

UNITED STATES DISTRICT COURT
 DISTRICT OF MASSACHUSETTS

)
 CAPITOL RECORDS, INC., et al.,)
)
 Plaintiffs,)
)
 v.)
)
 NOOR ALAUJAN,)
)
 Defendant.)

Civ. Act. No. 03-cv-11661-NG
 (LEAD DOCKET NUMBER)

)
 SONY BMG MUSIC ENTERTAINMENT,)
)
 et al., Plaintiffs,)
)
 v.)
)
 JOEL TENENBAUM,)
)
 Defendant.)

Civ. Act. No. 07-cv-11446-NG
 (ORIGINAL DOCKET NUMBER)

**PLAINTIFFS’ OPPOSITION TO DEFENDANT’S MOTION
 FOR LEAVE TO FILE AMENDED ANSWER AND COUNTERCLAIM**

Plaintiffs respectfully submit this Opposition to Defendant’s Motion for Leave to File Amended Answer and Counterclaim and state as follows:

INTRODUCTION

A year and a half after Defendant first answered the Complaint and more than seven months after defense counsel entered an appearance, assured the Court there would be no further amendments to Defendant’s Answer and Counterclaims,¹ and asked the Court for an immediate

¹ At the September 23, 2008 status conference, Defendant’s counsel declined to amend his counterclaims and requested “a trial date at the earliest convenience, ideally before the end of October.” (Tr. of Sept. 23, 2008 Status Conference, at 13:21-14:24, **Exhibit A** hereto.) Indeed, Defendant assured the Court that there would be “[n]o amendments, Your Honor.” (*Id.* at 14:17).

trial date, Defendant seeks leave to rewrite his operative pleading for the fourth time. Despite Defendant's Motion for Leave to file a *second* amended answer and counterclaim being ripe for ruling at the April 30, 2009 hearing, Defendant now seeks leave to file a *third* amended answer and counterclaim. Indeed, this is his fourth bite at the apple.

Defendant and his legal team have had more than ample opportunity to review the facts of the case, research the relevant law, and respond to the allegations in the Complaint. Yet, they have served no written discovery, have taken no depositions, and have only recently served initial disclosures. And while they pressed for an immediate trial date and opposed Plaintiffs' Motion to Continue, their operative pleading remains a moving target. Indeed, their practice of waiting until briefing is complete to propose new/different/additional claims serves no purpose other than needlessly delaying and increasing the cost of this litigation. In fact, it appears that Defendant is waiting until his counterclaims will be dismissed (or motion for leave denied) to take another stab at amending. Defendant's strategy has wasted the Court's time and Plaintiffs' time and money, and has substantially delayed these proceedings. For that reason alone, leave to file a third amended answer and counterclaim should be denied.

Contrary to Defendant's contention that he is seeking leave simply to clarify issues, he is, for the first time, attempting to assert an affirmative defense of fair use. However, because that affirmative defense has been waived, leave should be denied.

In addition, leave to assert this affirmative defense must be denied as futile. Indeed, every court to rule on fair use in the peer-to-peer file sharing context has rejected it as a matter of law. In fact, the well known copyright scholars Defendant intended to call as expert witnesses have stated unequivocally that any fair use defense in this case is without merit and that Defendant's alleged actions do not constitute fair use. *See* Defendant's Pretrial Memorandum

(Doc. 694). Lawrence Lessig opined that “of course [what Joel did] was against the law,” and fair use doesn’t excuse it. (March 29, 2009 email from Lawrence Lessig to Charles Nesson, **Exhibit B**). Wendy Seltzer agreed, stating “add me to those puzzled by the ‘fair use’ arguments and concluding that Defendant’s conduct did not meet “the legally established category of ‘fair use.’” (March 29, 2009 email from Wendy Seltzer to Charles Nesson, **Exhibit C**). And William Fisher proclaimed: “I cannot, however, testify that Joel’s activity constitutes a fair use under current copyright law, because I don’t think it does. (March 29, 2009 email from William Fisher to Charles Nesson. **Exhibit D**). These professors have all concluded that fair use *should not* encompass P2P filesharing. Professor Fisher explains: “In my view, the fair use doctrine has other, important functions in the copyright scheme [. . .] which would be impaired by twisting it to address this particular problem.” (March 29, 2009 email from William Fisher to Charles Nesson. **Exhibit E**). Similarly, Professor Seltzer explains: “I fear that we do damage to fair use by arguments that stretch it to include file-sharing.” (March 29, 2009 email from Wendy Seltzer to Charles Nesson. **Exhibit C**).

Finally, Defendant’s own counsel acknowledges that the assertion of fair use in the P2P context has “no real basis in case law or moderate academic scholarship.” (March 29, 2009 email from Raymond Bilderbeck to Charles Nesson, **Exhibit F**).

While Defendant and his counsel are on a crusade to transform Defendant’s illegal actions into a referendum on the “fairness” of online copyright infringement, such contentions have no place in this legal case and do not constitute an affirmative defense as matter of law. Fair use is a statutory exception to copyright and in order to survive, it must fall within the narrow confines of the statutory exception. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 590 (1994). It is not enough that Defendant believes this lawsuit, and others like it, is *unfair*. In

order to amend, Defendant's proposed amendments must comply with established law. Where, as here, they fall short, they must be rejected.

ARGUMENT

I. STANDARD OF REVIEW.

Fed. R. Civ. P. 15(a) requires courts to grant leave to amend only "when justice so requires." Rule 15(a)'s liberal amendment policy seeks to serve justice, but does not excuse a lack of diligence that imposes additional and unwarranted burdens on an opponent and the courts. *Acosta-Mestre v. Hilton Int'l*, 156 F.3d 49, 52 (1st Cir. 1998). Thus, courts properly deny leave where there is undue delay in seeking amendment and where the non-moving party will suffer prejudice. *Larocca v. Borden, Inc.*, 276 F.3d 22, 32 (1st Cir. 2002). When "considerable time has elapsed between the filing [. . .] and the motion to amend, the movant has the burden of showing some valid reason for his neglect and delay." *Acosta-Mestre*, 156 F.3d at 52 (citations omitted).

Similarly, where amendment would delay the completion of discovery and the trial of the case, leave should be denied as prejudicial to the non-moving party. *Id.*; *Tiernan v. Blyth, Eastman, Dillon & Co.*, 719 F.2d 1, 4 (1st Cir. 1983). As explained below, because Defendant unduly delayed bringing his proposed third amended answer and counterclaim, and because Plaintiffs will suffer further prejudice, leave to amend should be denied.

Moreover, where an amendment would be futile, leave to amend should be denied. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (leave to amend shall not be granted where amendments would be futile); *Maldonado v. Dominguez*, 137 F.3d 1, 11 (1st Cir. 1998) (denying a motion for leave to amend where the "amended claims would be destined for dismissal"); *Northeast Fed. Credit Union v. Neves*, 837 F.2d 531, 536 (1st Cir. 1988) (in denying the motion for leave to amend on futility grounds, the court noted that "[f]ederal courts need not tiptoe

through empty formalities to reach foreordained results”). An amendment is futile where the added claim could be defeated by a motion to dismiss or for summary judgment. *See Hatch v. Dep’t for Children*, 274 F.3d 12, 19 (1st Cir. 2001) (citation omitted); *Quanta Specialty Lines Ins. Co. v. Investors Capital Corp.*, 2008 U.S. Dist. LEXIS 35319, at *32 (S.D.N.Y. Apr. 30, 2008) (denying leave to amend on grounds that affirmative defense would be futile). Here, as explained below, Defendant’s proposed amendment would be futile. Accordingly, Defendant’s Motion for Leave should be denied.

II. DEFENDANT’S MOTION FOR LEAVE TO AMEND TO ASSERT A THIRD AMENDED ANSWER AND COUNTERCLAIM SHOULD BE DENIED ON GROUNDS OF WAIVER, UNDUE DELAY, AND PREJUDICE TO PLAINTIFFS.

A. Defendant’s Proposed Counterclaims Have Already Been Fully Briefed And Fail As A Matter Of Law.

Plaintiffs have extensively briefed and demonstrated the futility of Defendant’s proposed counterclaims for abuse of process under both Massachusetts and federal law. As noted in their Motion to Dismiss Counterclaim (doc. 670) and Opposition to Motion for Leave to Amend (doc. 703), which Plaintiffs incorporate by reference, Defendant’s counterclaims fail because prosecuting infringement under the Copyright Act is not, as a matter of law, an unlawful ulterior purpose. *See Broadway Mgmt. Servs., Ltd. v. Cullinet Software, Inc.*, 652 F. Supp. 1501, 1503 (D. Mass. 1987) (citing *Cohen v. Hurley*, 20 Mass. App. 439, 442 (1985)); *see also UMG Recordings v. Martino*, Civ. No. 4:08-CV-01756-JFM (M.D. Pa. April 21, 2009) (dismissing abuse of process counterclaim against record company plaintiffs on grounds of *Noerr-Pennington* immunity) (Attached as **Exhibit G**); *Motown Record Co. v. Kovalcik*, Civ. No. 2:07-CV-04702-AB (E.D. Pa. February 23, 2009) (same) (Attached as **Exhibit H**). Moreover, there is no cause of action for abuse of process under federal law and there is no basis for this Court to create one out of whole cloth. *See, e.g., Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (holding

that no federal common law claim for abuse of process exists); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (Absent some statutory authorization, federal courts have authority to create a federal common law remedy only when it is “necessary to protect uniquely federal interests.”). Accordingly, Plaintiffs will not revisit those claims herein, and incorporate their previous Motion to Dismiss (doc. 670) and Opposition to Motion for Leave to Amend (doc. 703) by reference.

B. Defendant Has Waived All Affirmative Defenses.

An affirmative defense is waived unless raised in the answer. *Davignon v. Clemmey*, 322 F.3d 1, 15 (1st Cir. 2003). Indeed, Rule 8(c) is designed to provide plaintiffs with adequate notice of a defendant's intention to litigate an affirmative defense, thereby affording an opportunity to develop any evidence and offer responsive arguments relating to the defense. *Id.* (citing *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1226 (1st Cir. 1994)). As Defendant did not assert fair use as an affirmative defense in his Answer, First Amended Answer, or Proposed Second Amended Answer, he has waived it.

While there are exceptions to the Rule 8(c) bar, none applies here. Indeed, the exceptions are limited to cases where (i) the defendant asserts the affirmative defense without undue delay and the plaintiff is not unfairly prejudiced by any delay, or (ii) the circumstances necessary to establish entitlement to the affirmative defense did not obtain at the time the answer was filed. *Id.* (citing *Depositors Trust Co. v. Slobusky*, 692 F.2d 205, 208 (1st Cir. 1982) (“A party may also have recourse to a late discovered affirmative defense by obtaining leave to amend his complaint.”)). As established below, Defendant’s undue delay will prejudice Plaintiffs. Moreover, the relevant facts and law have been available to Defendant’s counsel since he first entered this case over seven months ago.

Accordingly, Rule 8(c) mandates denial of Defendant's Motion for Leave to Amend.

C. Defendant's Undue Delay In Amending His Answer To Assert The Affirmative Defense Of Fair Use Has Prejudiced Plaintiffs And Mandates Denial Of His Motion.

Defendant bears the burden of showing some valid reason for his neglect and delay in asserting fair use as an affirmative defense. *See Acosta-Mestre*, 156 F.3d at 52. Where a party fails to do so and amendment would prejudice the non-moving party, leave should be denied. *Larocca*, 276 F.3d at 32. In his Motion for Leave, however, Defendant offers no explanation for his delay. *See* Motion at 1-3. The failure to proffer any reason should be dispositive. While Defendant filed his initial answer *pro se*, his counsel has been involved in this case since at least August 2008 and has already sought leave to file two amended answers. (Docs. 625² and 675). Each time, Plaintiffs expended substantial time and money responding to Defendant's meritless claims. Defendant does not offer - nor could he offer - any new facts that have recently come to light to justify this delayed request to amend. To the contrary, it appears that the assertion of this new affirmative defense is yet another musing by Defendant's counsel. This approach has needlessly delayed proceedings and increased the cost of this litigation. Such tactics run contrary to the spirit of the Federal Rules, which provide for "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1; *see Forman*, 371 U.S. at 178 (leave to amend should be denied where there is repeated failure to cure deficiencies by amendments previously allowed and undue prejudice). As Defendant has unduly delayed in asserting this defense, leave to amend should be denied. *See Forman*, 371 U.S. at 178.

Moreover, leave to amend should be denied where the non-moving party will suffer prejudice. *Acosta-Mestre*, 156 F.3d at 52. In *Tiernan v. Blyth, Eastman, Dillon & Co.*, the First

² In his September 24, 2008 deposition, Defendant admitted that his counsel helped prepare his August 19, 2008 amended answer and counterclaim.

Circuit recognized that unexcused delay in seeking amendment results in significant prejudice to the non-moving party.

Here, allowing Defendant leave to amend for the third time - thirty some days before the close of discovery and four months after the original trial date *requested by Defendant* - will further prejudice Plaintiffs. Indeed, leave to amend will likely require Plaintiffs to engage in additional discovery, could potentially alter their trial tactics and strategy, and will invariably result in additional delay. Plaintiffs should not be forced to bear the burden of Defendant's delay and neglect.

III. DEFENDANT'S MOTION FOR LEAVE SHOULD BE DENIED BECAUSE THE PROPOSED AMENDMENT WOULD BE FUTILE.

A. The Affirmative Defense Of Fair Use Fails As A Matter Of Law.

Section 107 of the 1976 Copyright Act instructs that "fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright." 17 U.S.C. § 107. In analyzing a defense of fair use, the Copyright Act specifies four factors that must be considered: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.*; *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 184 (D. Mass. 2007); *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132, 141 (2d Cir. 1998).

Regarding the first factor, courts typically ask three questions to determine the purpose and character of the use, including whether a defendant's use of copyrighted material is of the type that copyright is meant to prohibit. 17 U.S.C. § 107; *Fitzgerald*, 491 F. Supp. 2d at 184.

First, courts ask whether a defendant's use of the copyrighted material falls into a category specifically identified by Congress in the copyright statute as especially important to copyright's ends: "criticism, comment, news reporting, teaching[. . .]scholarship or research." *Fitzgerald*, 491 F. Supp. 2d at 184 (citing 17 U.S.C. § 107). Second, "courts ask whether the defendant's use was 'productive' or 'transformative' - i.e. whether it added anything to the copyrighted work in its use, and thus is treatable more as a new work referencing the old than as an instance of strict copying." *Id.* Third, "courts ask whether the use was commercial - i.e. whether it primarily served defendant's private interests rather than the public interest in underlying copyright law." *Id.* (citing 17 U.S.C. § 107); *Arica Inst., Inc. v. Palmer*, 970 F. 2d 1067, 1077 (2d Cir. 1992) (citations omitted); 17 U.S.C. § 101 (defining "financial gain" as the "expectation of receipt, of anything of value, including the receipt of other copyrighted works"); *Amer. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 14-16 (S.D.N.Y. 1992) (when copying is for the purpose of making multiple copies of the original, and thereby saving users the expense of purchasing authorized copies, it is not fair use). These three questions are cumulative. *Fitzgerald*, 491 F. Supp. 2d at 184.

Defendant's downloading and distribution of Plaintiffs' copyrighted sound recordings over a P2P network fails all three inquiries under the first factor as a matter of law. First, Defendant's actions do not fall within any of the statutorily enumerated categories. The copying and distribution cannot be fairly said to have been used for purposes of "criticism, comment, news reporting, teaching[. . .]scholarship or research."

Next, Defendant's conduct was not productive or transformative, as he copied entire recordings from other KaZaA users into his shared folder without alteration. Any suggestion that such actions are transformative has been soundly rejected. *A&M Records v. Napster, Inc.*,

239 F.3d 1004, 1015 (9th Cir. 2001) (“downloading MP3 files does not transform the copyrighted work). *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381, 1389 (6th Cir. 1996), is instructive. In that case, the Sixth Circuit rejected the defendant’s defense that the selection and arrangement of copyrighted materials in student “coursepacks” transforms the materials and constitutes fair use. *Id.* The court explained that “[i]f you make verbatim copies of 95 pages of a 316-page book, you have not transformed the 95 pages very much -- even if you juxtapose them to excerpts from other works and package everything conveniently.” *Id.* Indeed, “[t]his kind of mechanical ‘transformation’ bears little resemblance to the creative metamorphosis accomplished by the parodists in the *Campbell* case.” *Id.* Accordingly, the selection and placement of sound recordings in a KaZaA shared folder does not “transform” the copyrighted material for purposes of the first factor.

Finally, Defendant is a commercial infringer. Clearly, a person who engages in “file-sharing” does so with the expectation of receiving copyrighted works in return and, thus, does so for financial gain. In *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), the Ninth Circuit specifically held that the file trading by Napster users constituted a “commercial use” for purposes of the fair use analysis. *Id.* at 1015 (“Repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use.”). Not only has Defendant obtained hundreds of works without paying for them, thus rendering him a commercial infringer as defined above, he has also distributed those works to others free of charge. These actions have two different commercial impacts: (1) Defendant is saving money by not paying for the copyrighted works, and (2) the record companies are denied sales both to Defendant and to others as a result of his infringement. *See BMG Music v. Gonzalez*, 430 F.3d 888, 891 (7th Cir. 2005) (a copy downloaded, played, and retained on one’s

hard drive for future use is a direct substitute for a purchased copy). Moreover, Defendant could not argue that his infringement served anything other than his own private interests. The self-interested nature of his acts further precludes any fair use argument.

Regarding the second factor, “the nature of the copyrighted work,” in determining whether it is appropriate to invoke fair use, courts ask two questions about the copyrighted work itself: whether the work has been previously published, and whether it is factual or creative. *Id.* at 187. “[C]reative works justify stronger copyright protection and are less amenable to fair use [than factual works].” *Id.* (citing *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 751 F.2d 501, 509 (2d Cir. 1984)); *Campbell*, 510 U.S. at 586 (creative recordings are “close[] to the core of intended copyright protection”). This factor focuses not on what the infringer did with the copyrighted works, but rather the nature of the work itself. Here, as the sound recordings at issue are both creative works and previously published, this factor weighs strongly against a fair use defense. *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 657 (6th Cir. 2004) (sound recordings are creative works); *see also Princeton Univ. Press*, 99 F.3d at 1389 (“the excerpts copied for the coursepacks contained creative material, or ‘expression;’ it was certainly not telephone book listings that the defendants were reproducing”).

Regarding the third factor – where the entirety of the copyrighted works in issue are copied, a claim for fair use is negated. *See Infinity Broadcast*, 150 F.3d at 109 (“The more of a copyrighted work that is taken, the less likely the use is to be fair”); *Fitzgerald*, 491 F. Supp. 2d at 188 (“What matters is whether the alleged infringer used the ‘heart’ of the material; in other words, superficial editing or cropping does not impact the Court’s consideration); *Princeton Univ. Press*, 99 F.3d at 1389 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1122 (1990) (“The larger the volume . . . of what is taken, the greater

the affront to the interests of the copyright owner, and the less likely that a taking will qualify as a fair use.”)). Here, as the entire sound recording is wholesale copied and placed in Defendant’s KaZaA shared folder, this factor weighs against fair use.

“The fourth factor, the effect of the use upon the market for or value of the copyrighted work, ‘is undoubtedly the single most important element of fair use.’” *Los Angeles News Service v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992) (quoting *Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 566 (1985)). “To negate fair use one need only show that if the challenged use ‘should become widespread, it would adversely affect the potential market for the copyrighted work.’” *Harper & Row*, 471 U.S. at 568 (quoting *Sony Corp.*, 464 U.S. at 451); *Lotus Dev. Corp. v. Borland Int’l Inc.*, 831 F. Supp. 223, 243 (D. Mass. 1993). Here, the effect of online copyright infringement is undeniable. Indeed, the Department of Justice warns that online media distribution systems are ‘one of the greatest emerging threats to intellectual property ownership,’ estimated that ‘millions of users access P2P networks,’ and determined that ‘the vast majority’ of those users ‘illegally distribute copyrighted materials through the networks.’ Report of the Department of Justice’s Task Force on Intellectual Property, available at <http://www.cybercrime.gov/IPTaskForceReport.pdf> at 39 (October 2004).

Moreover, Defendant’s own legal scholars agree that Defendant’s actions have an adverse effect on the market. “[I]t’s not credible to argue that widespread P2P filesharing has not and will not give rise to ‘some meaningful likelihood of future harm’ to the revenues of the holders of copyrights in sound recordings and musical works.” (March 29, 2009 email from William Fisher to Charles Nesson, **Exhibit I**). As the dispositive element of effect on the market weighs against Defendant, his claim of fair use fails as a matter of law.

In his Motion for Leave, Defendant does not (and indeed could not) suggest that he satisfies any of the factors for fair use. Instead, he simply suggests that Plaintiffs have “the burden of proving that Joel Tenenbaum’s use was not fair.” *See* Motion at 2. Contrary to Defendant’s professorial musings, fair use is an affirmative defense which he has the difficult burden of proving. *Campbell*, 510 U.S. at 590. Stripped to its essence, Defendant’s “fair use” or “fairness” defense amounts to “nothing more than a bald claim that Defendant should be able to misappropriate plaintiffs’ property simply because there is a consumer demand for it. This hardly appeals to the conscience of equity.” *MP3.com*, 92 F. Supp. 2d at 352 (rejecting fair use defense). Accordingly, Defendant’s Motion for Leave to assert a fair use defense should be denied.

B. Courts Have Consistently Rejected A Fair Use Defense In The File-Sharing Context.

In the context of peer-to-peer file-sharing networks, courts have consistently rejected the fair use defense as a matter of law. In *Gonzalez*, 430 F.3d at 890, a KaZaA peer-to-peer file-sharing case, Judge Easterbrook explained:

Music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying originals. . . . It is no surprise, therefore, that the only appellate decision on point has held that downloading copyrighted songs cannot be defended as fair use, whether or not the recipient plans to buy songs she likes well enough to spring for. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014-19 (9th Cir. 2001). *See also UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (holding that downloads are not fair use even if the downloader already owns a copy).

With all of these means available to consumers who want to choose where to spend their money, **downloading full copies of copyrighted material without compensation to authors cannot be deemed "fair use." Copyright law lets authors make their own decisions about how best to promote their works; copiers such as Gonzalez cannot ask courts (and juries) to second-**

guess the market and call wholesale copying "fair use" if they think that authors err in understanding their own economic interests or that Congress erred in granting authors the rights in the copyright statute.

Id. at 890-91 (emphasis added). Similarly, in *Napster*, 239 F.3d at 1014-19, Napster argued that its users were not committing copyright infringement but were, instead, making fair use of the material. The Ninth Circuit rejected this argument, analyzing the four fair use factors in the peer-to-peer file-sharing context, finding that peer-to-peer file sharing fails all four factors. In *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), the court again rejected the fair use defense in the peer-to-peer context, holding that “on any view, defendant’s ‘fair use’ defense is indefensible and must be denied as a matter of law. *Id.* at 352 (emphasis added). This Court should follow its sister courts in rejecting the fair use defense as a matter of law in the peer-to-peer file-sharing context.

C. Defendant’s Own Scholars And His Counsel Concluded That Defendant’s Actions Do Not – And Should Not - Constitute Fair Use.

The legal scholars Defendant has relied on unanimously agree that an affirmative defense of fair use fails as a matter of law and would refuse to testify that Defendant’s actions constitute fair use. Indeed, in a series of emails made public by Defendant’s counsel, Defendant’s scholars explain that fair use does not – and should not– encompass filesharing.

First, William Fisher, professor of intellectual property law and faculty director of Mr. Nesson’s own Berkman Center for Internet and Society proclaimed, “I cannot, however, testify that Joel’s activity constitutes a fair use under current copyright law, because I don’t think it does.” (March 29, 2009 email from William Fisher to Charles Nesson. **Exhibit D**). He further explained: “In my view, the fair use doctrine has other, important functions in the copyright scheme [. . .] which would be impaired by twisting it to address this particular problem.” (March 29, 2009 email from William Fisher to Charles Nesson. **Exhibit E**).

Similarly, Lawrence Lessig, founder of Stanford Law School's Center for Internet and Society opined to Defendant's counsel, in no uncertain terms:

I am surprised if the intent is to fight this case as if what joel did was not against the law. of course it was against the law, and you do the law too much kindness by trying to pretend (or stretch) "fair use" excuses what he did. It doesn't.

(March 29, 2009 email from Lawrence Lessig to Charles Nesson, **Exhibit B**). Professor Lessig also proclaims that "P2P filesharing is wrong and kid's shouldn't do it," and informs Defendant's counsel that there is no "honest frame for joel's case" other than jury nullification. *Id.*

Finally, Wendy Seltzer, professor of information privacy and intellectual property at Washington College of Law and fellow with the Berkman Center, shared her opinion that Defendant's conduct is not fair use. "Add me to those puzzled by the 'fair use' arguments. I understood the argument to be that statutory damages are inappropriate and unconstitutional in response to personal-use copying, not that such copying was within the bounds of existing law." (March 29, 2009 email from Wendy Seltzer to Charles Nesson. **Exhibit C**). Professor Seltzer further explains: "I fear that we do damage to fair use by arguments that stretch it to include file-sharing." *Id.*

In addition to Defendant's scholars' conclusions that Defendant's infringement does not constitute fair use, a member of Defendant's own legal team concluded that fair use is "an argument which has no real basis in case law or moderate academic scholarship." (March 29, 2009 email from Raymond Bilderbeck to Charles Nesson, **Exhibit F**).

Undaunted by the confines of the law, Defendant's counsel informs that he is asserting "the premise of fair use as an instrument in law that you can speak directly to the jury." Email at 3; *see* Motion for Leave at 3. Defendant's counsel must not be permitted to assert baseless defenses in order to achieve extra-judicial ends. While Defendant may be seeking to assert a fair

use defense in an effort at jury nullification, because this defense fails as a matter of law, as acknowledged by his legal scholars and his counsel, he is not entitled to assert it. Accordingly, Defendant's Motion for Leave should be denied.

CONCLUSION

Defendant has largely conceded he committed the acts in question. Realizing that Defendant will be unable to mount a factual defense, he is left trying to rewrite the copyright laws in order to argue that his downloading and distribution of Plaintiffs' copyrighted sound recordings over a P2P network is somehow not a violation of the Copyright Act. And as each of Defendant's theories fail, he simply tries a new one. Allowing him to do so, especially at this late hour, prejudices Plaintiffs and undermines the rules of this Court, congressional intent, and the clear language of the Copyright Act.

For all of the foregoing reasons, Defendant's Motion for Leave to File Amended Answer and Counterclaim should be denied.

Dated: April 29, 2009

Respectfully submitted,

/s/ Timothy M. Reynolds

Timothy M. Reynolds (pro hac vice)

Eve G. Burton (pro hac vice)

Laurie J. Rust (pro hac vice)

HOLME ROBERTS & OWEN LLP

1700 Lincoln Street, Suite 4100

Denver, Colorado 80203

Telephone: 303-861-7000

Facsimile: 303-866-0200

Email: timothy.reynolds@hro.com

Daniel J. Cloherty

DWYER & COLLORA, LLP

600 Atlantic Avenue - 12th Floor

Boston, MA 02210-2211

Telephone: (617) 371-1000

Facsimile: (617) 371-1037

dcloherty@dwyercollora.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 29, 2009, the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND COUNTERCLAIM** was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF). A copy of the foregoing was also served by United States Mail on the following:

Charles Nesson
1575 Massachusetts Avenue
Cambridge, MA 02138
nesson@gmail.com
Attorney for Defendant

s/ Timothy M. Reynolds
Timothy M. Reynolds (pro hac vice)
HOLME ROBERTS & OWEN LLP
1700 Lincoln, Suite 4100
Denver, Colorado 80203
Telephone: (303) 861-7000
Facsimile: (303) 866-0200
Email: timothy.reynolds@hro.com