

- Plaintiffs' alleged conduct is protected under the First Amendment Right to Petition;
- Plaintiffs' actions in prosecuting claims for copyright infringement do not constitute abuse of process, as a number of other courts have already concluded;
- The unconstitutionality of statutory damages is not a counterclaim because it does not seek affirmative relief;
- The Copyright Act demonstrates Congress' intent to allow a plaintiff to recover statutory damages;
- Defendant's argument that statutory damages must be proportionate to actual damages has been considered, and rejected, by numerous courts.

Instead of defending his existing counterclaims, or addressing any of the arguments raised in Plaintiffs' Motion to Dismiss, Defendant pointed to an amended counterclaim, filed improperly at the same time as he filed his Opposition brief, and for which he did not have, nor did he seek, leave to file. Since that time, Defendant has filed a Motion for Leave to File an Amended Counterclaim, which Plaintiffs intend to oppose. By failing completely to defend his existing counterclaims against Plaintiffs' Motion to Dismiss, Defendant concedes that his original counterclaims for unconstitutionality of statutory damages and abuse of process may be dismissed. Indeed, none of the arguments raised in Plaintiffs' Motion to Dismiss have been rebutted in any way. Therefore, Plaintiffs' Motion to Dismiss should be granted.¹

WHEREFOFE, Plaintiffs respectfully request that their Motion to Dismiss (Doc. No. 670) be granted and that Defendant's original counterclaims (Doc. No. 625) be dismissed.

¹ While Plaintiffs believe that Defendant's amended counterclaim also has no merit, Plaintiffs intend to address that issue in their Opposition to Defendant's Motion for Leave. In addition to being untimely, there are multiple reasons why Defendant's amended counterclaim also fails as a matter of law. The merits of Defendant's new counterclaim, however, should be addressed in the context of Defendant's recently filed Motion for Leave, and not in the context of Plaintiffs' Motion to Dismiss Defendant's original counterclaims.

Dated: November 14, 2008

Respectfully submitted,

s/Eve G. Burton

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 14, 2008, a copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS** was served upon the counsel for Defendant via email and United States Mail at the following address:

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s/Eve G. Burton

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