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15 TROY AUGUSTO

16 UNITED STATES DISTRICT COURT  
17 CENTRAL DISTRICT OF CALIFORNIA  
18 WESTERN DIVISION

19 UMG RECORDINGS, INC., a  
20 Delaware corporation,  
21  
22 Plaintiff,

23 v.

24 TROY AUGUSTO d/b/a ROAST  
25 BEAST MUSIC COLLECTABLES  
26 AND ROASTBEASTMUSIC, an  
27 individual; and DOES 1 through 10,  
28 inclusive,  
29 Defendants.

Case No. 2:07-cv-3106 SJO (AJWx)

**ANSWER AND COUNTERCLAIM**

Defendant Troy Augusto answers Plaintiff UMG Recordings, Inc.'s  
Complaint as follows:

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**I. ANSWER**

**JURISDICTION AND VENUE**

- 1. Admitted.
- 2. Admitted.
- 3. Augusto admits that he is subject to the personal jurisdiction of this Court and that venue is proper in this District. Augusto denies the remaining allegations in this paragraph.

**PARTIES**

- 4. Augusto is without sufficient information to admit or deny the allegations in this paragraph.
- 5. Augusto admits that he resides in Pasadena, California and does business under the name Roast Beast Music Collectables and under the eBay User ID roastbeastmusic.
- 6. Augusto is without sufficient information to admit or deny the allegations in this paragraph.
- 7. Augusto is without sufficient information to admit or deny the allegations in this paragraph.

**BACKGROUND**

- 8. Augusto admits that he has sold CDs on the eBay internet auction website since approximately July, 2000 under the eBay User ID roastbeastmusic. Augusto denies the remaining allegations in this paragraph.

**FACTS**

- 9. Augusto is without sufficient information to admit or deny the allegations in this paragraph.
- 10. Augusto admits that UMG’s record labels promote their musical releases through the distribution of “Promo CDs” to select influential persons. Augusto denies the remaining allegations in this paragraph.
- 11. Augusto admits that he has sold CDs on the eBay internet auction

1 website under the eBay User ID roastbeastmusic, sometimes labeling his auctions  
2 with the name “Roast Beast Music Collectables.” Augusto admits that parties with  
3 whom he has transacted on eBay have given positive feedback on more than  
4 20,000 transactions, and that more than 15,000 different buyers have given positive  
5 feedback on their transactions with Augusto. Augusto denies the remaining  
6 allegations in this paragraph.

7 12. Augusto is without sufficient information to admit or deny the  
8 allegations in this paragraph.

9 13. Augusto is without sufficient information to admit or deny the  
10 allegations in this paragraph.

11 14. Denied.

12 15. Augusto is without sufficient information to admit or deny the  
13 allegations in this paragraph.

14 16. Augusto admits that under 17 U.S.C. § 109 he is entitled, without the  
15 authority of the copyright owner, to sell or otherwise dispose of the possession of  
16 CDs he owns, including the CDs at issue in this action. Augusto admits that the  
17 limitation on a copyright holder’s distribution right set forth in 17 U.S.C. § 109 is  
18 sometimes referred to as the “first sale doctrine.” Augusto admits that he has cited  
19 17 U.S.C. § 109 from time to time in his auction descriptions. Augusto denies the  
20 remaining allegations in this paragraph.

21 17. Augusto is without sufficient information to admit or deny the  
22 allegations in this paragraph.

23 18. Admitted.

24 19. Augusto admits that he affirmed as follows on each of the forms  
25 contained in Exhibit C:

26 I CERTIFY UNDER SWORN PENALTY OF PERJURY that I am  
27 sending this notification on the basis of my good faith belief that the  
28 listings or other materials referred to below do not involve infringing  
materials or uses and have been identified by a Verified Rights Owner  
(VeRO) Program participant, its agent, or law enforcement as

1 infringing by mistake or due to misidentification: . . . .

2 Augusto denies the remaining allegations in this paragraph.

3 20. Augusto admits that, on June 21, 2004, Capitol Records, Inc. and  
4 Virgin Records America, Inc. filed a civil action, No. 04C 4122, against Augusto  
5 in the United States District Court for the Northern District of Illinois. Augusto  
6 denies the remaining allegations in this paragraph.

7 21. Augusto admits that judgment was entered against him in *Capitol*  
8 *Records, Inc. v. Augusto*, No. 04C 4122 in the United States District Court for the  
9 Northern District of Illinois, on March 9, 2005. Augusto denies the remaining  
10 allegations in this paragraph.

11 **FIRST CLAIM FOR RELIEF**

12 **(Copyright Infringement under 17 U.S.C. § 501)**

13 22. This paragraph requires no response.

14 23. Augusto is without sufficient information to admit or deny the  
15 allegations in this paragraph.

16 24. Augusto is without sufficient information to admit or deny the  
17 allegations in this paragraph.

18 25. Denied.

19 26. Denied.

20 27. Denied.

21 28. Denied.

22 29. Denied.

23 30. Denied.

24 31. Denied.

25 **II. AFFIRMATIVE DEFENSES**

26 **FIRST AFFIRMATIVE DEFENSE**

27 **(First Sale Doctrine, 17 U.S.C. § 109)**

28 1. At the time he offered them for sale, Augusto was the owner of the



1 **PARTIES**

2 1. Augusto is an individual residing in Pasadena, California. Augusto  
3 does business on eBay under the user ID roastbeastmusic.

4 2. UMG is a Delaware corporation that maintains principal places of  
5 business in Santa Monica, California and New York, New York.

6 **JURISDICTION AND VENUE**

7 3. This Court has subject-matter jurisdiction over this action pursuant to  
8 17 U.S.C. § 101 *et seq.* (the Copyright Act); 28 U.S.C. § 1331 (federal question);  
9 and 28 U.S.C. § 1338(a) (exclusive federal copyright jurisdiction).

10 4. UMG is subject to the personal jurisdiction of this Court and venue is  
11 proper in this District under 28 U.S.C. § 1391(b) and 28 U.S.C. § 1400(a) in that  
12 the acts complained of herein occurred in this District and UMG resides, may be  
13 found, and/or transacts business in this District.

14 **FACTS**

15 5. eBay is an online auction website where millions of Internet users buy  
16 and sell goods and services worldwide.

17 6. Augusto has been a regular user of the eBay website since July, 2000.  
18 Since that time, he has built up substantial good will as a buyer and seller on eBay.  
19 Indeed, in his nearly seven years of selling activity on eBay, he has accumulated a  
20 positive feedback rating of 99.6% and has received over 21,000 user comments.

21 7. Augusto's eBay income, which is his primary source of income,  
22 comes mainly from the sale of CDs.

23 8. On information and belief, eBay created the Verified Rights Owner  
24 ("VeRO") program to provide intellectual property rights holders with a method  
25 for terminating auctions of goods they claim are infringing by submission of  
26 "Notices of Claimed Infringement."

27 9. Submission of a Notice of Claimed Infringement to the VeRO  
28 program constitutes a notification under the Digital Millennium Copyright Act

1 (“DMCA”), 17 U.S.C. § 512.

2 10. On various dates in 2006 and 2007, UMG, through an agent,  
3 submitted Notices of Claimed Infringement through the VeRO program  
4 (“Notices”).

5 11. These Notices demanded that eBay terminate the auctions of  
6 numerous CDs offered for sale by Augusto (the “Auctions”).

7 12. By these Notices, UMG represented under penalty of perjury that it  
8 had a good faith belief that the Auctions infringed UMG’s intellectual property  
9 rights.

10 13. By these Notices, UMG represented under penalty of perjury that all  
11 of the information contained in the Notices was accurate.

12 14. The CDs offered for sale in the Auctions were lawfully made, and  
13 their offer for sale did not infringe UMG’s copyrights.

14 15. Augusto’s sale of the CDs through the Auctions did not infringe  
15 UMG’s copyrights.

16 16. On information and belief, at the time it submitted the Notices, UMG  
17 did not have a good faith belief that the CDs offered for sale in the Auctions  
18 infringed UMG’s copyrights.

19 17. On information and belief, at the time it submitted the Notices, UMG  
20 did not have a good faith belief that Augusto’s Auctions or sale of the CDs through  
21 the Auctions infringed UMG’s copyrights.

22 18. On information and belief, not all of the information contained in the  
23 Notices was accurate.

24 19. On information and belief, at the time it submitted the Notices, UMG  
25 knew or should have known that not all of the information contained in the Notices  
26 was accurate.

27 20. At the time UMG submitted the Notices, no contract existed between  
28 Augusto and UMG.



1 Auctions were infringing.

2 31. UMG knowingly materially misrepresented that Augusto's Auctions  
3 and sale of the CDs through the Auctions were infringing.

4 32. UMG's knowing material misrepresentations were made under 17  
5 U.S.C. § 512.

6 33. As a result of UMG's knowing material misrepresentations, Augusto  
7 is entitled pursuant to 17 U.S.C. § 512(f) to all damages, including costs and  
8 attorneys' fees, he incurred as the result of eBay's reliance upon UMG's  
9 misrepresentations.

10 34. As a result of UMG's acts alleged herein, Augusto has suffered, is  
11 suffering, and will continue to suffer substantial damage to his business in the form  
12 of diversion of trade, loss of profits, and injury to goodwill and reputation, all of  
13 which are not yet fully ascertainable.

14 35. UMG's wrongful acts have caused, and are causing, great damage to  
15 Augusto, which damage cannot be accurately computed, and therefore, unless this  
16 Court restrains UMG from further commission of these acts, Augusto will suffer  
17 irreparable injury, for which it is without an adequate remedy at law. Accordingly,  
18 Augusto seeks an order enjoining UMG from any further wrongful notices or  
19 threats in connection with Augusto's sale of lawfully made CDs.

20 **PRAYER FOR RELIEF**

21 WHEREFORE, the Counterclaimant prays for judgment as follows:

22 1. Dismissal of UMG's claim for copyright infringement with prejudice  
23 and a declaration that UMG take nothing by way of its Complaint;

24 2. Injunctive relief restraining UMG, its agents, servants, employees,  
25 successors and assigns, and all others in concert and privity with UMG, from  
26 bringing any lawsuit or threat against Counterclaimant for copyright infringement  
27 in connection with the offering or sale of lawfully made CDs;  
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3. Damages according to proof;
4. Attorneys' fees pursuant to 17 U.S.C. § 512(f), other portions of the Copyright Act including Section 505, on a Private Attorney General basis, or otherwise as allowed by law;
5. Counterclaimant's costs and disbursements; and
6. Such other and further relief as the Court shall find just and proper.

Counterclaimant hereby requests a jury trial for all issues triable by jury including, but not limited to, those issues and claims set forth in any amended complaint or consolidated action.

Dated: August 6, 2007

KEKER & VAN NEST, LLP

By: \_\_\_\_\_  
MICHAEL H. PAGE  
JOSEPH C. GRATZ  
Attorneys for Defendant  
TROY AUGUSTO