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DISTRICT OF WYOMING
CHEYENNE

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CLERK
U.S. DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

RICHARD D. COLLARD and)
MOUNTAIN STATES CONSULTING,)
LLC, a Wyoming Limited Liability)
Company,)

Plaintiffs,)

vs.)

RONALD KAILEY and)
TRIBAL SOFTWARE, INC., a Wyoming)
corporation; and John Does 1 through 3,)

Defendants.)

Civil No. 01CV-008-B

RESPONSE TO MOTION TO AMEND COMPLAINT

COMES NOW the Defendants, Ronald Kailey and Tribal Software, Inc., by and through their attorneys, HATHAWAY, SPEIGHT & KUNZ, LLC, and respond to Plaintiffs' Motion to Amend as follows:

1. On or about August 7, 2001, Defendants filed their Motion for Judgment on the Pleadings alleging that Plaintiffs are not entitled to statutory damages or attorneys fees under the Federal Copyright Act.

2 On or about the 20th day of September, 2001, Plaintiffs filed their Joint Reply to Defendants' Motion for Judgment on the Pleadings, and Motion to Amend Complaint.

3. In page 1, paragraph 1, of their Reply, Plaintiffs admitted the merits of Defendants' Motion for Judgment on the Pleading and stipulated that, "for the reasons stated in Defendants' Motion, an award of statutory damages and attorneys fees is unavailable to Plaintiffs in this action."

4. After admitting the merits of Defendants' Motion, Plaintiffs moved the Court for leave to amend Plaintiffs' prayer for relief to include a request for costs, pursuant to 17 U.S.C. §505 and for the specific monetary damages provided for in 17 U.S.C. §504(b).

5. Plaintiffs inclusion of their Motion to Amend in their, unrelated, response to Defendants' dispositive motion is improper and, because the hearing on Defendants' dispositive motion is scheduled for September 28, 2001, fails to give Defendants the amount of time offered by the Federal Rules of Civil Procedure for responding to Plaintiffs' Motion.

6. Despite Plaintiffs' improper attempt to raise this new issue in their response to Defendants' dispositive motion, Defendants have filed this response to Plaintiffs' Motion to Amend and do no object to its consideration during the Court's hearing on Defendants' dispositive motion.

7. Plaintiffs' Motion asks that they be allowed to amend paragraph 46 (c) of their Complaint to add a claim for "monetary damages pursuant to 17 U.S.C. §504(b)." [Plaintiffs' Motion at p.2.] Plaintiffs original complaint only sought an award of "their

actual damages and profits, in an amount to be proven at trial.” [Complaint at Paragraph 46(b).]

8. In addition to allowing Plaintiffs to collect their actual damages and lost profits, 17 U.S.C. §504(b) permits a plaintiff to recover the profits of a copyright infringer that “are attributable to the infringement and are not taken into account in computing the actual damages. 17 U.S.C. §504(b).

9. Plaintiffs’ original Complaint does not seek such profits and to allow Plaintiffs to add a claim for such a category of profits at the eleventh hour in this litigation is both improper and unfairly prejudicial to Defendants. All relevant discovery deadlines have already passed in this litigation and final pretrial memorandum are to be filed with the court in less than one month. Furthermore, addition of this new element of damages will complicate the issues which will have to be presented to the trier of fact.

10. As Plaintiffs admit in their Motion, prejudice to the party opposing amendment is a proper basis upon which to deny the amendment. See R.E.B. Inc. v. Ralston Purina Co., 525 F.2d 749 (10th Cir. 1975). Defendants would be unduly prejudiced if Plaintiffs are allowed to amend their Complaint.

11. With regard to Plaintiffs’ request to amend their complaint to add a specific request for costs under 17 U.S.C. §505, Plaintiffs request is untimely and is unnecessary.

12. Paragraph 46(e) of Plaintiffs’ Complaint already requests that Plaintiffs “be awarded [their] attorney’s fees together with interest and costs.” Plaintiffs request for costs is appropriate given the provisions of Federal Rule of Civil Procedure 54.

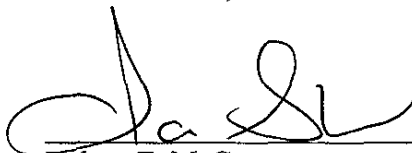
13. However, to the extent Plaintiffs seek costs not otherwise recoverable under Rule 54, and which would only be recoverable under 17 U.S.C. §505, such request is untimely and would prejudice Defendants.

14. Contrary to Plaintiffs' representation in their Motion, the proposed amendments are not simply "refinements of existing demands, but seek to introduce new elements of damages not previously sought and about which Defendants have not had fair notice for purposes of discovery and preparation of their defense.

WHEREFORE, Defendants respectfully request that the Court deny Plaintiffs' Motion to Amend Complaint.

Dated this 28th day of September, 2001.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of September, 2001, a true and correct copy of the foregoing was served as follows:

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BY