ex. A-01. EMI Music also attached a "representative sample" of 364 EMI works that were being "copied, performed, stored, distributed, and made available for download on or by MP3[t]unes," and reminded MP3tunes that "pursuant to 17 U.S.C. § 512(c)(3)(A)(ii) ... MP3[t]unes is obligated to remove all of EMI's copyrighted works" from its websites, Counterclaims Ex. A-02, A-04. While discussions between the parties were ongoing, MP3tunes sued EMI in federal district court in California. As described above, the California court dismissed MP3tunes' lawsuit in its entirety. Ex. 1 (*MP3tunes, LLC v. EMI Group, PLC*, No. 07CV1844 WQH (NLS), slip op. at 14 (S.D. Cal. Apr. 18, 2008)).

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[1] The EMI Music labels that are named plaintiffs/counter-defendants are Capitol Records, LLC; Caroline Records, Inc.; EMI Christian Music Group Inc.; Priority Records LLC; and Virgin Records America, Inc. The EMI Publishing catalogs named plaintiffs/counter-defendants are Beechwood Music Corp.; Colgems-EMI Music Inc.; EMI April Music Inc.; EMI Blackwood Music; EMI Full Keel Music; EMI Golden Torch Music Corp.; EMI Longitude Music; EMI Virgin Music, Inc.; and EMI Virgin Songs, Inc. MP3tunes' counterclaim complaint also names EMI Group, Ltd., EMI Group North America, Inc., EMI Group North America Holdings, Inc., and EMI Music North America, LLC as counter-defendants.

The counterclaim complaint that MP3tunes has now filed in this lawsuit seeks to revive theories and claims that the California court dismissed. Like MP3tunes' California complaint, the counterclaim complaint focuses almost entirely on EMI's September 4, 2007 letter, and specifically to 12 works from the representative list of 364. Tellingly, MP3tunes cannot even assert with certainty that these 12 works were lawfully licensed. Rather, using carefully selected language, it alleges that it "has no reason to believe ... [the works alleged are] anything but lawful," that it believes the works alleged are "lawfully available," or that it has found the works on websites that contain some "free promotional downloads." Based solely on these ambiguous allegations, MP3tunes asserts that EMI violated Section 512 by including these works in its takedown letters. Counterclaims ¶¶ 49, 50, 52.

The September 4 takedown letter and two others are attached to MP3tunes' counterclaim complaint. Counterclaims Ex. A-23 & A-17 (EMI Music Letter & List), A-26 & A-15 (EMI Publishing Letter & List). MP3tunes claims that it disabled access to the 567 works listed in those letters, but it identifies no harm that it suffered from doing so. Counterclaims ¶ 55.

From these facts, MP3tunes alleges a violation of Section 512(f) of the DMCA, which provides a cause of action to online service providers who are harmed by knowing, material misrepresentations by copyright owners in certain circumstances. It also seeks a declaration that it is protected by the DMCA's safe harbors, 17 U.S.C. § 512(a)-(d). Counterclaims ¶¶ 93-96, 90-92. MP3tunes alleges that the very same activities covered by the Section 512(f) claim also violate various New York and California laws, and seeks a declaratory judgment that MP3tunes' conduct did not violate copyright laws. All of these claims should be dismissed.

ARGUMENT

I. LEGAL STANDARD ON THE MOTION

Under Rule 12(b)(6), a complaint may be dismissed "for failure of the pleading to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007) (internal citations and quotations omitted). MP3tunes' allegations cannot withstand the instant motion to dismiss their counterclaims.

II. MP3TUNES' AFFIRMATIVE DMCA CLAIM SHOULD BE DISMISSED.

MP3tunes' Section 512(f) counterclaim is substantially the same as MP3tunes' allegation in the California action: MP3tunes claims EMI sent a takedown notice that "knowingly materially misrepresented that certain material on the [MP3tunes] Sites was infringing in violation of 17 U.S.C. § 512(f)(1) when it was not." Counterclaims ¶ 94; Ex. 2 (MP3tunes California Compl. ¶ 64). MP3tunes' counterclaim here differs from the claim that the California court dismissed on MP3tunes' first attempt in only two respects. First, MP3tunes has now mined EMI's September 4, 2007 takedown letter a little deeper; whereas it initially alleged seven errors in the letter, it now alleges five more. Counterclaims ¶¶ 49 (identifying works by The Concretes (Ex. A-9) and Underoath (Ex. A-9)) & 50 (Morningwood (Ex. A-7), Gemma Hayes (Ex. A-7), KT Tunstall (Ex. A-10)). Second, MP3tunes has combed through two other takedown notices that EMI Music and EMI Publishing sent it on October 25, 2007, and has alleged one additional work it believes was listed (twice) in error from those takedown notices. Counterclaims ¶¶ 51, 53 (Cracker (Ex. A-18)). Adding up the three takedown notices MP3tunes attached to its

Complaint, EMI brought 567 works to MP3tunes' attention. Counterclaims Exs. A-4, A-15, A-17. MP3tunes complains about 13.

MP3tunes' original Section 512(f) claim was dismissed by the California court. The current counterclaim should also be dismissed. Although the original claim was dismissed without prejudice, the dismissal was on the merits and thus has unavoidable binding effects. First, issue preclusion and the law of the case bar relitigation of the issue that the California court decided. The California court's conclusion that alleging seven defects in a notice containing 364 works is a *de minimis* error that cannot support a Section 512(f) claim is binding. Second, the new issues that MP3tunes presents fare no better. However framed — five more authorized works out of the original 364, or 13 allegedly authorized works within the total of 567 — MP3tunes has failed to allege anything more than *de minimis* errors. Moreover, just as in California, MP3tunes has failed to allege that it was damaged by the alleged errors in any cognizable way. The counterclaim must be dismissed.

A. Collateral Estoppel and the Law of the Case Doctrine Bar MP3tunes from Relitigating the October 25, 2007 Takedown Notice.

There is no doubt what was at issue when the California court ruled on MP3tunes' first Section 512(f) claim. In its ruling, the Court specifically quoted the very allegation that MP3tunes has repeated in its counterclaim: "[T]he Amended Complaint alleges that 'Defendants knowingly materially misrepresented that certain material on [MP3tunes.com and Sideload.com] . . . was infringing in violation of 17 U.S.C. § 512(f)(1) when it was not.'" Ex. 1 (4/18/08 Order) at 11 (alterations in original). The California court addressed the merits of MP3tunes' claim. It reasoned that MP3tunes had failed to allege that the works were actually non-infringing, and had alleged only that MP3tunes had no reason to think otherwise; that MP3tunes had failed to allege any facts that showed EMI to have made "knowing and material misrepresentations"; and that

MP3tunes' identification of seven works out of 364 was "not material given the breadth of infringement" addressed in the takedown notice. Ex. 1 (4/18/08 Order) at 12-13. On that reasoning, the Court reached its conclusion: "Plaintiff's affirmative claim pursuant to 17 U.S.C. § 512(f) is dismissed without prejudice for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6)." Ex. 1 (4/18/08 Order) at 14. That conclusion on the issue was necessary to its decision; had the court there believed MP3tunes stated a claim, the court could not have dismissed the suit as it did.

That ruling on the seven works identified in the September 4, 2007 takedown notice bars a portion of MP3tunes' claim here for two reasons. First, collateral estoppel bars the litigation of an issue presented and necessarily decided in a prior action between the same parties. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Segal v. AT & T*, 606 F.2d 842, 844-45 (9th Cir. 1979); *Zdanok v. Glidden, Durkee Famous Foods Div.*, 327 F.2d 944, 955 (2d Cir. 1964). This is true even when the previous case was dismissed without prejudice: Preclusive effect attaches, even in a dismissal without prejudice, "so long as the determination being accorded preclusive effect was essential to the dismissal." *Deutsch v. Flannery*, 823 F.2d 1361, 1364 (9th Cir. 1987) (citations omitted); *see also State Farm Mut. Auto. Ins. Co. v. Mallela*, No. 04-4923, 2002 U.S. Dist. LEXIS 25187, at *27-28 (S.D.N.Y. Nov. 18, 2002); *Kim v. Fujikawa*, 871 F.2d 1427, 1433 (9th Cir. 1989) (applying issue preclusion and finding that "[m]erely submitting additional allegations that are not sufficiently different from those contained in the previous complaint will not render the doctrine inapplicable") (citations omitted); *In re Duncan*, 713 F.2d 538, 541 (9th Cir. 1983); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4418 at 171 (1981). The issue that the California court ruled on — whether

allegations regarding a handful of the 364 works cited could support a Section 512(f) claim — cannot be relitigated here.

Second, even if MP3tunes could relitigate that issue, the law of the case doctrine requires that this Court reach the same result that the California court did. Under the law of the case doctrine, "a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation." *In re PCH Assocs.*, 949 F.2d 585, 592 (2d Cir. 1991) (citation omitted). That the previous ruling came in a different lawsuit between the parties is of no moment, because the doctrine applies "in different lawsuits between the same parties." *Ammar Textiles, Ltd. v. Contitrade Servs. Corp.*, No. 93 Civ. 237 (CSH), 1994 WL 115993, at *3 (S.D.N.Y. Mar. 30, 1994) (applying the law of the case doctrine to dismiss claim that simply reasserted a claim from an earlier lawsuit, setting forth "essentially the same facts"); *Terence J. v. Metro North Commuter R.R. Co.*, No. 91 Civ. 3263 (CSH), 1992 WL 42232, at *2 (S.D.N.Y. Feb. 25, 1992) (same). The law of the case doctrine aims to prevent parties from relitigating issues over and over, as MP3tunes is trying to do here.

B. MP3tunes Has Failed To State a Section 512(f) Claim.

Section 512(f) provides a cause of action against a party "who knowingly materially misrepresents ... that material or activity is infringing" by one "who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material." 17 U.S.C. § 512(f). A Section 512(f) claim exists only where the defendant "'knowingly' and 'materially' misrepresent[ed] that copyright infringement . . . occurred," *Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004), and that the plaintiff was harmed as a result. MP3tunes cannot allege any of this.

1. MP3tunes Has Not Adequately Alleged Knowing, Material Misrepresentations.

At the outset, it must be noted that MP3tunes still has failed to allege that EMI made *any* misrepresentations, let alone misrepresentations sufficient to satisfy Section 512(f). To satisfy the statute, MP3tunes would have to claim *at least* that EMI represented that material on the MP3tunes sites was infringing, when in fact the material was non-infringing — and that EMI *knew* the material was non-infringing. MP3tunes' counterclaim complaint falls far short, studiously *avoiding* even a claim that the works EMI identified were in fact non-infringing. MP3tunes dances around the misrepresentation point, claiming only that "it is likely" that the identified works are lawfully available, that some works "appear to be authorized," and that some works were included on sites that "offer[] free promotional downloads." Counterclaims ¶¶ 49-53. MP3tunes fails to make any non-conclusory allegation that any of the identified works were actually non-infringing. *See* Ex. 1 (4/18/08 Order) at 12 (dismissing claim in part because MP3tunes "ha[d] not identified or alleged a single track as definitively lawful, non-infringing, and wrongfully included"). Unable even to allege a misrepresentation, it is difficult to conceive that MP3tunes could prove a *knowing* misrepresentation.

But even assuming that the five new works MP3tunes points to from the September 4 takedown notice, and the one other work from the October 25 takedown notices, were in fact non-infringing, these numbers standing alone do not provide a valid foundation for a finding that EMI made any "material[]" misrepresentation, particularly "given the breadth of infringement alleged" in the takedown notices. Ex. 1 (4/18/08 Order) at 13. Section 512(f) does not authorize lawsuits based on mistakes, let alone trivial mistakes. *See MP3tunes, LLC v. EMI Group, PLC*, No. 07CV1844 WQH (NLS), slip op. at 13; *Rossi v. Motion Picture Ass'n of America*, 391 F.3d 1000, 1004-05 (9th Cir. 2004) (an unknowing mistake cannot support a claim pursuant to 17

U.S.C. § 512(f)); *Arista Records, Inc. v. MP3Board, Inc.*, No. 00-4660, 2002 WL 1997918, at *15 (S.D.N.Y. Aug. 29, 2002). Particularly in light of the California decision that seven works out of 364 works was *de minimis*, nothing in an allegation that 13 works in a takedown list hundreds of titles long could suggest the kind of concerted effort to defraud that MP3tunes claims. The claim cannot stand.

2. MP3tunes Has Failed To Allege Any Cognizable Harm.

Even if MP3tunes did allege material misrepresentations, the counterclaim still fails because MP3tunes has not alleged any cognizable injury. The only allegation made by MP3tunes is that it took down links to the five or six new works. Counterclaims ¶ 55. That is not a cognizable harm. Section 512(f) provides for a claim only by someone "who is injured ... *as the result* of the service provider relying upon such misrepresentation in removing or disabling access to the material." The act of removing or disabling access cannot itself give rise to a lawsuit in the absence of harm "as the result" of that action. 17 U.S.C. § 512(f). Rather, the Section 512(f) plaintiff must have suffered some injury as a result of taking down identified material, such as loss of business or reputational harm. Under Section 512(f)'s plain language, the mere takedown, without some resulting harm, cannot support a claim. Here, MP3tunes does not allege any resulting harm. Indeed, with a database of over 400,000 works, taking down five or six new works (or, adding in its previous claim, 13 works) without more, simply cannot support a claim for damages. The Section 512(f) claim must be dismissed.

III. MP3TUNES' STATE LAW CLAIMS SHOULD BE DISMISSED.

MP3tunes asserts three state law claims — deceptive business practices and unfair competition claims under New York law and an unfair, unlawful, or deceptive business practices claim under California law — all based on the same takedown notices that MP3tunes alleges

violated the DMCA. All of these state law claims are preempted by the DMCA's extensive regulation of copyright notices relating to online infringement. None of them state a claim.

A. Plaintiff's State Law Claims Are Preempted.

Federal law carefully regulates the relationship between content owners and online service providers who perform or distribute their content. Specifically, the DMCA sets forth a specific and detailed process by which copyright owners give online service providers notice of allegedly infringing activities. In order for that system of regulation to be given effect, however, it must take priority over state laws that might otherwise be perceived as alternative ways to govern the same field and activities. Preemption protects the powers that Congress exercised when either of two conditions is present. First, state laws are "field" preempted when Congress regulates an entire field so comprehensively that there is little room for the state to act. Second, state laws are "conflict" preempted when their enforcement would interfere with some purpose of a federal statute. MP3tunes argues that the violation of Section 512(f) gives rise not only to the remedies provided by the DMCA, but to separate ones provided under state law. *See* Counterclaims ¶ 57 ("EMI engaged in an unfair, deceptive, or illegal business act or practice in that they were aware that their conduct violated 17 U.S.C. § 512(f)"). However, well-established doctrines of field and conflict preemption do not permit state law to modify or supplement federal regulation and remedies.

1. The State Laws MP3tunes Invokes Are Field Preempted by the DMCA.

Under the doctrine of field preemption, "state law is preempted when the 'scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.'" *Freeman v. Burlington Broads., Inc.*, 204 F.3d 311, 320 (2d Cir. 2000) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Courts

must look for evidence that Congress wanted to settle the matter, *see id.* at 321, and at Congress's stated purposes, *Ass'n of Int'l. Auto. Mfrs., Inc. v. Abrams*, 84 F.3d 602, 608 (2d Cir. 1996). There is no doubt that the field at issue here — the relationship between the copyright owner and online service provider as outlined in Section 512 — is fully federally regulated.

As a matter of background, the DMCA is part of a comprehensive federal regulatory scheme. Not only is the broader field of copyright constitutionally assigned to the federal government, *see* U.S. Const. art. I, sec. 8, cl. 8, but the Second Circuit has recognized that, in enacting the Copyright Act, the Congress had the "'express objective of creating national, uniform copyright law by broadly preempting state statutory and common-law copyright regulation.'" *Krause v. Titleserv, Inc.*, 402 F.3d 119, 123 (2d Cir. 2005) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989)). Indeed, "Congress passed the 1978 Act to implement a uniform system of copyright protection applicable to all creative works." *Roth v. Pritikin*, 710 F.2d 934, 938 (2d Cir. 1983). Because copyright is such a heavily federalized area of law, the case for preemption with respect to any particular field within its bounds will be particularly strong. *See Reyes v. Downey Sav. & Loan Ass'n, F.A.*, 541 F. Supp. 2d 1108, 1112 (C.D. Cal. 2008).

The specific field that Congress has preempted with Section 512 is both narrowly defined and fully regulated. Congress has regulated the rights and relationship between a copyright owner and an online service provider, fully defining the contents and effects of takedown notices and the rights and remedies between the copyright owner and the website on which that owner's property might appear. It left no room for state laws to add any additional regulation. Congress enacted Section 512 in order to set a balanced statutory framework for combating piracy, designed to "provide strong incentives for service providers and copyright owners to cooperate

to detect and deal with copyright infringements." H.R. Rep. No. 105-796 at 72 (1998) (Conf. Rep.).

The statute that sets forth that balance is extensive. It sets forth, for example, the elements that must be included in a DMCA takedown notice. 17 U.S.C. § 512(c)(3)(A). The statute also sets forth the effects of a proper notice, *id.* at 512(c)(1)(A), as well as of a deficient notice, *id.* at 512(c)(3)(B). Importantly, Section 512(f) also sets forth the circumstances in which a takedown notice's recipient has a cause of action against the sender: when the sender (a) knowingly and (b) materially (c) misrepresents that material is infringing, and the recipient (d) suffers damages (e) as a result of relying on the misrepresentation (f) in removing or disabling access to the material claimed to be infringing. 17 U.S.C. § 512(f). Thus, at least for service providers as defined under the Act, Congress left no room for states to engage in further regulation. Because applying the state statutes that MP3tunes invokes here would add additional layers of regulation where Congress has plainly intended to, and did, cover the field, MP3tunes' state law claims should be preempted by the DMCA.

2. The State Laws MP3tunes Invokes Are Conflict-Preempted by the DMCA.

Second, even where Congress has not preempted a field, state laws are preempted to the extent they stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ass'n of Am. Med. Colls. v. Cuomo*, 928 F.2d 519, 522-23 (2d Cir. 1991) (quoting *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 986 (2d Cir. 1989)). Congress's purposes in Section 512(f) were simple. Congress was acutely aware that the services at issue, like MP3tunes, were often facilitating massive infringement that would result in takedown notices addressing thousands of works. The DMCA thus assists copyright owners facing

massive online infringement while providing a remedy to online service providers who are legitimately harmed, in defined circumstances, by knowing and material misrepresentations.

The Copyright Act, like other federal laws, preempts state laws that interfere with such congressional purposes. In *Am. Soc'y of Composers, Authors, and Publishers v. Pataki*, No. 95-9895, 1997 WL 438849 (S.D.N.Y. Feb. 27, 1997), the court concluded that federal law preempted a state statute that regulated the conduct of copyright investigations by performing rights societies. Granting ASCAP's request for a preliminary injunction, the court concluded that ASCAP was likely to succeed on the merits of its preemption argument. *Id.* at *4-*5.

The state statute in *ASCAP* was barred by conflict preemption for three reasons. First, the statute had a "deterrent effect" on the copyright owner's enforcement power. *See id.* at *5. That is, by requiring copyright owners to give notice of their enforcement efforts when federal law did not, "the provisions hinder the realization of the federal copyright scheme." *Id.* at *4. That burden "threatens to marginalize copyright itself because copyright is not self-enforcing." *Id.* at *4. Second, in permitting damages when a copyright owner failed to give notice of its visit, the state law resulted in "the nullification of federal remedies." *Id.* at *5. Third, the requirement that the copyright owner give the alleged infringer notice within 72 hours of taking certain investigative steps upset the balance that Congress had set in imposing a three-year statute of limitations. *See id.* at *4-*5. "Under the Supremacy Clause, the state has no power to resist Congress's determination of fairness as embodied in the federal statute of limitations, and its attempt[] to do so conflicts with federal law." *Id.* at *5.

More specifically, courts have recognized that Section 512(f) preempts state law claims that would set different standards for online service providers' compliance with takedown notices. In *Lenz v. Universal Music Corp.*, No. 07-03783, 2008 WL 962102 (N.D. Cal. Apr. 8,

2008), the court concluded that Congress must have intended for Section 512(f) to preempt claims based on tortious interference with contract. *Id.* at *4. The plaintiff in *Lenz* alleged that a copyright owner had interfered with the plaintiff's relationship with Youtube, by sending Youtube a takedown notice that resulted in the removal of plaintiff's video. *Id.* The court concluded that Section 512(f) must preempt the tortious interference with contract provision, because "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Hillsborough County Fla. v. Automated Med. Labs. Inc.*, 471 U.S. 707, 713 (1985)). The court rejected the plaintiff's argument that a tortious interference claim could still stand because the takedown notice had misrepresented the owner's copyrights, because in Section 512(f) "Congress provide[d] an express remedy for misuse of the DMCA[]." *Id. See also Online Policy Group,* 337 F. Supp. 2d at 1205-06.

MP3tunes' state law claims here interfere with Section 512(f) no less than the state law did in *ASCAP* and the state claims did in *Lenz*. If this Court were to permit MP3tunes to sue EMI for copyright notices under state "unfair competition" and "business practices" laws, it would similarly interfere with Congress's intent in Section 512. Section 512(f) requires takedown-notice plaintiffs to show, among other things, that they were harmed as the result of a knowing and material misrepresentation. Permitting suits in other circumstances would upset Congress's balance by imposing additional burdens on copyright owners. MP3tunes' state law claims should be preempted by the DMCA.

B. Plaintiff's State Law Claims Should Be Dismissed on the Merits.

Even if the DMCA did not preempt state laws on the issue, MP3tunes' claims should be dismissed because the state laws in question do not support MP3tunes' claims..

1. MP3tunes Fails To State a Claim for Unfair Business Practices.

MP3tunes fails to state a claim for unfair business practice under New York law because it fails to allege that any takedown notice harmed the public interest or that anyone, including itself, was harmed. New York General Business Law § 349 makes unlawful "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. Law § 349. "In contrast to common-law fraud, General Business Law § 349 is a creature of statute based on broad consumer-protection concerns." *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 343, 725 N.E.2d 598, 704 N.Y.S.2d 177 (1999). Thus, to establish a prima facie case under Section 349, a plaintiff must demonstrate that "(1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result." *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000) (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995)).[2]

First, the allegations are not sufficiently "consumer oriented" to make out a claim. Indeed, the Counterclaims fail to allege that any consumer was harmed or even that EMI "misled" consumers as that term is understood by Section 349. Rather, MP3tunes alleges only that "by sending the Notice, EMI engaged in an unfair, deceptive, or illegal act or practice in that they were aware that their conduct violated 17 U.S.C. § 512(f)." Counterclaims ¶ 55. Without

[2] The Second Circuit has noted that "corporate competitors . . . have standing to bring a claim . . . so long as some harm to the public at large is at issue." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995) (internal quotations omitted); *see also City of New York v. Cyco.Net, Inc.*, 383 F.Supp. 2d 526, 561-62 (S.D.N.Y. 2005); *Constr. Tech., Inc. v. Lockformer Co.*, 704 F. Supp. 1212, 1222 (S.D.N.Y. 1989). Indeed, "[t]he critical question" in assessing a suit by a corporate competitor "is whether the matter affects the public interest in New York." *Securitron*, 65 F.3d at 264; *All R's Consulting, Inc. v. Pilgrims Pride Corp.*, No. 06-civ-3601, 2008 U.S. Dist. LEXIS 30626, at *39-*41 (S.D.N.Y. Mar. 28, 2008); *MaGee v. Paul Revere Life Ins. Co.*, 954 F. Supp. 582, 586 (E.D.N.Y. 1997) ("[T]he injury must be to the public generally."); *see also Maurizio*, 230 F.3d at 521 ("Private contract disputes, unique to the parties … would not fall within the ambit of the statute.").

specific allegations that consumers were deceived by EMI's actions, MP3tunes fails to state an unfair and deceptive business practices claim. *Securitron*, 65 F.3d at 257; *All R's Consulting, Inc.*, 2008 U.S. Dist. LEXIS 30626 at *39-*41; *MaGee*, 954 F.Supp. at 586.

Further, MP3tunes fails to allege how, if at all, it was actually injured by EMI's conduct. A prima facie case under Section 349 requires, *inter alia*, a showing that plaintiff has been injured by the alleged violation. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N. A*, 85 N.Y.2d 20, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995). MP3tunes' claim is devoid of any allegations to support how it was injured by EMI's conduct. As noted above, the only allegation made by MP3tunes is that it took down links to the handful of works that were allegedly wrongly identified by EMI. Counterclaims ¶ 55. There is not even a suggestion that MP3tunes suffered any injury as a result.

2. MP3tunes Fails To State a Claim for Common-Law Unfair Competition.

MP3tunes also fails to state a claim for common-law unfair competition because it has not alleged that EMI has competed with MP3tunes by somehow using MP3tunes' labors. The essence of an unfair competition claim under New York law is that the defendant misappropriated the fruit of plaintiff's labors and expenditures by obtaining access to plaintiff's business idea either through fraud or deception, or an abuse of a fiduciary or confidential relationship. *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175 (2d Cir. 2001); *see also Werlin v. Reader's Digest Ass'n., Inc.*, 528 F. Supp. 451, 464 (S.D.N.Y. 1981); *Roy Exp. Co. Establishment v. CBS, Inc.*, 503 F. Supp. 1137, 1151-52 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095, 1105 (2d Cir. 1982) ("[A] cause of action for unfair competition requires unfairness and an unjustifiable attempt to profit from another's expenditure of time, labor and talent . . . .") (internal citations and quotation marks omitted); *Laser Diode Array, Inc. v. Paradigm Lasers,*

Inc., 964 F. Supp. 90, 95 (W.D.N.Y. 1997) ("Misappropriation of another's commercial advantage [is] a cornerstone of the tort."). MP3tunes fails to allege that EMI has competed with the company by somehow using its labors. Absent an actual misappropriation of labors and expenditures, MP3tunes' conclusory allegation that EMI's acts were unfair and deceptive business acts or practices is insufficient to change this outcome. *See Gristede's Foods, Inc. v. Unkechauge Nation*, 532 F. Supp. 2d 439 (E.D.N.Y. 2007) (finding that it is insufficient for a plaintiff to simply assert that the defendants' actions are unfair).

3. Plaintiff Fails to State a Claim for Violation of the California Business & Professions Code.

Like its other state law claims, MP3tunes' counterclaims for violation of the California Business & Professions Code must be dismissed for failure to state a claim. California's Unfair Competition Law focuses, not surprisingly, on anti-competitive conduct. *See, e.g., Denbicare U.S.A. Inc. v. Toys "R" Us, Inc.*, 84 F.3d 1143, 1152 (9th Cir. 1996). It bars certain business competition that is "unlawful, unfair, or fraudulent." Cal. Bus. & Prof. Code § 17200. In this context, however, "unfair" means conduct that threatens the letter or spirit of antitrust laws or harms competition. *Express, LLC v. Fetish Group, Inc.*, 464 F. Supp. 2d 965, 980 (C.D. Cal. 2006); *Carter v. Variflex, Inc.*, 101 F. Supp. 2d 1261, 1270 (C.D. Cal. 2000). Likewise, "fraudulent" under this statute focuses on whether "the public" was defrauded, not on whether the purported competitor — MP3tunes — was defrauded. *See Nat'l Rural Telecomms. Coop. v. DirecTV, Inc.*, 319 F. Supp. 2d 1059, 1077-78 (C.D. Cal. 2003). The conduct alleged here, even if not preempted by federal law, could not form the basis of a Section 17200 claim.

IV. MP3TUNES' DECLARATORY JUDGMENT CLAIM SHOULD BE DISMISSED.

Finally, MP3tunes' declaratory judgment claim adds nothing to this case. It is a mirror image of EMI's complaint, seeking a declaration on issues that will be addressed in the ordinary

course of litigating EMI's copyright claims. Because the Declaratory Judgment Act "does not require the courts to issue a declaratory judgment," but "confers a discretion on the courts," when a counterclaim simply seeks a declaratory judgment on defenses that the defendant will raise in the ordinary course, the declaratory judgment claim should be dismissed. *New York Times Co. v. Gonzales*, 459 F.3d 160, 165 (2d Cir. 2006) (internal quotation marks omitted). These principles require dismissal of the declaratory judgment claim.

Courts regularly dismiss declaratory judgment claims that simply restate issues from the affirmative litigation. When the claim "can be resolved by resolution of" a corresponding claim, *AMX Corp. v. Pilote Films*, No. 04-2035, 2007 WL 1695120, at *22 (N.D. Tex. June 5, 2007), such as when an affirmative claim and declaratory judgment claim "raise identical factual and legal issues," the declaratory judgment claim is destined to "become moot" and "must be dismissed." *Avery Dennison Corp. v. Acco Brands, Inc.*, No. 99-1877, 2000 WL 986995, at *4 (C.D. Cal. Feb. 22, 2000). Entertaining such claims through a declaratory judgment action adds needless layers of pleadings without resolving any additional disputes.

Here, MP3tunes' declaratory judgment claim primarily consists of issues that it has expressly raised as affirmative defenses to EMI's copyright claims; namely, that MP3tunes is eligible for the safe-harbor protections outlined in the DMCA's 17 U.S.C. § 512(a)-(d) and (k). These issues will be resolved in EMI's affirmative case.

Since they will be presented as defenses, there is no separate reason to consider MP3tunes' Section 512 safe-harbor arguments, Counterclaims ¶ 92, as requests for declarations. MP3tunes seeks four such declarations. First, MP3tunes seeks a declaration that it is a "service provider[]" under Section 512(k). Counterclaims ¶ 92. Second, MP3tunes asks for a declaration that its activities, as described in the takedown notice it received from EMI immediately prior to

the lawsuit, fall within the protections of Section 512(a)-(d). *Id.* Third, MP3tunes alleges that the takedown notice it received "was deficient under 17 U.S.C. §§ 512(c) and/or (d)." *Id.* Fourth, MP3tunes alleges that MP3tunes' response was sufficient under those provisions. *Id.* All of the issues raised by these four requests for declarations are subsumed within MP3tunes' Tenth Affirmative Defense, which provides:

> Defendant alleges that some or all of the claims for damages are barred from any affirmative recovery under the safe harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512.

The statute MP3tunes invokes, Section 512, provides, among other things, a safe-harbor from copyright liability for some activities of online service providers when those providers respond appropriately to statutory takedown notices, 17 U.S.C. § 512(a)-(d). That affirmative defense will be addressed and litigated in the ordinary course of EMI's lawsuit and will address the first four issues on which MP3tunes seeks a declaration.[3]

Additionally, it is worth noting that the MP3tunes' repeated DMCA argument, and focus on particular takedown notices, is a red herring. MP3tunes seeks to convey the false impression that the DMCA protects it from copyright liability so long as it disables access to specific works identified in formal, statutory notices. In fact, "The DMCA was enacted both to preserve copyright enforcement on the Internet and to provide immunity to … '*innocent*' service providers who can prove they do not have actual or constructive knowledge of the infringement," *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (emphasis added), not to give carte blanches to those who mock copyright law and make a living off of

[3] The adequacy of that takedown notice and MP3tunes' response to it, under Section 512(c) and (d), will be addressed in determining whether MP3tunes' actions upon receiving the notice entitle the company to Section 512's safe harbors. *See* 17 U.S.C. §§ 512(c)(1)(C) (making safe harbor depend in part on whether the service provider, "upon notification of claimed infringement as described in [Section 512(c)(3)], responds expeditiously to remove, or disable access to," the claimed infringing material).

infringement. The DMCA's legislative history shows that the statute was never intended to protect those who "turned a blind eye to 'red flags' of obvious infringement." H. Rep. No. 105-551, pt. 2, at 57 (1998). When "the infringing nature" of a site "would be apparent from even a brief and casual viewing, safe harbor status ... would not be appropriate." *Id.* at 58. Under the statute, then, responses to takedown notices are necessary but hardly sufficient to justify DMCA protection. *Costar Group Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 702 n.8 (D. Md. 2001). As long as the company was aware of infringing activity and failed to stop it, as the evidence will show, MP3tunes will be ineligible for safe harbors. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1104 (9th Cir. 2007) (suggesting that "red flag" exists when it is "apparent that the website instructed or enabled users to infringe another's copyright"). The DMCA counterclaims, whether captioned as an affirmative defense or as a counterclaim, are a distraction.

The final declaration MP3tunes seeks is a direct mirror image of EMI's claims. It asks for a declaration that its activities "do not constitute direct copyright infringement, contributory copyright infringement and/or inducement of copyright infringement." Counterclaims ¶ 92. This relief directly tracks EMI's claims, which allege direct infringement, EMI Compl. ¶¶ 41-62, contributory infringement, EMI Compl. ¶¶ 70-76, and inducement of copyright infringement, EMI Compl. ¶¶ 63-69. The declaratory judgment issue will be necessarily addressed during litigation of EMI's affirmative claim. *See Arista Records LLC v. Usenet.com, Inc.*, No. 07-8822, 2008 WL 4974823, at *5 (S.D.N.Y. Nov. 24, 2008) (Baer, H.) (dismissing declaratory judgment counterclaims that "serve no purpose because they mirror the issues raised in Plaintiffs' Complaint, constitute no affirmative cause of action, and are duplicative of Usenet's affirmative defenses."); *see also, e.g.*, *Stickrath v. Globalstar, Inc.*, No. CO7-1941, 2008 WL 2050990, at *4 (N.D. Cal. May 13, 2008); *Interscope Records v. Kimmel*, No. 3:07-cv-0108, 2007 WL 1756383,

at *4 (N.D.N.Y. June 18, 2007); *Interscope Records v. Duty*, No. 05CV3744, 2006 WL 988086, at *3 (D. Ariz. Apr. 14, 2006); *W. Shoshone Nat'l v. U.S.*, 415 F. Supp. 2d 1201, 1205-06 (D. Nev. 2006). This Court's resources ought not be wasted managing additional components of litigation that will not resolve additional disputes.

V. THIS COURT SHOULD STAY DISCOVERY ON THE COUNTERCLAIMS.

While EMI has no objection to discovery proceeding immediately on MP3tunes' affirmative defenses (and thus on the issues presented by MP3tunes' declaratory judgment claim), EMI seeks a stay of discovery on MP3tunes' counterclaims until this Court decides the instant motion to dismiss. Given the expedited joint briefing schedule for this motion and the motion to dismiss, and the impending January 16, 2009 oral argument date set for the motions, MP3tunes will suffer no unfair prejudice from the stay since the motion to dismiss will likely be decided promptly and will render the instant request for a stay moot. Indeed, MP3tunes has yet to even serve any discovery requests on its counterclaims. Moreover, the discovery they could seek on their Section 512(f) and state law counterclaims is extensive and completely distinct from the discovery mandated by EMI's affirmative claims. Therefore, given the discrete nature of the requests and the unnecessary burden that would result from requiring responses while the motion is pending, neither the parties nor the Court should be forced to expend valuable time and resources on costly and potentially unnecessary discovery at this juncture.

Rule 26(c) gives courts discretion to stay discovery while a motion to dismiss is pending "for good cause shown." Fed. R. Civ. P. 26(c); *Spencer Trask Software & Info. Servs. v. RPost Int'l*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002). Good cause may be shown "where a party has filed a dispositive motion, the stay is for a short period of time, and the opposing party will not be prejudiced by the stay." *Spencer Trask Software*, 206 F.R.D. at 368 (citing *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120, 1996 WL 101277, at *2 (S.D.N.Y. March 7, 1996)). Courts

also consider the breadth of discovery sought and the burden of responding to it, *id.*; *Anti-Monopoly, Inc.*, 1996 WL 101277, at *3, and the strength of the motion that is the basis of the discovery stay application. *Id.* Because EMI meets those criteria, a stay should be granted.

A. MP3tunes Will Suffer No Unfair Prejudice from a Stay of Discovery on Its Counterclaims.

MP3tunes will suffer no prejudice from a stay of discovery on its counterclaims during the pendency of the instant motion to dismiss. Indeed, there is no justifiable basis for MP3tunes to assert that it needs immediate discovery on its counterclaims. First, MP3tunes would be hard-pressed to make such an argument since it has not yet even served any discovery requests relating to its counterclaims. Further, the motion to dismiss (like the motion to stay) will be fully briefed by January 8, 2009 and argued by January 16, 2009. Given this schedule, MP3tunes will not be prejudiced by a brief stay of discovery until the Court decides the motion to dismiss.

In addition, MP3tunes will be entitled to take discovery on its affirmative defenses immediately. Since MP3tunes' declaratory judgment claim simply restates issues that it has expressly raised as affirmative defenses to EMI's copyright claims, MP3tunes would also be able to pursue discovery on its declaratory judgment claim. However, discovery on MP3tunes' counterclaims, which MP3tunes will no doubt use to delve into EMI's business practices and policies, is not warranted at this stage in light of the likelihood of dismissal of the counterclaims, and MP3tunes would not be unfairly burdened by a brief stay of such discovery until this Court decides the instant motion to dismiss. *See Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, No. CV-05-4294, 2006 U.S. Dist. LEXIS 94944, at *3 (E.D.N.Y. Mar. 3, 2006) (granting motion for stay where plaintiffs failed to demonstrate that a stay of discovery would unfairly prejudice them); *Telesca v. Long Island Hous. P'ship*, No. CV-05-5509, 2006 U.S. Dist. LEXIS 24311, at *6-7 (E.D.N.Y. Apr. 27, 2006) (finding that "[a]ll parties will necessarily incur substantial

expenses if and/or when discovery is conducted, and the plaintiff has failed to demonstrate that a stay of discovery, for the purposes of avoiding such expenses during the pendency of the motions to dismiss, would be unfairly prejudicial"); *Gandler v. Nazarov*, No. 94 Civ. 2272, 1994 WL 702004, at *4 (S.D.N.Y. Dec. 14, 1994) (staying discovery where plaintiffs failed to show they would be unfairly prejudiced).

B. The Discovery That MP3tunes May Seek on Its Counterclaims Would Be Extensive and Burdensome on EMI.

If this Court denies the instant motion to stay discovery on MP3tunes' counterclaims, MP3tunes will use its affirmative DMCA and state law claims to conduct extensive discovery into the methods by which EMI polices online piracy and the licensing arrangements that EMI has entered for its works. For example, MP3tunes could request information concerning EMI's business processes and internal controls for takedown notices, and arrangements that EMI had to license or otherwise authorize the works that were listed on the takedown notices.

The burden of such a production, if permitted, would be immense. Because such discovery would relate to claims that are likely to be dismissed, as discussed above, it would be an unnecessary hardship to allow extensive discovery on the counterclaims before EMI's motion is decided. *See Chrysler Capital Corp. v. Century Power Corp.*, 137 F.R.D. 209, 209-10 (S.D.N.Y. 1991); *Am. Booksellers Ass'n v. Houghton Mifflin Co.*, No. 94 Civ. 8566, 1995 WL 72376, at *1 (S.D.N.Y. Feb. 22, 1995) (staying discovery pending motion to dismiss because "[t]he discovery sought by plaintiffs is very broad and to require defendants to respond to it at this juncture, when their motion to dismiss may be granted, would be extremely burdensome."). In light of the breadth of discovery that MP3tunes may seek on its counterclaims, a stay pending resolution of the motion to dismiss is appropriate.

C. Strength of Dispositive Motion

Finally, this court should grant the instant request for a stay of discovery on MP3tunes' counterclaims because, as set forth above, there is substantial legal ground for complete dismissal of MP3tunes' counterclaims. *See Gandler*, 1994 WL 702004, at *3-4 (granting a stay of discovery where, *inter alia*, defendant's motion to dismiss was well-grounded in the law); *Port Dock & Stone Corp.*, 2006 U.S. Dist. LEXIS 94944, at *3 (granting stay where defendants raised "substantial issues with regard to the viability of plaintiffs' complaint as against [defendants], and defendants' arguments do not appear to be frivolous or unfounded).

CONCLUSION

For all of the foregoing reasons, counter-defendants respectfully request that their motion to dismiss and to stay discovery on the counterclaims be granted in all respects.

Dated: New York, New York
December 15, 2008

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