Electronic Frontier Foundation

TYPICAL CLAIMS AND COUNTERCLAIMS IN PEER TO PEER LITIGATION

To facilitate discussion and assist future litigants, the following outlines the basic elements of some common claims and counterclaims raised by peer-to-peer filesharing litigants, as well as some of the relevant defenses.

Note: This outline is purely informational and intended to be a survey of claims raised, rather than a promotion of any or all of the claims referenced. The Electronic Frontier Foundation does not intend to, nor should this summary be interpreted as, a comment on the merits of any of the causes of actions or defenses described below.

THE COMPLAINT

The plaintiff in a copyright infringement action must allege and prove, at a minimum, both (1) ownership of the copyright; and (2) infringement by the defendant, *i.e.*, copying of original constituent elements of a copyrighted work.[1] A complaint alleging copyright infringement must state which specific original work is the subject of the copyright claim, and specify by what acts and during what time the alleged infringement occurred.[2] Additionally, the plaintiff will usually allege willfulness in the complaint in order to preserve the right to seek an increased award of statutory damages for willful infringement.[3]

In the context of peer-to-peer filesharing cases, complaints generally allege that:

> [E]ach Defendant, without the permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download, distribute to the public, and/or make available for distribution to others certain [copyrighted recordings].

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[1] *See Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) ("To establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."); Paul Goldstein, *Copyright* § 14.3, at 14:7.

[2] *See e.g., Gee v. CBS, Inc.*, 471 F. Supp. 600, 643 (D. Pa. 1979) ("To be sufficient under Rule 8 a claim of infringement must state, Inter alia, which specific original work is the subject of the copyright claim, that plaintiff owns the copyright, that the work in question has been registered in compliance with the statute and by what acts and during what time defendant has infringed the copyright."), *aff'd*, 612 F.2d 572 (3d Cir. 1979); *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992) ("A properly plead copyright infringement claim must allege 1) which specific original works are the subject of the copyright claim, 2) that plaintiff owns the copyrights in those works, 3) that the copyrights have been registered in accordance with the statute, and 4) by what acts during what time the defendant infringed the copyright."). *But see Jetform Corp. v. Unisys Corp.*, 11 F. Supp. 2d 788 (D. Va. 1998) (rejecting heightened pleading standard for copyright infringement claims); *Mid America Title Company v. Kirk*, 991 F.2d 417, 421-22 (7th Cir. 1993) (ruling that copyright infringement claims need not be pled with particularity).

[3] Paul Goldstein, Copyright § 14.1, at 14:5.

Complaints often provide a list of the copyrighted recordings that were allegedly infringed, and identify the defendants by IP addresses associated with shared file folders in which the plaintiffs allegedly found the recordings.

THE MOTION TO DISMISS

Since infringement is an essential element of the plaintiff's claim, the defendant may deny infringement and move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Wrong Party: Defendants in peer-to-peer filesharing cases have successfully moved to dismiss on the grounds that the plaintiffs brought suit against the wrong party. In *Priority Records v. Chan*, Case No. 04-CV-73645-DT, the plaintiffs filed suit against Candy Chan because an e-mail address at an IP addressed registered to Chan allegedly was used to download and participate in peer-to-peer distribution of copyrighted recordings. After Chan disclosed that one of her children used the e-mail address in question, the plaintiffs sought to dismiss Chan, and the court granted the voluntary dismissal with prejudice.[4]

Failure to Allege Actual Dissemination: Defendants may also seek dismissal for failure to satisfy the pleading requirements applicable to copyright infringement claims. Several defendants have challenged the adequacy of allegations that the defendant merely made copyrighted recordings available for distribution to others, arguing that there is no liability for infringing upon the right of distribution unless copies of copyrighted works were *actually* disseminated to members of the public.[5]

Insufficient Specificity: In addition, defendants have requested dismissal based on plaintiffs' failure to allege the specific acts of infringement or during what time they occurred. Courts have held that a properly pled copyright infringement claim must allege with some specificity by what acts during what time the defendant infringed the copyright. Broad, sweeping allegations of infringement do not comply with Rule 8 of the

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[4] *Priority Records L.L.C. v. Chan*, 2005 WL 2277107 (E.D. Mich. 2005).

[5] *National Car Rental Sys. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) ("[i]nfringement of the distribution right requires an actual dissemination of . . . copies") (citing 2 Nimmer on Copyright § 8.11[A], at 8-124.1); *see also Arista Records, Inc. v. Mp3Board, Inc.*, No. 00 Civ. 4660(SHS), 2002 WL 1997918, at *4 (S.D.N.Y. Aug. 29, 2002) (same); *In re Napster, Inc.*, 377 F. Supp. 2d 796, 805 (N.D. Cal. 2005) (granting summary judgment for defendants where plaintiff's "indexing" theory, premised on the assumption that any offer to distribute a copyrighted work violates the distribution right, was insufficient to prove infringement). Likewise, Professor Goldstein has observed that if the distribution right is to be infringed, "an actual transfer must take place; a mere offer for sale will not violate the right." Paul Goldstein, *Copyright* § 5.5.1, at 5:102 to 5:102-1. *But see Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) (holding that that when a public library added an unauthorized copy of a work to its collection, and made the copy available to the public, it had completed all the steps necessary for distribution to the public).

Federal Rules of Civil Procedure.[6] However, plaintiffs probably are not required to allege each individual act of infringement in the Complaint,[7] and some courts have found allegations of continuing infringement to be sufficient to give notice under Rule 8 as to the timing of the allegedly infringing acts.[8]

COUNTERCLAIMS

Counterclaims raised by defendants accused of copyright infringement for peer-to-peer filesharing include: (1) invasion of privacy; (2) abuse of legal process; (3) civil Racketeer Influenced and Corrupt Organizations (RICO) violations; (4) electronic trespass; and (5) violation of the Computer Fraud and Abuse Act.

Invasion of privacy

Defendants in P2P suits have occasionally alleged invasion of privacy. The basis for these claims is not always explicit, but the gravamen seems to be plaintiffs' alleged invasion of defendants' computers and/or plaintiffs' public identification of the defendants as file-sharers.

These claims implicate three classic privacy torts:

(1) *Public Disclosure of Private Facts*, which creates a cause of action against one who "gives publicity" to a private matter that is "highly offensive to a reasonable person" and "is not of legitimate concern to the public."[9]

(2) *False Light*, which creates a cause of action when one publicly discloses a matter that places a person "in a false light" that is "highly offensive to a reasonable person." The publisher must have "had

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[6] *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (D.N.Y. 2000); *see also Gee v. CBS, Inc.*, 471 F. Supp. 600, 643 (D. Pa. 1979), *aff'd*, 612 F.2d 572 (3d Cir. 1979); *Hartman v. Hallmark Cards, Inc.*, 639 F. Supp. 816 (W.D. Mo. 1986), *aff'd*, 833 F.2d 117 (8th Cir. 1987); *Stampone v. Stahl*, 05 Civ. 1921, 2005 WL 1694073 at *2 (D.N.J. 2005).

[7] *Carell v. Shubert Organization, Inc.*, 104 F. Supp. 2d 236, 251 (S.D.N.Y. 2000) (finding "allegations [to be] sufficiently specific for purposes of Rule 8, despite the fact that each individual infringement was not specified").

[8] *See Franklin Electronic Publishers v. Unisonic Prod. Corp.*, 763 F. Supp. 1, 4 ("[w]hile plaintiff has not alleged the date defendants allegedly commenced their infringing activities, plaintiff has alleged that defendant continues to infringe"); *Home & Nature, Inc. v. Sherman Specialty Co.*, 322 F. Supp. 2d 260, 266 (E.D.N.Y. 2004) (finding the plaintiff's allegation that the "defendant has, since December 2000, infringed and continues to infringe 'one or more' of [the plaintiff's] copyrights by 'importing, causing to be manufactured, selling and/or offering for sale unauthorized tattoo-like jewelry items'" satisfied Rule 8's pleading requirements).

[9] Restatement (second) of Torts § 652D (1977). According to the Restatement, "publicity" means that the matter is communicated to the "public at large" or "to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."

knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [counterclaimant] would be placed.[10]

(3) *Intrusion Upon Seclusion*, which provides a remedy when one intrudes "upon the solitude or seclusion of another or his private affairs or concerns" if the intrusion is "highly offensive to a reasonable person." The tort of intrusion concerns the way that information is obtained. The intrusion itself makes the intruder subject to liability, even though there is no publication or other use of the information.[11]

Note: The New York Court of Appeals has held that common law privacy torts are not cognizable in New York; the right to privacy is governed exclusively by sections 50 and 51 of the state Civil Rights Law.[12]

Litigation privilege. Otherwise actionable statements made by litigants in connection with a judicial proceeding may be privileged under state law. The litigation privilege protects a party from liability for invasion of privacy irrespective of his purpose in publishing the matter, of his belief in its truth or even his knowledge of its falsity.[13] For example, California Civil Code § 47 provides an absolute statutory privilege for statements made in judicial, legislative, and other official proceedings. Illinois law likewise recognizes an absolute privilege for statements said in judicial proceedings.[14]

Consent is a defense to intrusion,[15] and consent may be implied.[16] Thus, for example, a party may have difficulty claiming intrusion where she has invited outsiders to access her files. However, one's consent to intrusion must be informed.[17]

The *Noerr-Pennington doctrine* has been applied to immunize various forms of administrative and judicial petitioning activity from legal liability in subsequent litigation

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[10] Restatement (second) of Torts § 652E (1977).

[11] Restatement (second) of Torts § 652B (1977).

[12] *Howell v. New York Post Co*., 81 N.Y.2d 115, 123 (N.Y. 1993). Section 50 of the New York Civil Rights law criminalizes the use "for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without [written consent]." NY CLS Civ R § 50 (2005). With certain limited exceptions, section 51 provides for equitable and monetary relief to "any person whose name, portrait, picture or voice is used . . . for advertising purposes or for the purposes of trade without . . . written consent."

[13] Restatement (second) of Torts §§ 587, 652F (1977).

[14] *McGrew v. Heinold Commodities, Inc.*, 497 N.E.2d 424 (Ill. App. Ct. 1986) (absolute privilege for statements said in judicial proceedings operates as a complete bar to false light claims).

[15] *See Baugh v. CBS, Inc.*, 828 F. Supp. 745, 752 (N.D. Cal. 1993) (holding that "consent is an absolute defense, even if improperly induced"); *Miller v. Motorola*, 560 N.E.2d 900, 904 (Ill. App. Ct. 1990) (there can be no wrongful intrusion where the plaintiff consents to the defendant's conduct or voluntarily provides the information to the defendant.

[16] *See Cramer v. Consolidated Freightways, Inc.*, 209 F.3d 1122 (9th Cir. 2000).

[17] *See Sanchez-Scott v. Alza Pharmaceuticals*, 103 Cal. Rptr. 2d 410 (Cal. 2001).

on First Amendment grounds.[18] Lawsuits are protected by the doctrine because they are essentially petitions to the courts for redress of grievances.[19] However, the Noerr-Pennington doctrine does not immunize "objectively baseless" sham litigation.[20] Under the Noerr-Pennington test, a must first determine whether a reasonable litigant could realistically expect success on the merits. If not, *i.e*., the challenged litigation is objectively meritless, a court will turn to the second, subjective, prong of the test—whether the lawsuit was brought in bad faith.[21]

Abuse of legal process

Abuse of process is generally defined as "the misuse of a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which the process is not designed."[22] Claimants must establish that the opposing party committed "(1) a willful act in the use of legal process after its issuance that is not proper in the regular conduct of the proceeding, and (2) an ulterior motive or purpose on the part of the person causing the process to issue."[23]

Special allegations. While in some jurisdictions malice is not a necessary element of a cause of action for abuse of process, except where punitive or exemplary damages are sought, in other jurisdictions, proof of malice is required.[24] Moreover, some courts require the plaintiff to plead and prove that the "prior action was . . . pursued to a legal termination in [the plaintiff's] favor, [or that it] was brought without probable cause."[25]

As in the context of privacy actions, the *Noerr-Pennington doctrine* limits abuse of process claims.[26]

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[18] *See Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983).

[19] *See Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). *But see Theofel v. Farey-Jones*, 359 F.3d 1066, 1079 (9th Cir. 2004) ("subpoenaing private parties in connection with private commercial litigation bears little resemblance to the sort of governmental petitioning the [Noerr-Pennington] doctrine is designed to protect").

[20] *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993).

[21] *Id.*

[22] Lisa A. Zakolski, 1 Am. Jur. 2d *Abuse of Process* §1 (2004).

[23] Id. at §5; *Slaff v. Slaff*, 151 F. Supp. 124, 126 (D.N.Y. 1957) ("Bad motive is not enough. There must be a perversion of the process, some improper use made of it wholly apart from the object of the process itself."); *Clark Equipment Co. v. Wheat*, 154 Cal.Rptr. 874, 885 (Cal. 1979)("Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.").

[24] Zakolski, 1 Am. Jur. 2d *Abuse of Process* §8.

[25] *See, e.g., Silver v. Gold*, 259 Cal. Rptr. 185, 187 (Cal. Ct. App. 1989); *Alabama Power Co. v. Neighbors*, 402 So. 2d 958, 962 (Ala. 1981).

[26] *See Protect Our Mountain Environment, Inc. v. District Court of County of Jefferson*, 677 P.2d 1361, 1369 (Colo. 1984) ("[W]hen a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the

RICO

In order to state a cause of action under the RICO Act,[27] a civil complaint must allege: (1) that a "person" within the scope of the statute;[28] (2) has utilized a "pattern of racketeering activity" or the proceeds thereof; (3) to infiltrate an interstate "enterprise;"[29] (4) by (a) investing the income derived from the pattern of racketeering activity in the enterprise; (b) acquiring or maintaining an interest in the enterprise through the pattern of racketeering activity; (c) conducting the affairs of the enterprise through the pattern of racketeering activity; or (d) conspiring to commit any of the above acts.[30] A plaintiff in a private, civil RICO action must also allege that he was injured in his business or property "by reason of" one of the foregoing.[31]

Predicate Acts. Under the second element of a RICO cause of action, the "racketeering activity" must consist of two or more specified predicate acts, such as fraud or extortion (for a federal offense), or "any act or threat involving murder, kidnapping, gambling, arson, robbery, which is chargeable under State law and punishable by imprisonment for more than one year" (for a state offense).[32] Courts strictly require a RICO complaint to allege every essential element of each predicate act.[33] Further, all civil RICO actions grounded in fraud must state, with particularity, the circumstances

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constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.").

[27] 18 U.S.C. §§1961-1968.

[28] Section 1961(3) defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property." The required distinctness between the enterprise and the defendant under § 1962(c) may present difficulties for a private civil RICO plaintiff who wants to name as a defendant a corporation that is the same as or closely related to the enterprise. Hon. Jed S. Rakoff, RICO, Civil and Criminal Law and Strategy, § 1.04 (2005)

[29] The definition of an enterprise "includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

[30] Rakoff, RICO, Civil and Criminal Law and Strategy, § 1.02; 18 U.S.C. § 1962.

[31] Rakoff, RICO, Civil and Criminal Law and Strategy, § 1.03; 18 U.S.C. § 1964(c).

[32] 18 U.S.C. § 1961(1).

[33] *See, e.g., Broderick v. Roache*, 751 F. Supp. 290, 293-295 (D. Mass. 1990) (dismissing RICO claim because plaintiff did not allege the necessary elements of extortion under Massachusetts law); *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169-170 (2d Cir. 1999) (setting forth essential elements of a RICO action predicated on fraud); *Sanville v. Bank of America National Trust & Savings Ass'n*, No. 00-56792, 2001 WL 1005892 *1 (9th Cir. 2001) (affirming dismissal of plaintiff's RICO claims for failure to plead with sufficient particularity that the defendants had the specific intent to deceive or defraud as required for both mail and wire fraud).

constituting fraud as required under Federal Rule of Civil Procedure 9(b).[34] And, the predicate acts must have sufficient "continuity and relationship" to constitute a pattern.[35]

Electronic trespass

This cause of action is a species of the traditional tort of "trespass to chattel," *i.e.*, the intentional use of or interference with a chattel, or personal property, which is in the possession of another, without justification.[36] There is no liability for trespass unless it is intentional, except where the intrusion results from reckless or negligent conduct.[37] A person who commits a trespass to chattel is subject to liability "only if he dispossess the other of the chattel, the chattel is impaired as to its condition, quality, or value, the possessor is deprived of the use of the chattel for a substantial time or bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest."[38]

In order to prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish that the defendant intentionally and without authorization interfered with the plaintiff's possessory interest in a computer system and that the defendant's unauthorized use proximately resulted in damage to the plaintiff."[39]

Computer Fraud and Abuse Act

The Computer Fraud and Abuse Act (CFAA), a criminal statute, provides a civil remedy to "any person who suffers damage or loss by reason of a violation of this section."[40] Provisions of the CFAA potentially applicable to counterclaims in the context of peer-to-peer filesharing cases prohibit: (1) accessing a computer without authorization or exceeding authorized access to obtain "information from any protected computer if the conduct involved an interstate or foreign communication;" (2) intentionally accessing a protected computer without authorization, and as a result of such conduct, causing damage; (3) "knowingly and with intent to defraud, access[ing] a protected computer

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[34] Rakoff, RICO, Civil and Criminal Law and Strategy, § 1.04 (2005).

[35] Rakoff, RICO, Civil and Criminal Law and Strategy, § 1.04; *see also H. J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

[36] Robin C. Larner, 75 Am. Jur. 2d Trespass § 16 (2005).

[37] Id. at § 9.

[38] Id. at § 17.

[39] *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1069-1070 (N.D. Cal. 2000); *see also Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 405 (2d Cir. 2004). The Second Circuit affirmed the grant of a preliminary injunction based on the district court's finding that the defendant's use of search robots consumed a significant portion of the capacity of the plaintiff's computer systems. While the defendant's robots alone would not incapacitate the plaintiff's systems, the court found that if the defendant were permitted to continue to access the plaintiff's computers through such robots, it was "highly probable" that other Internet service providers would devise similar programs to access the plaintiff's data, and that the system would be overtaxed and would crash.

[40] 18 U.S.C. §§1030.

without authorization, or exceed[ing] authorized access, and by means of such conduct furthering the intended fraud and obtain[ing] anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $ 5,000 in any one-year period."[41]

A civil action for a violation of the CFAA may be brought only if the conduct involves one of the factors set forth in subsection (a)(5)(B): "(i) loss to one or more persons during any one-year period . . . aggregating at least $ 5,000 in value; (ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals; (iii) physical injury to any person; (iv) a threat to public health or safety; or (v) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security."[42]

The statute of limitations for civil actions under the Act is two years from the date of the act complained of or the date of the discovery of the damage.[43]

[41] §1030(a).
[42] §§1030(g), (a)(5)(B).
[43] §1030(g).