

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

---

CAPITOL RECORDS, INC., <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. Act. No. 03-CV-11661-NG
	)	(LEAD DOCKET NUMBER)
NOOR ALAUJAN,	)	
	)	
Defendant.	)	

---

INTERSCOPE RECORDS, <i>et al.</i>	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. Act. No. 1:08-cv-11126-NG
	)	(ORIGINAL DOCKET NUMBER)
AMANDA PAUL	)	
	)	
Defendant.	)	

---

**PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS DEFENDANT’S COUNTERCLAIMS**

Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiffs UMG Recordings, Inc., *et al.* (“Plaintiffs”), respectfully move to dismiss both counterclaims asserted against them by Defendant Amanda Paul (“Defendant”) because Defendant’s counterclaims fail to state claims upon which relief can be granted.

**INTRODUCTION**

Defendant asserts two declaratory judgment counterclaims, each of which has previously been addressed by this Court in another case, *Capitol Records, Inc. v. Hallahan*, Case No. 07-cv-

10333-NG (D. Mass. Sept. 7, 2007) (Doc. No. 460<sup>1</sup>). First, Defendant seeks a declaration that she did not infringe Plaintiffs' copyrights. (Counterclms, ¶ 18.) The Court in *Hallahan* allowed this counterclaim to withstand a motion to dismiss based on the Court's rationale that the Supreme Court has upheld a "roughly analogous counterclaim" in the patent infringement context. *Hallahan*, Case No. 07CV10333-NG, slip op. at 2 (citing to *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83 (1993)). Plaintiffs respectfully assert that the *Cardinal Chemical* case is entirely distinct from the facts in this case. The declaratory judgment counterclaim sought in *Cardinal Chemical* – where the defendant was seeking to have the patents deemed invalid – was in no way a mirror image of the plaintiff's claims for patent infringement. In fact, the counterclaim had nothing to do with whether the defendant infringed the patents.

Here, Defendant's counterclaim should be dismissed because it is the exact mirror image of Plaintiffs' claim of infringement and also duplicative of Defendant's defenses to Plaintiffs' claim. *Arista Records, LLC v. Tschirhart*, Case No. SA-05-CA-372, slip op. at 9 (W.D. Texas May 24, 2006) (dismissing counterclaims) (attached hereto as Exhibit A); *see also Interscope Records v. Kimmel*, 2007 U.S. Dist. LEXIS 43966, at \*16 (N.D.N.Y. June 18, 2007) (same); *Virgin Records Am. v. Thompson*, Cause No. SA-06-CA-592, at 1 (W.D. Texas Sep. 21, 2006) (dismissing duplicative declaratory judgment counterclaim) (attached hereto as Exhibit B); *Elektra Entm't Group v. Garrett*, Cause No. W-07-CA-037 at 1-2 (W.D. Texas June 22, 2007) (same) (attached hereto as Exhibit C); *Interscope Records v. Duty*, 2006 U.S. Dist. LEXIS 20214, at \*10-11 (D. Ariz. April 14, 2006) (same). For the reasons stated in *Tschirhart*, *Kimmel*, *Thompson*, *Garrett*, *Duty* and below, Defendant's first counterclaim is redundant and unnecessary and it should be dismissed under Rule 12(b)(6).

---

<sup>1</sup> Like this case, *Capitol Records, Inc. v. Hallahan*, Case No. 07-cv-10333-NG (D. Mass.) was later consolidated into the lead case, Case No. 03-cv-11661-NG.

Second, Defendant seeks a declaration that Plaintiffs purportedly misused their copyrights and should be deemed to have forfeited their exclusive rights under the Copyright Act. (Counterclms, ¶¶ 25, 26.) Defendant's counterclaim should be dismissed because copyright misuse is not a cause of action. The Court in *Hallahan* denied this counterclaim for several reasons, including that it relates to Plaintiffs' concerted efforts incident to litigation and, therefore, is precluded by the *Noerr-Pennington* doctrine. *Hallahan*, Case No. 07-cv-10333-NG, slip op. at 3-4 (Doc. No. 460). Indeed, no court has ever recognized such a claim, and numerous courts have dismissed counterclaims similar to the one asserted by Defendant here. *See, e.g., Kimmel*, 2007 U.S. Dist. LEXIS 43966, at \*16; *Garrett*, Cause No. W-07-CA-037 at 2-3 (Ex. C). For the same reasons cited by the Court in *Hallahan* and those reasons explained below, Defendant's second counterclaim should be dismissed for failure to state a claim upon which relief may be granted.

For these and other reasons discussed below, the Court should dismiss each of Defendant's counterclaims for failure to state a claim under Rule 12(b)(6).

## ARGUMENT

### **I. Legal Standard for Motion To Dismiss.**

When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, the Court must "accept[] the [appellants'] well-pleaded facts as true . . ." and reject "unsupported conclusions or interpretations of law." *Estate of Bennett v. Wainwright*, 548 F.3d 155, 162 (1st Cir. 2008) (internal quotations and citations removed). Although the district court must accept the well-pleaded factual allegations of the complaint as true, "the court need not credit bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." *Redondo-Borges v. United States HUD*, 421 F.3d 1, 5 (1st Cir. 2005). However, the allegations

found in the complaint “must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (requiring plaintiff to plead “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [her claim]”). Ultimately, a court should dismiss a complaint for failure to state a claim when the complaint does not “possess enough heft to set forth a plausible entitlement to relief.” *Wainwright*, 548 F.3d at 162 (internal quotations and citations removed).

Courts in the First Circuit routinely dismiss complaints and counterclaims for failure to state a claim upon which relief can be granted if based on the facts alleged on the face of the pleading an affirmative defense will inevitably succeed in defeating the claim. *Nisselson v. Lernout*, 469 F.3d 143, 150 (1st Cir. 2006) (holding that “While most Rule 12(b)(6) motions are premised on a plaintiff’s putative failure to state an actionable claim, such a motion may sometimes be premised on the inevitable success of an affirmative defense.”); *Blackstone Realty LLC v. FDIC*, 244 F.3d 193, 197 (1st Cir. 2001) (holding that “It is well established that affirmative defenses, such as the failure of a contract sued upon to satisfy the statute of frauds, may be raised in a motion to dismiss an action for failure to state a claim” and citing cases dismissing an action based on statute of frauds and statute of limitations defenses).

As demonstrated below, Defendant’s counterclaims fail to include any plausible grounds for relief and should be dismissed.

## **II. The Court Should Dismiss Defendant’s Claim For Declaratory Judgment.**

### **A. Defendant’s Counterclaim Is Redundant Because It Mirrors Plaintiffs’ Copyright Claim.**

Courts routinely dismiss “mirror image” counterclaims where they merely restate issues already before the court as part of a plaintiff’s affirmative case. *See Kimmel*, 2007 U.S. Dist. LEXIS 43966, at \*15-16 (dismissing a counterclaim for declaratory judgment of non-

infringement where the issue is “squarely before the Court” as a result of Plaintiffs’ claims); *Atlantic Recording Corp. v. Serrano*, 2007 U.S. Dist. LEXIS 95203, at \*11-12 (S.D. Cal. Dec. 28, 2007); *Duty*, 2006 U.S. Dist. LEXIS 20214, at \*12; *Tschirhart*, SA-05-CV-372-OLG, slip op. at 9-10 (dismissing a counterclaim for declaratory judgment of non-infringement because the claim was both “redundant and unnecessary”) (Ex. A); *Green Bay Packaging, Inc. v. Hoganson & Assoc., Inc.*, 362 F. Supp. 78 (N.D. Ill. 1973); *Resolution Trust Corp. v. Ryan*, 801 F. Supp. 1545, 1556 (S.D. Miss. 1992) (dismissing defendant’s counterclaims for declaratory judgment because they were “redundant and moot upon disposition of the claims against defendants”); *Aldens, Inc. v. Packel*, 524 F.2d 38, 53 (3d Cir. 1975) (dismissing Attorney General’s counterclaim for declaratory relief where counterclaim presented the “identical issues posited by the complaint”); *Veltman v. Norton Simon, Inc.*, 425 F. Supp. 774, 776 (S.D.N.Y. 1977) (dismissing counterclaim for declaratory relief as “redundant” and “moot”); *GNB Inc. v. Gould, Inc.*, 1990 U.S. Dist LEXIS 16172, \*12 (N.D. Ill. Nov. 30, 1990) (dismissing counterclaim as “duplicative” where it was “essentially a restatement” of plaintiff’s claim from defendant’s perspective).

Similarly, courts routinely dismiss declaratory judgment counterclaims that are duplicative of a defendant’s own defenses. *See FDIC v. Bancinsure, Inc.*, 770 F. Supp. 496, 500 (D. Minn. 1991) (dismissing counterclaim that “seeks the same result as defendant’s denials and affirmative defenses” as “redundant”); *Lee v. Park Lane Togs, Inc.*, 81 F. Supp. 853, 854 (S.D.N.Y. 1948) (dismissing defendant’s counterclaim seeking declaration of invalidity of trademark as unnecessary where allegations of counterclaim were already before court as a defense).

Here, Defendant seeks a declaration of non-infringement that is entirely duplicative and a mirror image of Plaintiffs' claim of infringement against Defendant. (*Compare* Compl., ¶ 16 with Counterclms, ¶ 18.) Likewise, Defendant's counterclaim also duplicates her defenses to Plaintiffs' claim. Defendant's counterclaim alleges that she "did not commit any of the alleged acts of downloading and file-sharing." (Counterclms, ¶ 11.) The same denial of infringement is contained in Defendant's Amended Answer (Ans., ¶ 4) as well as in several of the affirmative defenses set forth therein (Ans. at 3, Eighth and Ninth Affirmative Defenses). As the Court held in *Tschirhart*, a case similar to the one at bar that involved a group of record companies suing an individual for copyright infringement on a peer-to-peer network, "[t]he issue of copyright infringement will be decided by this Court regardless of the declaratory judgment claim . . . Therefore, defendant's claim for a declaratory judgment is redundant and unnecessary." *Tschirhart*, SA-05-CV-372, slip op. at 9 (Ex. A). Because Defendant's counterclaim is entirely duplicative of Plaintiffs' claim for copyright infringement and of Defendant's defenses to Plaintiffs' claim, it is redundant and unnecessary, and should be dismissed. *See id.*

**B. Defendant's Attempted Use of the Declaratory Judgment Act Here Fails to Comport With the Act's Purpose.**

The Declaratory Judgment Act ("Act") was not intended to allow parties to bring redundant counterclaims like the one proposed by Defendant. The Act was initially intended to dispel difficulties in cases where a party sought to challenge the constitutionality of a statute without having to violate the statute, and now serves to allow courts to declare the rights of adverse parties before they accrue avoidable damages. *See Steffel v. Thompson*, 415 U.S. 452, 466 (1974); *see also Polykoff v. Collins*, 816 F.2d 1326, 1333 (9th Cir. 1987). The Act does not automatically grant the right to have a claim for declaratory relief heard, and the Court should not do so here, because allowing such a claim would only waste judicial resources. *See Kimmel*,

2007 U.S. Dist. LEXIS 43966, at \*15 (dismissing duplicative counterclaim for non-infringement and holding that “[t]he issue of copyright infringement will be decided by this court regardless of the declaratory judgment claim . . . Therefore, [defendant’s] claim for a declaratory judgment is redundant and unnecessary.”); *Tschirhart*, SA-05-CV-372, slip op. at 9 (same) (Ex. A).

**C. The Patent Infringement Context Does Not Provide a Basis for Allowing Defendant’s Copyright Declaratory Judgment Counterclaim.**

In the *Hallahan* case, this Court allowed a similar declaratory judgment counterclaim to proceed against plaintiff copyright holders. *Hallahan*, Case No. 07-cv-10333-NG, slip op. at 2 (Doc. No. 460). The Court found that a copyright infringement counterclaim could proceed because the Supreme Court “has sustained a roughly analogous counterclaim over patent infringement, and the present situation is not meaningfully distinguishable.” *Id.* The only legal basis for the Court’s ruling was the Supreme Court’s ruling in a patent case, *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83 (1993). Plaintiffs respectfully submit that Defendant’s counterclaim here is not analogous because the declaratory judgment counterclaim in *Cardinal Chemical* was not a mirror image of plaintiffs’ claim. Rather, the counterclaim there sought to have the patents deemed invalid, regardless of whether the product in dispute was infringed or not. As such, the *Cardinal Chemical* counterclaim was not a mirror image whereas the counterclaim in this case is a precise mirror image counterclaim.

First, the Supreme Court’s ruling on patent infringement in *Cardinal Chemical* is entirely distinct from the facts in this case. In *Cardinal Chemical*, a defendant filed an answer denying infringement and asserted a “counterclaim for a declaratory judgment **that the patents are invalid.**” *Id.* at 86 (emphasis provided). The trial court entered declaratory judgment finding that patent invalid and, thus, found that the defendant had not infringed the patent. The appellate court subsequently vacated the declaratory judgment based on the finding of non-infringement

by the defendant. *Id.* The Supreme Court reversed the appellate court because such a ruling only “prolongs the life of invalid patents [and] encourages endless litigation (or at least uncertainty) over the validity of outstanding patents.” *Id.* at 102. In other words, the Supreme Court found that declaratory judgment for invalidity of a patent was wholly distinct from whether the patent was infringed. Furthermore, the declaratory judgment counterclaim at issue focused solely on the validity of the patent and had nothing to do with whether the defendant had infringed the patent.

In *Cardinal Chemical*, and similar patent infringement declaratory judgment counterclaims, the validity of the patent affects future conduct of the defendant, as well as others similarly situated. Here, the conduct being questioned in Defendant’s declaratory judgment counterclaim – the reproduction and distribution of Plaintiffs’ copyrighted sound recordings by Defendant – already occurred, involves only this Defendant, and would not prevent any future litigation. Defendant has not challenged the validity of Plaintiffs’ copyrights or disputed Plaintiffs’ allegations of ownership or registration – in fact, Defendant asserts Plaintiffs’ ownership affirmatively in her counterclaim. (Counterclms, ¶ 6.) Instead, the declaratory judgment she seeks – whether Defendant committed the infringement at issue – involves only past conduct and would not alter future conduct by the parties or others. Similarly, it would not allow the parties to avoid damages or preserve judicial resources. Therefore, the analogy to *Cardinal Chemical* fails and, unlike declaratory judgment counterclaims challenging the validity of a patent (or copyright), Defendant’s counterclaim does not comport with the Act’s purpose and should be dismissed.

Second, the First Circuit has distinguished copyrights from patents when considering counterclaims asserted against rights holders. The First Circuit refused to extend the rationale



behind a patent misuse claim to encompass copyright misuse because “the policy rationale for a copyright misuse defense is weaker than in the case of patent misuse because an exclusive right to express an idea in a particular way (a copyright) is a lesser threat to competition than an exclusive right to use the idea itself (a patent).” *Data General Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1170 (1st Cir. 1994) (refusing to recognize copyright misuse defense).

Here, there is no issue pertaining to competition, nor is there any policy rationale for Defendant’s counterclaim.

For all these reasons, the Court should refuse to consider the analogy to *Cardinal Chemical* when considering the validity of Defendant’s copyright counterclaim.

### **III. Defendant’s Second Counterclaim For Alleged Misuse Of Copyright Fails To State A Claim For Relief And Should Therefore Be Dismissed.**

#### **A. There Is No Affirmative Claim For Copyright Misuse.**

Defendant’s counterclaim for alleged misuse of copyright should be dismissed for failure to state a claim because alleged copyright misuse is not recognized as a cause of action by any court. *See Garcia-Goyco v. Law Envtl. Consultants, Inc.*, 428 F.3d 14, n.7 (1st Cir. 2005) (holding that the First Circuit has “not yet recognized misuse of a copyright as a defense to infringement” let alone an affirmative claim for relief); *Broadcast Music, Inc. v. Hearst/ABC Viacom Entm’t Servs.*, 746 F. Supp. 320, 328 (S.D.N.Y. 1990) (dismissing copyright misuse counterclaim because “[s]uch a claim is unprecedented and the Court declines to create the claim”); *see also Arista Records, Inc. v. Flea World, Inc.*, 356 F. Supp. 2d 411, 428 (D.N.J. 2005) (holding that “copyright misuse is not a claim but a defense” and noting that even the defense of copyright misuse “has rarely been upheld as a defense to a claim of copyright infringement”); *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1199 (N.D. Cal. 2004) (“[T]he Court is aware of [no legal authority] that allows an affirmative claim for damages

for copyright misuse.”); *Ass’n of Am. Med. Colleges v. Princeton Review, Inc.*, 332 F. Supp. 2d 11, 19 (D.D.C. 2004) (“Because the policy reasons underlying the development of the equitable doctrine of copyright misuse are grounded in the unclean hands doctrine, permitting copyright misuse as an independent, affirmative claim would be contrary to the purpose of the doctrine.”); *MGM Studios, Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213, 1225 (C.D. Cal. 2003) (stating that “copyright misuse cannot found a claim for damages”); *Warner/Chappel Music, Inc. v. Pilz Compact Disc, Inc.*, 1999 U.S. Dist. LEXIS 17161, at \*15-16, n.5 (E.D. Pa. 1999) (“[There is] virtually no authority in any Circuit for [an affirmative claim of copyright abuse].”); *Shady Records, Inc. v. Source Enters.*, 2004 U.S. Dist. LEXIS 26143, at \*50 (S.D.N.Y. Dec. 30, 2004) (“Within the Second Circuit, misuse or abuse of copyright is not firmly established as either a counterclaim or an affirmative defense, and there is some disagreement in the other Circuits as to whether it can give rise to a defense outside the context of antitrust violations, let alone an independent counterclaim.”).

Defendant does not – and cannot – cite any legal authority to counter Plaintiffs’ argument that copyright misuse simply does not exist as an affirmative claim in the First Circuit or in any court. Nor is there any reasonable argument for creating such a cause of action. The foregoing case law makes clear that courts do not recognize an affirmative claim for copyright misuse. Accordingly, as Defendant’s counterclaim for misuse of copyright fails to state a claim for affirmative relief, it should be dismissed.

**B. Any Counterclaim Seeking To Assert Copyright Misuse As A Defense To Plaintiffs' Claim Of Infringement Also Fails As A Matter Of Law.**

To the extent Defendant seeks to assert her misuse counterclaim not as an affirmative claim for relief, but as a defense to Plaintiffs' claim of infringement, the counterclaim still fails.<sup>2</sup> The defense of copyright misuse has generally been recognized only in limited factual circumstances where the copyright holder is alleged to be "restraining competition; imposing restrictions on the use of copyrighted [material] that extend beyond the permissible bounds of the exclusive rights granted by the copyright laws." See *Electronic Data Sys. Corp. v. Computer Assoc. Int'l, Inc.*, 802 F. Supp. 1463, 1466 (N.D. Tex. 1992). In other words, the copyright misuse defense is generally recognized only when the defendant presents antitrust allegations restraining competition. See *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1200 (7th Cir. 1987).

A prerequisite to any antitrust claim requires an allegation of "a relevant market in which the anticompetitive effects of the challenged activity can be assessed." *Geddie v. Seaton*, 2006 U.S. Dist. LEXIS 55106, at \*18 (N.D. Tex. Aug. 8, 2006); see also *United States v. Eastman Kodak, Co.*, 63 F.3d 95, 104 (2d Cir. 1995) (dismissing antitrust claims because "[w]ithout a definition of the relevant market, there is no way to measure a company's ability to act as a monopolist"). An antitrust claim also "must include 'allegations covering all the elements that comprise the theory for relief' to survive a Rule 12(b)(6) challenge." *Geddie*, 2006 U.S. Dist. LEXIS 55106, at \*17 (citing *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954)).

---

<sup>2</sup> Even had Defendant pled copyright misuse as an affirmative defense with the requisite facts, the appropriate remedy still would not be that the copyright holder forfeits its copyrights.

To sustain a misuse defense in the context of copyrights, a party must “establish a nexus between . . . alleged anti-competitive actions and [the copyright holder’s] power over copyrighted material.” *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 192 F. Supp. 2d 321, 345 (D.N.J. 2002) (internal quotation omitted). Moreover, “generalized antitrust violations will not suffice” to support a misuse defense to copyright infringement. *Id.*

Here, Defendant’s misuse counterclaim contains only conclusory allegations of “collusive[]” behavior, “antitrust” violations, and “unlawful” agreements. (Counterclms, ¶ 21.) Defendant does not, and could not, offer any specific factual allegations to support any of these conclusory allegations. Such conclusory allegations do not “possess enough heft to set forth a plausible entitlement to relief.” *Wainwright*, 548 F.3d at 162 (internal quotations and citations removed). Nor does Defendant make any allegations of any nexus between Plaintiffs’ copyrights and any alleged anti-competitive behavior, any relevant market, or any harm to any relevant market. The generalized antitrust violations that Defendant presents here fail as a matter of law to state a misuse defense. *See Video Pipeline*, 192 F. Supp. 2d at 345 (holding that “generalized antitrust violations will not suffice”).

Moreover, an examination of Defendant’s specific allegations (Counterclms, ¶¶ 19-27) demonstrates that Plaintiffs are not in any way attempting to control competition. On the contrary, Defendant’s allegations, unsubstantiated rhetoric and hyperbole aside, demonstrate that Plaintiffs are engaged in nothing more than protecting their copyrights. Plaintiffs have brought this lawsuit and others like it to combat the significant and ongoing problem of online piracy, which the United States Supreme Court has called “infringement on a gigantic scale.” *See Grokster Ltd.*, 545 U.S. at 940. Defendant’s allegations, even if accepted at face value, do not present a situation in which Plaintiffs are attempting to control competition for an area outside of

the scope of their copyrighted works. Accordingly, Defendant cannot make out a misuse defense. *See Video Pipeline*, 192 F. Supp. 2d at 346 (holding that the alleged infringer had failed to demonstrate any effort by the copyright holder to “to control competition for an area that is outside the scope of its copyrighted works”).

Plaintiffs’ claims in this and other cases fall squarely within the rights granted to Plaintiffs under the Copyright Act, and Plaintiffs have brought this action for no other purpose than to protect their copyrights. No court has recognized a purported “misuse” defense, let alone an independent affirmative claim of misuse, based on the facts alleged by Defendant in this case, and for good reason. To do so would effectively chill the ability of copyright holders to protect their copyrights. For all of these reasons, Defendant’s allegations fail to state a defense of misuse of copyright as a matter of law, and this counterclaim should be dismissed.

**C. Plaintiffs’ Conduct Is Also Protected By The First Amendment Right To Petition.**

The First Amendment guarantees “the right of the people . . . to petition the Government for a redress of grievances.” *U.S. Const. Amend. I*. The Supreme Court has declared the right to petition to be “among the most precious of the liberties safeguarded by the Bill of Rights.” *United Mine Workers v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967). This right to petition has been extended to afford a party the right to access the courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

Consistent with this right, sometimes referred to as *Noerr-Pennington* immunity, numerous courts have shielded litigants from claims relating to the filing of litigation. *See, e.g. Hallahan*, Case No. 07-cv-10333-NG, slip op. at 2 (Order, Doc. No. 460); *T.F.T.F. Capital Corp. v. Marcus Dairy, Inc.*, 312 F.3d 90, 93 (2d Cir. 2002); *Cheminor Drugs, Ltd. v. Ethvl Corp.*, 168 F.3d 119, 128-129 (3d Cir. 1999); *Video Int’l Prod., Inc. v. Warner-Amex Cable*

*Comm.*, 858 F.2d 1075, 1082-83 (5th Cir. 1988); *Am. Mfg. Servs., Inc. v. Official Comm. of Unsecured Creditors of the Match Elecs. Group, Inc.*, 2006 U.S. Dist. LEXIS 22987, at \*15 (N.D.N.Y. 2006) (“The Noerr-Pennington doctrine generally immunizes from liability a party’s commencement of a prior court proceeding.”).

Courts have also extended *Noerr-Pennington* “to encompass concerted efforts incident to litigation, such as prelitigation ‘threat letters.’” *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 100 (2d Cir. 2000) (citing *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992) (holding that concerted threats of litigation are protected under *Noerr-Pennington*); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367-68 (5th Cir. 1983) (same)); see also *DIRECTV, Inc. v. Personette*, 2003 U.S. Dist. LEXIS 19695, at \*19-20 (W.D. Mich. Oct. 20, 2003) (holding that actions such as sending out pre-suit letters and making threats of litigation are the type of litigation activities covered by the *Noerr-Pennington* doctrine, and thus dismissing counterclaims); *DirecTV, Inc. v. Milliman*, 2003 U.S. Dist. LEXIS 20938, at \*23-24 (E.D. Mich. Aug. 26, 2003) (stating that *Noerr-Pennington* immunity extends beyond antitrust claims to acts related to the right to seek redress for wrong from the Courts, and dismissing deceptive trade practice counterclaim under *Noerr-Pennington*).

Defendant here alleges that Plaintiffs have acted collusively in “litigating and settling” cases similar to this one (Counterclms, ¶ 21), and have forfeited their exclusive rights to the copyrights to the sound recordings at issue (Counterclms, ¶ 25.) Such allegations seek to prevent the commencement of this litigation and others like it and, therefore, are contrary to the First Amendment Right to Petition and established precedent holding the commencement of a lawsuit to be immune from such claims. See *Personette*, 2003 U.S. Dist. LEXIS 19695, at \*19-20 (holding that actions such as sending out pre-suit letters and making threats of litigation are

covered by *Noerr-Pennington*). For this additional reason, Defendant's counterclaim for copyright misuse should be dismissed.

### CONCLUSION

For all of the above reasons, Plaintiffs ask this Court to dismiss Defendant's counterclaims, and for such other relief as the Court deems just and necessary.

INTERSCOPE RECORDS; SONY BMG  
MUSIC ENTERTAINMENT; MAVERICK  
RECORDING COMPANY; WARNER BROS.  
RECORDS INC.; ARISTA RECORDS LLC;  
and UMG RECORDINGS, INC.

By their attorneys,

Dated: March 2, 2009

By: /s/ Claire Newton  
John R. Bauer, BBO# 630742  
Nancy M. Cremins, BBO # 658932  
Claire Newton BBO # 669598  
ROBINSON & COLE LLP  
One Boston Place  
Boston, MA 02108-4404  
Main Phone: (617) 557-5900  
Main Fax: (617) 557-5999

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 2, 2009, Plaintiffs filed the foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIMS** using the CM/ECF electronic filing system and served a copy on Defendant via United States Mail at the following address:

Amanda Paul  
708 John Quincy Adams  
171 Fearing Street  
Amherst, Massachusetts 01003

/s/ Claire Newton

John R. Bauer, BBO# 630742  
Nancy M. Cremins, BBO # 658932  
Claire Newton BBO # 669598  
ROBINSON & COLE LLP  
One Boston Place  
Boston, MA 02108-4404  
Main Phone: (617) 557-5900  
Main Fax: (617) 557-5999