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*Counsel for Plaintiff Zenbu Magazines LLC,
and the Putative Class*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

Case No.: 15-cv-309

CLASS ACTION

ZENBU MAGAZINES LLC, on behalf of
itself and all others similarly situated,

Plaintiff,

v.

APPLE INC.,

Defendant.

COMPLAINT FOR:

**VIOLATION OF CAL. CIV. CODE §
980(a)(2);**

**VIOLATION OF CAL. BUS. & PROF.
CODE §§ 17200 ET SEQ.;**

MISAPPROPRIATION; and

CONVERSION

DEMAND FOR JURY TRIAL

1 Plaintiff Zenbu Magazines LLC (“Zenbu”), on behalf of itself, all others similarly
2 situated, and the general public, by and through its undersigned counsel, hereby brings this
3 action against defendant Apple Inc. (“Apple”), and alleges the following upon its own
4 knowledge, or where it lacks personal knowledge, upon information and belief including the
5 investigation of its counsel.

6 INTRODUCTION

7 1. Apple operates and offers to the general public a streaming music service called
8 iTunes Radio, which is available through an Internet browser, as well as through applications
9 for Android, Apple (iOS), and Windows smartphones and tablets.

10 2. Included in the iTunes Radio library are sound recordings of musical
11 performances that initially were “fixed” (that is, in a tangible medium, *i.e.*, recorded) prior to
12 February 15, 1972, for which Apple has not obtained the recordings’ owners’ authorization
13 to perform, and for which Apple does not and has not paid the recordings’ owners royalties
14 or licensing fees when it performs the recordings.

15 3. Apple has copied tens of thousands of pre-1972 recordings to its servers,
16 transmitting and performing them via iTunes Radio to its millions of users on a daily basis,
17 without any authorization. Apple profits from its unauthorized reproduction, distribution, and
18 public performance of pre-1972 recordings by charging subscription fees to its users, without
19 paying royalties or licensing fees for pre-1972 recordings.

20 4. Because Apple operates iTunes Radio without licenses for pre-1972 recordings,
21 Apple is liable under California law for violation of Cal. Civ. Code § 980(a)(2), violation of
22 Cal. Bus. & Prof. Code §§ 17200, *et seq.*, misappropriation, and conversion.

23 5. Zenbu owns all right, title and interest in and to a library of pre-1972 sound
24 recordings, which includes at least one recording that Apple has reproduced, distributed, and
25 performed without paying Zenbu any royalties or licensing fees, specifically “Sin City,” by
26 The Flying Burrito Brothers, off the Album, “The Gilded Palace of Sin,” which was fixed in
27 1969. Zenbu brings this action on behalf of itself and similarly-situated owners of pre-1972
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1 copyrights to sound recordings that have been reproduced, distributed, and performed by
2 Apple without paying royalties or licensing fees.

3 **THE PARTIES**

4 6. Plaintiff Zenbu Magazines LLC is a New York limited liability company with
5 its principal place of business in Brooklyn, New York.

6 7. Defendant Apple Inc. is a California corporation with its principal place of
7 business at 1 Infinite Loop, Cupertino, California 95014.

8 **JURISDICTION AND VENUE**

9 8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §
10 1332(d)(2)(A), the Class Action Fairness Act, because the matter in controversy exceeds the
11 sum or value of \$5,000,000 exclusive of interest and costs, at least one member of the class
12 of plaintiffs is a citizen of a State different from defendant. In addition, more than two-thirds
13 of the members of the class reside in states other than the state in which defendant is a citizen
14 and in which this case is filed, and therefore any exceptions to jurisdiction under 28 U.S.C. §
15 1332(d) do not apply.

16 9. The Court has personal jurisdiction over defendant pursuant to Cal. Code Civ.
17 P. § 410.10, as a result of defendant's substantial, continuous and systematic contacts with
18 the State, and because defendant has purposely availed itself of the benefits and privileges of
19 conducting business activities within the State.

20 10. Venue is proper in this Northern District of California pursuant to 28 U.S.C. §
21 1391(b) and (c), because defendant resides (i.e., is subject to personal jurisdiction) in this
22 district, and a substantial part of the events or omissions giving rise to the claims occurred in
23 this district.

24 **INTRADISTRICT ASSIGNMENT**

25 11. Pursuant to N.D. Cal. Civ. L.R. 3-2(c), (d) & 3-5(b), this action is properly
26 assigned to the San Jose Division because the action arises in Santa Clara County in that a
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1 substantial part of the events or omissions which give rise to plaintiff's claims occurred in
2 Cupertino, California, in Santa Clara County, where Apple resides.

3 **FACTS**

4 12. Since September 18, 2013, iTunes Radio has been provided by Apple to
5 members of the public throughout the United States. Apple delivers and streams music
6 through its iTunes software, which itself is available for a wide variety of both Mac and PC
7 formats and hardware (for example, computers, laptops, smartphones, Apple TV, etc.). In
8 marketing iTunes Radio, Apple represents that subscribers have access to over 20 million
9 songs, with "No ads. No breaks. Just great music."

10 13. Apple provides iTunes Radio on a free basis to iTunes users, supporting the
11 service by selling advertising, and linking each sound recording performed to a page in the
12 iTunes Store where the user may purchase the song for download.

13 14. Among the sound recordings that Apple publicly performs, reproduces, and
14 distributes on an ongoing and regular basis are pre-1972 recordings, including at least one for
15 which Zenbu owns the sound recording copyright, specifically "Sin City," by The Flying
16 Burrito Brothers, from the Album, "The Gilded Palace of Sin," which was fixed in a tangible
17 medium (i.e., recorded) in 1969.

18 15. In order to stream music recordings to the public, Apple has reproduced and
19 copied, and continues to reproduce and copy, pre-1972 recordings, including to one or more
20 servers and storage devices, and uses technology or systems that result in a copy of pre-1972
21 recordings being distributed to its subscribers' computers or storage devices.

22 16. Apple is aware that it does not have any license, right, or authority to reproduce,
23 perform, distribute, or otherwise exploit via iTunes Radio any pre-1972 recordings, including
24 pre-1972 recordings owned by Zenbu.

25 17. Apple is also aware which of the recordings it reproduces, performs, and
26 distributes or otherwise exploits via iTunes Radio are pre-1972 recordings.

CLASS ACTION ALLEGATIONS

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2 18. Zenbu seeks to represent a class comprised of all owners of sound recordings of
3 musical performances that initially were “fixed” (*i.e.*, recorded) prior to February 15, 1972,
4 which sound recordings were reproduced, performed, distributed, and/or otherwise exploited
5 by Apple via iTunes Radio, and for which Apple was not authorized or licensed to reproduce,
6 perform, distribute, or otherwise exploit.

7 19. Numerosity – The members in the proposed class are so numerous that
8 individual joinder of all members is impracticable, and the disposition of the claims of all
9 class members in a single action will provide substantial benefits to the parties and Court.

10 20. Commonality – Common questions of law and fact exist as to all members of
11 the putative class and subclass, which do not vary from member to member, and which may
12 be resolved without reference to individual facts and circumstances include, without
13 limitation:

- 14 a. Whether Apple reproduced, performed, distributed or otherwise exploited
15 via iTunes Radio pre-1972 sound recordings;
- 16 b. Whether Apple was authorized by the owners of the sound recording
17 copyrights to reproduce, perform, distribute, or otherwise exploit the
18 sound recordings via iTunes Radio pre-1972 recordings;
- 19 c. Whether Apple paid royalties or licensing fees for pre-1972 sound
20 recordings that it reproduced, performed, distributed, or otherwise
21 exploited via iTunes Radio;
- 22 d. Whether Apple’s reproduction, performance, distribution, or other
23 exploitation via iTunes Radio of pre-1972 sound recordings constitutes a
24 violation of Cal. Civ. Code § 980(a)(2);
- 25 e. Whether Apple’s reproduction, performance, distribution or other
26 exploitation via iTunes Radio of pre-1972 sound recordings constitutes an
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1 unfair business practice in violation of Cal. Bus. & Prof. Code §§ 17200,
2 *et seq.*;

3 f. Whether Apple's reproduction, performance, distribution or other
4 exploitation via iTunes Radio of pre-1972 sound recordings constitutes
5 misappropriation;

6 g. Whether Apple's reproduction, performance, distribution or other
7 exploitation via iTunes Radio of pre-1972 sound recordings constitutes
8 conversion;

9 h. The proper equitable, injunctive, and prospective relief;

10 i. The proper amount of actual or compensatory damages;

11 j. The proper amount of restitution or disgorgement;

12 k. The proper amount of punitive damages; and

13 l. The proper amount of reasonable litigation expenses and attorneys' fees.

14 21. Typicality – Zenbu's claims are typical of the claims of members of the class in
15 that they are based on the same underlying facts, events, and circumstances relating to
16 Apple's conduct. Zenbu's interests are consistent with, and not antagonistic to, those of the
17 other class members it seeks to represent.

18 22. Adequacy – Zenbu will fairly and adequately represent and protect the interests
19 of the class, has no interests incompatible with the interests of the class, and has retained
20 counsel competent and experienced in class action and music copyright litigation.

21 23. Predominance – Questions of law and fact common to the class predominate
22 over any questions affecting only individual class members.

23 24. Superiority – Class treatment is superior to other options for resolution of the
24 controversy because individual litigation of the claims of all class members is impracticable.
25 The claims of the individual members of the class may range from small sums to larger sums.
26 For those class members with smaller claims, the expense and burden of individual litigation
27 may not justify pursuing the claims individually. Moreover, even if every class member could
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1 afford to pursue individual litigation, that would greatly tax the court system, as well as
2 present potential for varying, inconsistent, or contradictory judgments, and magnify the delay
3 and expense to all parties and the court system resulting from multiple trials of the same
4 factual issues.

5 **CAUSES OF ACTION**

6 **FIRST CAUSE OF ACTION**

7 **VIOLATION OF CAL. CIV. CODE § 980(a)(2)**

8 25. Zenbu realleges and incorporates the allegations elsewhere in the Complaint as
9 if fully set forth herein.

10 26. Pursuant to Cal. Civ. Code § 980(a)(2), Zenbu and members of the putative class
11 possess exclusive ownership interests in and to pre-1972 recordings, including the artistic
12 performances embodied in those recordings.

13 27. Through its unauthorized reproduction, performance, distribution, or other
14 exploitation via its iTunes Radio of pre-1972 sound recordings (including the Zenbu Pre-
15 1972 Recordings), Apple has infringed Zenbu's and the class members' exclusive ownership
16 interests in and to the pre-1972 recordings, in violation of Cal. Civ. Code § 980(a)(2).

17 28. As a direct and proximate consequence of Apple's violation of Cal. Civ. Code §
18 980(a)(2), Apple has received and retained money and value that rightfully belong to Zenbu
19 and members of the class.

20 29. As a direct and proximate consequence of Apple's violation of Cal. Civ. Code §
21 980(a)(2), Zenbu and members of the class have been damaged in an amount that is not yet
22 fully ascertained, but which likely is many millions of dollars.

23 **SECOND CAUSE OF ACTION**

24 **VIOLATION OF CAL. BUS. & PROF. CODE §§ 17200 *ET SEQ.***

25 30. Zenbu realleges and incorporates the allegations elsewhere in the Complaint as
26 if fully set forth herein.

1 31. The Unfair Competition Law prohibits any “unlawful, unfair or fraudulent
2 business act or practice.” Cal. Bus. & Prof. Code § 17200.

3 **Unfair**

4 32. Apple’s conduct as alleged herein was unfair because its conduct was immoral,
5 unethical, unscrupulous, or substantially injurious and the utility of its conduct, if any, did
6 not outweigh the gravity of the harm to its victims.

7 33. Apple’s conduct as alleged herein was also unfair because it violates public
8 policy as declared by specific constitutional, statutory, or regulatory provisions, including
9 without limitation Cal. Civ. Code § 980(a)(2).

10 **Unlawful**

11 34. Apple’s conduct as alleged herein was “unlawful” within the meaning of the
12 UCL because it was in violation of Cal. Civ. Code § 980(a)(2).

13 **THIRD CAUSE OF ACTION**

14 **MISAPPROPRIATION**

15 35. Zenbu realleges and incorporates the allegations elsewhere in the Complaint as
16 if fully set forth herein.

17 36. Pursuant to Cal. Civ. Code § 980(a)(2) and California common law, Zenbu and
18 members of the class possess exclusive ownership interests in and to the pre-1972 recordings,
19 including the artistic performances embodied in those recordings.

20 37. Zenbu and members of the class, and their predecessors in interest, invested
21 substantial time and money developing the pre-1972 recordings reproduced, performed,
22 distributed, and otherwise exploited by Apple via iTunes Radio.

23 38. Because Apple does not obtain licenses to pre-1972 recordings, it does not incur
24 any of the costs that a licensee is otherwise obligated to pay in order to reproduce, perform,
25 distribute or otherwise exploit via iTunes Radio pre-1972 recordings.

26 39. Apple has misappropriated, and continues to misappropriate, for its own
27 commercial benefit, the exclusive ownership interests in and to the pre-1972 recordings, by
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1 reproducing, performing, distributing, or otherwise exploiting via iTunes Radio pre-1972
2 recordings.

3 40. As a direct and proximate consequence of Apple's misappropriation, Apple has
4 received and retained money and value that rightfully belongs to Zenbu and members of the
5 class.

6 41. As a direct and proximate consequence of Apple's violation of Cal. Civ. Code §
7 982(a)(2), Zenbu and members of the class have been damaged in an amount that is not yet
8 fully ascertained, but which likely is many millions of dollars.

9 42. Apple acted with oppression, fraud, or malice. Apple's conduct was undertaken
10 in conscious disregard of the rights of Zenbu and each member of the class. Accordingly,
11 Zenbu and each member of the class is entitled to an award of punitive damages against Apple
12 in an amount sufficient to punish and make an example of Apple, so as to discourage Apple
13 and others from engaging in the same behavior in the future.

14 **FOURTH CAUSE OF ACTION**

15 **CONVERSION**

16 43. Zenbu realleges and incorporates the allegations elsewhere in the Complaint as
17 if fully set forth herein.

18 44. Pursuant to Cal. Civ. Code § 980(a)(2) and California common law, Zenbu and
19 members of the class possess exclusive ownership interests in and to the pre-1972 recordings,
20 including the artistic performances embodied in those recordings.

21 45. By reproducing, performing, distributing or otherwise exploiting via iTunes
22 Radio pre-1972 recordings, Apple has converted for its own use the property rights of Zenbu
23 and each member of the class, in the pre-1972 recordings, and has dispossessed Zenbu and
24 each member of the class of their property rights.

25 46. As a direct and proximate result of its conversion, Apple has received and
26 retained money and value that rightfully belongs to Zenbu and members of the class.

1 47. As a direct and proximate consequence of Apple's violation of Cal. Civ. Code §
2 982(a)(2), Zenbu and members of the class have been damaged in an amount that is not yet
3 fully ascertained, but which likely is many millions of dollars.

4 48. Apple acted with oppression, fraud, or malice. Apple's conduct was undertaken
5 in conscious disregard of the rights of Zenbu and each member of the class. Accordingly,
6 Zenbu and each member of the class is entitled to an award of punitive damages against Apple
7 in an amount sufficient to punish and make an example of Apple, so as to discourage Apple
8 and others from engaging in the same behavior in the future.

9 **PRAYER FOR RELIEF**

10 49. Wherefore, Zenbu, on behalf of itself, all others similarly situated, and the
11 general public, prays for judgment against Apple as to each and every cause of action,
12 including:

- 13 a. An Order declaring this action to be a proper class action, appointing
14 Zenbu and its counsel to represent the class, and requiring Apple to bear
15 the cost of class notice;
- 16 b. An Order permanently enjoining Apple from, without license,
17 reproducing, performing, distributing, or otherwise exploiting via iTunes
18 Radio pre-1972 recordings;
- 19 c. An Order permanently enjoining Apple, and its agents, servants, directors,
20 officers, principals, employees, representative, subsidiaries, parents,
21 affiliates, successors, assigns, and those acting in concert with them or at
22 their direction, from infringing, misappropriating, or converting, directly
23 or indirectly, Zenbu's and the class members' exclusive ownership
24 interests in and to the pre-1972 recordings, including the artistic
25 performances embodied in those recordings, including without limitation
26 by directly or indirectly reproducing, performing, distributing, or
27 otherwise exploiting via iTunes Radio the pre-1972 recordings;
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- d. An Order requiring Apple to pay Zenbu and the class compensatory damages on any cause of action where such damages are allowable;
- e. An Order requiring Apple to pay Zenbu and the class restitution to restore all funds acquired by means of any act or practice declared by the Court to be unlawful or unfair;
- f. An Order requiring Apple to disgorge or return all monies, revenues, and profits obtained by means of any wrongful or unlawful act or practice;
- g. An Order requiring Apple to pay punitive damages on any causes of action so allowable if Zenbu proves Apple's conduct was knowing, willful, malicious, oppressive, or reckless;
- h. An Order requiring Apple to pay pre- and post-judgment interest on any monetary amounts awarded;
- i. An Order requiring Apple to pay fees and costs, including reasonable attorneys' fees, incurred in pursuing this action; and
- j. An Order providing for all other such equitable relief as may be just and proper.

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JURY DEMAND

50. Zenbu hereby demands a trial by jury on all issues so triable.

Dated: January 22, 2015

/s/ Jack Fitzgerald

By: Jack Fitzgerald

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