

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

PAUL V. AMBROSE, :
Plaintiff, : CASE NUMBER: No. 07-1248
vs. :
Judge Arthur J. Schwab
TRAIN COLLECTORS ASSOCIATION, :
and EASTERN DIVISION - T.C.A., :
Defendants, :
AND :
TRAIN COLLECTORS ASSOCIATION, :
and EASTERN DIVISION - T.C.A., :
Defendants and Third Party :
Plaintiffs, :
vs. :
KRAUSE PUBLICATIONS and :
DAVID DOYLE, :
Third Party Defendants. :

BRIEF IN SUPPORT OF
PLAINTIFF/COUNTERCLAIM DEFENDANT PAUL V. AMBROSE'S MOTION TO DISMISS
THE COUNTERCLAIMS UNDER FED.R.CIV.P. 12(b)(6) AND MOTION TO STRIKE
CERTAIN AFFIRMATIVE DEFENSES AS TO THE AMENDED COMPLAINT UNDER
FED.R.CIV.P. RULE 12(f)

I. INTRODUCTION:

Plaintiff filed this copyright infringement action pertaining to the averred willful Intellectual Property thievery by Defendants Train Collectors Association ("TCA") and Eastern Division - T.C.A. ("Eastern Division"), which was done for the sole purpose for profit by these Defendants, in order to secure an apology, receive payment of his attorney's fees as provided for by the Copyright Act and to have the Defendants undertake certain remedial efforts so that these Defendants would actually follow the ethical standards they boast of having on

their websites.¹ Defendants responded by filing numerous false pleadings and materially-false Affidavits as well as averring that Plaintiff was trying to extort money from them and that Undersigned Counsel was trying to destroy them for spite.²

Defendants latest bad faith action is to file certain Affirmative Defenses to the Amended Complaint, most of which are barred as a matter of law by either the Copyright Act or applicable case law, and to file three averred meritless Counterclaims against Plaintiff. In addition to incorporating substantial and material false pleadings, Defendants in violation of their own Rules are attempting to terminate Plaintiff's membership in Defendant TCA because he included "ringers" in his books, including one that a Lionel Set included a "69" watt transformer instead of a "60" watt transformer.³

II. PROCEDURAL HISTORY:

Plaintiff filed a two-count Copyright Infringement action against Defendants TCA and Eastern Division on September 18, 2007 (D.E. #1). Defendants filed a Motion to Dismiss/Alternative Motion for Stay on November 8, 2007 (D.E. #12). Plaintiff filed a Nine Count (Count I - Contributory Copyright Infringement; Count II - Vicarious Copyright Infringement; Count III - Direct Copyright Infringement; Count IV - Lanham Act; Count V - Pennsylvania Unfair Trade Practices Act; Count VI - Civil Conspiracy; Count VII - RICO; Count VIII - Civil Conspiracy and Count IX - Declaratory Judgment Acts) Amended Complaint on November 13,

1. When this civil action was instituted, Plaintiff issued a press release that stated that he would donate any net Statutory Damages he received under the Copyright Act against these Defendants to charity.

2. As noted in the Motion to Dismiss the Third Party Complaint which is being filed at the same time as this Motion to Dismiss/Motion to Strike, several Rule 11 Motions as to deliberate false pleadings are currently being served on Defendants' counsel.

Defendants' averments that Plaintiff is attempting to "extort" money flies directly against the documented facts that Plaintiff has served on Defendants over the past two months three different written settlement offers, none of which requested a single dollar for Plaintiff other than his costs.

3. Mr. Doyle copied this "ringer" as well as all others in addition to dozens of paragraphs, hundreds of sentences and virtually all of Plaintiff's compilation choices.

2007 (D.E. #15). This Court denied Defendants' Alternative Motion for Stay on November 15, 2007.

Defendants filed their Motion to Dismiss the Amended Complaint on November 29, 2007 (D.E. #21). Plaintiff filed his Brief in Opposition to Defendants' Motion to Dismiss on December 16, 2007 (D.E. #33). This Court denied Defendants' Motion to Dismiss on December 17, 2007 (D.E. #34).

Defendants filed their Answer, Affirmative Defenses and three Counterclaims on December 31, 2007 (D.E. #36). Defendants filed a Third Party Complaint on January 4, 2008 (D.E. #40) against Third Party Defendants Krause Publications, Inc. ("Krause") and David Doyle ("Doyle").

III. DEFENDANTS' COUNTERCLAIMS FAIL TO STATE A CAUSE OF ACTION UPON RELIEF MAY BE GRANTED:

(A) Standard of Review - Motion under Rule 12(b)(6):

A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and drawing all reasonable factual inferences in favor of the plaintiff, it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would warrant relief. Ca Public Employees' Retirement System v. Chubb, 394 F.3d 126, 143 (3rd Cir. 2004). In making this determination, the Court need not credit a complaint's "bald assertions" or "legal conclusions." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir.1997). Dismissal is appropriate where, as here, it clearly appears that no set of facts could support the claim. Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984).

(B) Defendants fail to properly state a cause of action in their first Counterclaim under the theory of ABUSE OF PROCESS:

Counterclaim Plaintiffs TCA and Eastern Division first seek recovery under an Abuse of Process count against Ambrose on grounds that Ambrose filed his Complaint and Amended Complaint "in a manner for which it was not designed, as an improper way to gain competitive advantage for AT,

to destroy TCA and Eastern Division, and to force a settlement in the Doyle Action." (172)

The gist of an action for abuse of process is the improper use of process after it has been issued, that is, a perversion of it: Mayer v. Walter, 64 Pa. 283 (Pa., 1870):

An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it ... On the other hand, legal process, civil or criminal, may be maliciously used so as to give rise to a cause of action where no object is contemplated ... other than its proper effect and execution . . .

It is evident that when such a wrong has been perpetrated, it is entirely immaterial whether the proceeding itself was baseless or otherwise. We know that the law is good, but only if a man use it lawfully.

Mayer v. Walter, supra, p. 285-286. Abuse of civil process is concerned with a perversion of a process after it is issued. McGee v. Feege, 517 Pa. 247, 253, 535 A.2d 1020, 1023 (1987), quoting Publix Drug Co. v. Breyer Ice Cream Co., 347 Pa. 346, 349, 350, 32 A.2d 413 (1943).

The Restatement (Second) of Torts § 682 defines the tort "abuse of process" as the use of legal process against another "primarily to accomplish a purpose for which it is not designed." Rosen v. American Bank of Rolla, 627 A.2d 190, 192, 426 Pa.Super. 376, 381 (Pa. Super., 1993) (quoting Restatement (Second) of Torts § 682):

"To establish a claim for abuse of process, it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed, and (3) harm has been caused to the plaintiff."

Id. at 382, 627 A.2d at 192. Abuse of process, in essence, then **is the use of legal process as a tactical weapon to coerce a desired result** that is not the legitimate object of the process. McGee, supra at 259 (Emphasis Added).

In their Answer, Affirmative Defenses and Counterclaims, Defendants make the following accusations relevant to this claim:

156. Upon information and belief, several major booksellers sold the Doyle Catalog, including Amazon.com, Barnes & Noble and Borders. Upon information and belief, these booksellers make money on the sale of the Doyle Catalog.

157. Ambrose has not sued Amazon.com, Barnes & Noble, or Borders in connection with their sales of the Doyle Catalog.

159. AT's website has displayed selected court orders and pleadings on its website regarding both this case and the Doyle action. The postings are found via a prominent link that is above links to the AT website for information relating to train auctions. The postings provide an account of the litigations that is misleading and biased in favor of Ambrose.

160. Ambrose's legal counsel has stated that it is his intent to ruin financially TCA and Eastern Division and to take control of the National Toy Train Museum.⁴

4. This is an example of the material false pleading that the Defendants have continually engaged in as to this action and is the subject of several Rule 11 Motions that are currently being served on Defendants' counsel.

Despite Defendants' contentions about Undersigned Counsel's motives, it is obvious from the substantial number of letters and e-mails from said counsel that have already been entered into the record of this action that counsel has attempted to do his best to save Defendants' members from the inanity of Defendants' officials and attorneys that has been exhibited to-date in this action. The written record will evidence that counsel wrote Defendant three times in August 2007 with a plea to have Defendant TCA's attorney contact him about this matter so that litigation would not be necessary, only to have all three letters so ignored; that counsel delayed the filing of this action for five weeks waiting to be contacted by an attorney representing the Defendants, which never occurred; that counsel wrote to Defendants' current counsel twice in early October 2007 with a plea to meet to discuss this action so that further litigation would not be required, only to have both offers ignored; and that counsel twice offered both of Defendants' current counsel to come to their office to walk them page-by-page through the marked up copies of the Ambrose and Doyle books to see the actionable copying, only to have both offers ignored.

Likewise the written record will evidenced that Plaintiff, through Undersigned Counsel, has served on Defendants over the past two months three different written settlement offers, none of which requested a single dollar for Plaintiff other than his costs.

This Court is also well-aware of the extensive attempts this counsel has undertaken to achieve a stay in this action so that the parties could go into Mediation in an attempt to stop the legal expenses of both parties from further escalating. The fact that Defendants are respectfully averred to have no legal defense to any of Plaintiff's claims in the Amended Complaint, that trial may lead to a significant judgment, including punitive damages and the

Defendants' averment are in reality an accusation of copyright misuse that would than become an abuse of process claim under Pennsylvania law. Defendants aver that because Plaintiff did not sue Amazon.com, Barnes and Noble or Borders, all of which Defendants averred sold copies of the Infringing Works, Plaintiff's lawsuit against them constitute copyright misuse.⁵ In the two Infringement actions filed, Plaintiff chose to sue the Author, the Publishing House, and these Defendants, who have i) sold the infringing books at their profit; ii) distributed the infringing books at their profit; iii) allowed the distribution of the infringing books at their profit; iv) promoted the infringing books for their profit and v) then called Plaintiff names, stated that Plaintiff and his attorney would be thrown out of the TCA for suing them, and boasted in print that Plaintiff did not have a case, all so that they could make more profit selling and distributing infringing books.

This type of claim has been specifically rejected by several courts. UMG Recordings, Inc. v. MP3.Com, Inc., 92 F.Supp.2d 349, 353 (S.D.N.Y. 2000) (rejecting copyright misuse claim based on charges of "selective prosecution" as "frivolous," holding that "plaintiffs have reasonably exercised their right to determine which infringers to pursue, and in

responsibility for the considerable legal expenses and costs incurred by Plaintiff in this action, and that such a judgment may lead to the termination of the existence of these Defendants is not evidence that such a termination is the goal of either Plaintiff or his counsel. In fact, Plaintiff and his counsel since before this action was filed have expended tremendous resources in unsuccessful attempts to have the officials running these two Defendants understand their liabilities under the Copyright Act.

5. Plaintiff actually did want to sue Amazon.com, Barnes and Noble and Borders Books but reconsidered when he believed this Court would look unfavorably to adding several additional Defendants. As Plaintiff has written in correspondence as to this case: "Some members have asked me why I did not sue Barnes and Noble or Borders instead of the TCA. Well, I wanted to but my lawyer told me there was a practical matter of how many entities I could sue before the Judge would be upset. And I note that neither Barnes and Noble, or Borders, have the stated ethical standard of the TCA (as noted on its website) to be "Known to command the highest quality and ethical values in all its activities." And given that I am a member of the TCA, and paid dues to it for more than twenty-five years, I expected the TCA to be at least fair to me and to do the right thing."

which order to pursue them").⁶ Most of the cases that recognize the affirmative defense of copyright misuse involve unduly restrictive licensing schemes. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1026-27 n.8 (9th Cir. 2001). Where, as here, a counterclaimant makes only "vague allegations" and does not "allege facts showing that [the counterdefendant] used its copyrights to prohibit directly the independent development or use of a competing product," dismissal on the pleadings is appropriate. **See also** Webcaster Alliance, Inc. v. Recording Industry Association of America, Inc., 2004 WL 1465722, *6-7 (N.D. Cal. 2004) (dismissing claim for declaratory judgment alleging copyright misuse); Microsoft Corp. v. Computer Support Services of Carolina, Inc., 123 F. Supp. 2d 945, 956 (W.D.N.C. 2000) (granting motion to dismiss) (emphasis added); Syncsort Inc. v. Sequential Software, Inc., 50 F. Supp. 2d 318 (D.N.J. 1999) (granting judgment on pleadings on copyright misuse counterclaim). Since Plaintiff did not engage in copyright misuse, and his Complaint and Amended Complaint were merely intended to enforce his rights under the Copyright Act, Defendants fail to properly aver a cause of action under abuse of process.

(C) Defendants fail to properly state a cause of action in their second Counterclaim under the theory of FRAUDULENT MISREPRESENTATION:

Counterclaim Plaintiffs TCA and Eastern Division next seek recovery under a Fraudulent Misrepresentation count against Ambrose on grounds that Ambrose Copyrighted Works, since they included "ringers", defrauded in a general sense the train collecting community that Defendants aver they represent.

6. **See** Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 647 F.2d 200, 207 (D.C.Cir. 1981) ("It is clear that a copyright owner may sue "any member of the distribution chain"); Wells v. Universal Pictures Co., 166 F.2d 690, 692 (2nd Cir. 1948); Grocers Baking Co. v. Sigler, 132 F.2d 498, 502 (6th Cir. 1942); Columbia Broadcasting Sys., Inc. v. Scorpio Music Distributors, Inc., 569 F.Supp. 47, 48-49 (E.D.Pa. 1983), aff'd without op., 738 F.2d 424 (3rd Cir. 1984) ("It is well established that a suit for infringement is analogous to other tort actions and infringers are jointly and severally liable; hence plaintiff need sue only such participants as it sees fit", quoting Costello Publishing Co. v. Rotelle, 670 F.2d 1035, 1043 (D.C.Cir. 1981)).

Under Pennsylvania law, fraud consists of anything calculated to deceive whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look, or gesture. Frowen v. Blank, 493 Pa. 137, 143, 425 A.2d 412, 415 (1981); In re Thorne's Estate 344 Pa. 503, 511 n. 2, 25 A.2d 811, 816 n. 2 (1942). Traditionally, in order to state a cause of action for fraud, the plaintiff was required to establish:

- (1) a misrepresentation;
- (2) a fraudulent utterance thereof;
- (3) an intention by the maker that the recipient will thereby be induced to act;
- (4) justifiable reliance by the recipient upon the misrepresentation;
- (5) damage to the recipient as the proximate result.

See Pittsburgh Nat'l Bank v. Larson, 352 Pa.Super. 250, 507 A.2d 867 (1986), quoting Delahanty v. First Pennsylvania Bank, 318 Pa.Super. 90, 108, 464 A.2d 1243, 1252 (1983).

Defendants aver that Plaintiff's use of "ringers" in his Copyrighted Works constituted fraud. As has been extensive detailed in the companion Krause action, as well as in the Amended Complaint, Plaintiff included approximately thirty "ringers" in his Edition 2 that were required of him by his publisher. A "ringer" was defined in the Amended Complaint as "creative minor, non-material and deliberate typos" (Emphasis added).⁷ Of the thirty "ringers" so included, approximately eight were "association" ringers, that is, Plaintiff included a true factoid in a listing where the factoid had no relationship to the listed Set; approximately seven of the "ringers" were factoids that turned out to be true upon subsequent research; and the balance of the included "ringers" were creations of variations that did not ever exist. As such, it is factually, and legally, impossible for anyone to have been defrauded in the manner averred by Defendants since it was

7. See Paragraph 25 of the Amended Complaint, which notes that "Advance Collectors who reviewed Ambrose's Copyrighted Work would have easily recognized the "ringers" and the reasons why Ambrose included them in his works."

impossible for anyone to have purchased an item that was described as a "ringer" since the item so identified was never manufactured, and therefore never offered for sale.

Defendants' claim also suffers from a multitude of pleading errors. Defendants do not aver that they purchased any of Plaintiff's Copyrighted Works, yet alone any that are averred to contain such "ringers." Nor do Defendants aver anywhere in their averments that any of their members actually purchased any of the Copyrighted Works. More importantly, Defendants do not aver with the specificity required in the Federal Rules under a fraud count as to the averred material misrepresentations of Plaintiff and how any member, or either Defendants, sustained harm from such material misrepresentations.⁸ For example, no averment was made as to how a collector was defrauded of any amount because he purchased a set that contained a "69" Watt transformer of a particular model, instead of the "60" Watt transformer actually included in said Set, when in fact such a transformer never existed in that wattage. (The Amended Complaint clearly notes that Lionel never in fact manufactured a "69" Watts Transformer as to any model they made). As such, no one could be defrauded by buying a transformer that did not actually exist and Defendants in their Counterclaims do not specifically aver that anyone actually lost even a penny in purchasing something that did not exist that was uniquely created as a "ringer." Accordingly, Defendants fail to satisfy the pleading requirements by identifying a single individual who suffered damages as result of any purchase he made while depending on a "ringer" that was included in any of Plaintiff's books.

8. The Third Circuit has stated that "Rule 9(b) imposes a heightened pleading requirement of factual particularity with respect to allegations of fraud. Rule 9(b) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Although Rule 9(b) falls short of requiring every material detail of the fraud such as date, location, and time, plaintiffs must use "alternative means of injecting precision and some measure of substantiation into their allegations of fraud." In re Nice Systems, Ltd. Securities Litigation, 135 F.Supp.2d 551, 577 (D.N.J., 2001). The imposition of a heightened pleading requirement in fraud actions serves important objectives: "Rule 9(b)'s heightened pleading standard gives defendants notice of the claims against them, provides an increased measure of protection for their reputations, and reduces the number of frivolous suits brought solely to extract settlements." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1418 (3d Cir. 1997).

(D) Defendant TCA fails to properly state a cause of action in their third Counterclaim under the theory of DECLARATORY JUDGMENT:

The By-Laws of Defendant TCA clearly provides that only a member may file a complaint that leads to a termination of a member's membership in the TCA.⁹ Defendant TCA's third Counterclaim does not identify a member who has filed such a complaint against Plaintiff or even whether such a Complaint has been filed. As of the date of this Brief no member who has filed such a complaint has been identified to the Plaintiff and as such this Court must proceed upon the fact that no such complaint has been filed. Since Defendant TCA is not authorized by its own By-laws or Board Policy Book to terminate a member's membership absent a member's complaint, or to bring on its own a complaint against a member (which it is apparently attempting to do in its Third Counterclaim), Defendant TCA is precluded by the facts it averred to seek a declaration of its right to terminate Plaintiff's membership.

Give Defendant TCA's disgraceful failure to follow its own By-Laws, Plaintiff will not even address whether TCA has the authority to discipline one of its members for including "ringers" where such inclusions are an ordinary and typical matter for any fact-based reference guide by any Publisher. Given that this ethically-challenged organization has an Immediate Past President that is averred to have filed a materially-false Affidavit with this Court and who presided over the willful unconscionable conduct of these Defendants as detailed in the Amended Complaint, and who is still acknowledging Mr. David Doyle as a member of its Standard Committee charged with preventing fraud in the Toy Train Hobby, all while refusing to apologize to Plaintiff for the Intellectual Property thievery it deliberately committed, it is obvious that this abysmal Organization has abandoned any moral grounds it might have had to discipline any of its members.

9. See Paragraph 104 of the Amended Complaint, which specifically details the provisions of Defendant TCA's Board Policy Book as to the procedure for disciplining a member:

(iv) Article II, Section 6A of Defendant TCA's By-Laws states that any member in good standing may file with the President of the Association a complaint on transactions or dealings involving trains against another member or members of the Association or against an Applicant to the Association.

V: ELEVEN OF DEFENDANTS' AFFIRMATIVE DEFENSES TO THE AMENDED COMPLAINT ARE IMPROPER AND SHOULD BE STRIKEN:

(A) Standard of Review - Motion under Rule 12(f):

Rule 12(f) provides, in relevant part, that "[u]pon motion made by a party ... the court may order stricken from the pleading any insufficient defense." Motions to strike legally insufficient defenses "serve a useful purpose by eliminating insufficient defenses and saving the time and expense which would otherwise be spent in litigating issues which would not affect the outcome of the case." U.S. v. Kramer, 757 F. Supp. 397, 410 (D.N.J. 1991). Thus, where the insufficiency of a defense is "clearly apparent," the defense should be stricken. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3d Cir. 1986). Defendants have asserted seventeen separate defenses, eleven of which are respectfully averred to be legally insufficient on their face.

(B) The Second Separate Defense: Waiver and/or Estoppel Defense(s):

Defendants' estoppel defense should be rejected because Defendants have failed to aver, yet alone provide any competent evidence, that they relied on any action by Plaintiff with respect to any of the Copyrighted Works. Mere recitation of the legal buzzwords will not suffice. **See**, e.g., Paine Webber, Inc. v. International Mobile Machines Corp., 1992 WL 75068 at *2 (S.D.N.Y.1992) ("while an answer need not include a detailed statement of the applicable defenses, a defendant must do more than make conclusory allegations") (citing Heller Financial, Inc. v. Midwhay Powder Co., Inc., 883 F.2d 1286, 1294-95 (7th Cir.1989)); Telectronics Proprietary. Ltd. v. Medtronics. Inc., 687 F.Supp. 832, 841 (S.D.N.Y.1988) ("the word 'estoppel' without more is not a sufficient statement of a defense").

(C) The Third Separate Defense: Failure to Mitigate:

If Defendants are found liable, they are liable for damages as specified by statute. Plaintiff has no duty to mitigate on a copyright infringement claim. 17 U.S.C. §504.

(D) The Fifth Separate Defense: De Minimis Receipts from Sale of Infringing Works:

The amount of profit or lack thereof, is not a defense to a copyright infringement claim.¹⁰ Further, Defendants' pleadings are just not true even on their face. The Burke Affidavit that Defendants filed with their Motion to Dismiss noted that Defendant TCA made a profit of \$1,370.00 from the sale of the First Infringing Work just in the month of April 2007! Given the number of copies of this Book that TCA identified it sold just in that one month (85 sales) at the Retail Price of \$29.99 per copy, the gross sales revenue of \$2,549.15 satisfies one of the requirements of 18 U.S.C. §2319 (relating to criminal infringement of a copyright). Obviously if Defendant TCA sold enough copies of an Infringing Work to satisfy the threshold of a criminal statute relating to copyright infringement, such sales can not be de minimis.¹¹

(E) The Sixth Separate Defense: De Minimis Receipts from Train Meets held by Defendants, their Divisions and/or Chapters from where the Infringing Works were sold:

As noted above, the amount of profit or lack thereof is not a defense to a copyright infringement claim.¹²

10. An offer to sell an infringing item is the same as an actual sale. **See** Independent Film Distrib., Ltd. v. Chesapeake Industries, Inc., 250 F.2d 951, 953-954 (2nd Cir. (N.Y.) 1958). As such, there is no need to achieve a profit in order to violate the Copyright Act.

11. Defendant TCA's averment also ignores that in its Form 990 Tax Returns filed with the Internal Revenue Service Defendant lists the sale of such "Lionel Reference Books" as the promotion of the "Historical Significance of Model Toy Trains." Such sales were one of four acknowledged exempt purpose achievements used to evidence Defendant's non-profit status. It is submitted that Defendant TCA can not tell this Court one thing and the Internal Revenue Service the contrary.

12. Defendants note in their Affirmative Defense that "Table rental fees are not a significant source of contribution or revenue to TCA or to its unincorporated divisions. In fact, it is sometimes the case that the money received from the train meets does not cover the expenses incurred to hold them. As a result, membership dues help to off-set the cost of the meets"(¶116). This is another example of the material false pleading that the Defendants have continually engaged in as to this action and is the subject of several Rule 11 Motions that are currently being served on Defendants' counsel.

This pleading, which incorporated elements of the Affidavit signed by Mr. Burke, is directly contradicted by the filed Tax Returns of these Defendants

(F) The Eighth Separate Defense: Defendant Eastern Division did not receive revenue from the Doyle Book Signings held at its April 2007 Train Meet:

As noted above, the amount of profit or lack thereof is not a defense to a copyright infringement claim. Defendant Eastern Division received at least \$360,063.00 in revenue from its past two York Meets, obviously not a de minimis amount, and has admitted in its Answer that at least one table holder (Plaintiff averred three) who paid fees to that Defendant conducted a book signing by Mr. Doyle who signed books for members who paid admission fees to Defendant Eastern Division.

(G) The Ninth Separate Defense: Krause and Doyle lied to Defendants TCA and Eastern Division:

"[E]ven where the defendant believes in good faith that he is not infringing a copyright, he may be found liable." Pye v. Mitchell, 574 F.2d 476, 481 (9th Cir. 1978). Intent is not an element of copyright infringement and, thus, absence of intent is not a valid defense to a claim of copyright infringement. Costello Publishing Co. v. Rotelle,

and the various other Divisions of Defendant TCA. For example, Defendant Eastern Division's Form 990 filed with the Internal Revenue Service for the 2005 Tax Year indicates that Defendant Eastern Division received \$360,063.00 in revenue from table and admission fees charged for the two York Train Meets that it holds each year. This revenue is the sole revenue received by that Defendant other than \$4,264.00 in interest and dividends. The Tax Return does not indicate that Eastern Division charges any "dues" as averred by its pleadings with this Court. Further, Defendant Eastern Division notes in Part VIII of its return that "The Association's only source of income is admissions charged for two annual train collectors' meets. These meets provide the medium for members to buy, sell, trade and share with other members their experiences within their mutual hobby." Likewise, in Part III of its Return, Defendant Eastern Division notes that its stated purpose was the "Advancement of Toy Train Collection" and that the sole exempt purpose achievement was "Two (Train Collectors) Meets were held for it's members" and "Attendance exceeded 28,500 Members and Guests."

This material dependence on revenue from Train Meets, both for revenue and to support the exempt purpose requirements so that these organizations are considered non-profits, is evidenced by the tax returns of every other Division of Defendant TCA that Plaintiff has been able to obtain. As further example, the Train Collectors Association - Fort Pitt Division, which holds Train Meets in Cranberry (a Pittsburgh suburb) claims in its 2006 Form 990 Return that \$30,527.00 of a total of \$59,652.00 in revenue came from its Toy Train Meets (that Division did receive \$7,834.00 in due payments). The Return further indicates that Fort Pitt Division in 2005 had \$152,313.00 in revenue from its Train Meets the earlier year since it hosted for that tax period Defendant TCA's Annual Convention in Pittsburgh.

supra at 1044 n. 13; Wihtol v. Crow, 309 F.2d 777, 780 (8th Cir. 1962). Further, courts have held that copyright infringing defendants can not assert contribution in claims against third parties who allegedly contribute to infringement; neither the Copyright act nor federal common law recognize a copyright infringer's right to contribution. See e.g., Artista Records, Inc. v. Flea World, Inc., 356 F.Supp.2d 411, 416 (D.N.J., 2005); Equity Builders and Contractors, Inc. v. Russell, 406 F.Supp.2d 882, 886-887 (N.D. Ill., 2005); Lehman Brothers, Inc. v. Wu, 294 F.Supp.2d 504 (S.D.N.Y.2003); Johnston v. Smith, 1997 WL 584349 (N.D.Ga.1997).

(H) The Tenth Separate Defense: Defendants are no longer selling the Doyle Book(s):

Plaintiff's Amended Complaint seeks recovery for the willful copyright infringements that Defendants are averred to have committed prior to December 1, 2007. Whether Defendants are currently or not currently selling or distributing the Doyle Books is irrelevant to the claims set forth in the Amended Complaint.

(I) The Eleventh Separate Defense: De Minimis Copying:

Defendants aver that any "copying" that occurred was de minimis. Given that Doyle has stipulated to this Court that he engaged in willful actionable copying, Defendants' reference to "copying" must be a "shorthand reference to the act of infringing any of the copyright owner's five exclusive rights set forth at 17 U.S.C. § 106. Dun & Bradstreet Software v. Grace Consulting, 307 F.3d 197, 206 (3rd Cir. 2002). This is not a valid defense as to a copyright infringement claim. The sale, offer or distribution of a single book may constitute infringement. Defendants do not dispute their own Burke Affidavit that they sold 85 copies of the first Infringing Work in just one month, or the averments set forth in the Amended Complaint that several members sold copies of the Infringing Works at the 2007 Annual Convention and at both 2007 York Meets.

(J) The Fourteenth Separate Defense: Copyright Misuse:

The legal meritless of this defense has already been discussed in the Counterclaim section of this Brief.

(K) The Fifteenth Separate Defense: Unclean Hands:

Defendants failed to come forth with any admissible evidence, or even a proper averment, showing bad faith or misconduct on the part of Plaintiff. As such, this Defense should be stricken by the Court. See generally Dunlop-McCullen v. Local 1-S, AFL-CIO-CLC, 149 F.3d 85, 90 (2d Cir.1998) ("We have held, however, that "[m]isconduct ... unrelated to the claim to which it is asserted as a defense, does not constitute unclean hands"). Moreover, "while equity does not demand that its suitors shall have led blameless lives, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue." Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co., 324 U.S. 806, 814-15, 65 S.Ct. 993, 89 L.Ed. 1381 (1945) (quotation marks and citation omitted); Warner Bros. Inc. v. Gay Toys, Inc., 724 F.2d 327, 334 (2d Cir.1983) ("[T]he defense of unclean hands applies only with respect to the right in suit.").

Further, "[t]he unclean hands defense is not an automatic or absolute bar to relief; it is only one of the factors the court must consider when deciding whether to exercise its discretion and grant an injunction." 11A Wright, Miller, Kane, *Federal Practice and Procedure: Civil* 2d § 2946, at 111. "The doctrine of unclean hands also may be relaxed if defendant has been guilty of misconduct that is more unconscionable than that committed by plaintiff." *Id.* § 2946, at 112.); A.H. Emery Co. v. Marcan Prods. Corp., 389 F.2d 11, 18 n. 4 (2d Cir.), cert. denied, 393 U.S. 835, 89 S.Ct. 109, 21 L.Ed.2d 106 (1968) (Traditionally the doctrine of unclean hands has required a finding of wrongful intent or willful misconduct and mere negligent conduct has not sufficed).

(L) The Sixteenth Separate Defense: Estoppel and/or Acquiesce:

Defendants' second estoppel defense should be rejected because Defendants failed to provide any competent evidence, or even make a proper averment, that they relied on any action by Plaintiff with respect to any of the Copyrighted Works. Mere recitation of the legal buzzwords will not suffice. **See**, e.g., Paine Webber, Inc. v. International Mobile Machines Corp., 1992 WL 75068 at *2 (S.D.N.Y.1992) ("while an answer need not include a detailed statement of the

applicable defenses, a defendant must do more than make conclusory allegations") (citing Heller Financial, Inc. v. Midwey Powder Co., Inc., 883 F.2d 1286, 1294-95 (7th Cir.1989)); Telectronics Proprietary. Ltd. v. Medtronics. Inc., 687 F.Supp. 832, 841 (S.D.N.Y.1988) ("the word 'estoppel' without more is not a sufficient statement of a defense").

VI: CONCLUSION:

For the reasons set herein, Plaintiff respectfully requests this Court to Dismiss Defendants' Three Counterclaims and to strike eleven of Defendants' Affirmative Defenses.

January 10, 2008

Respectfully submitted,

By: /s/ Drew J. Bauer
Drew J. Bauer, Esquire
Attorney for Plaintiff
PA I.D. No. 37536
Post Office Box 14537
Pittsburgh, PA 15234
(412) 833-1700
(412) 833-1170 (fax)
drewjbauer@yahoo.com