

PUBLIC CITIZEN LITIGATION GROUP

1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

(202) 588-1000

BY EMAIL: tlalban@kilpatricktownsend.com

November 21, 2013

Tali Alban, Esquire
Kilpatrick Townsend & Stockton LLP
Eighth Floor
Two Embarcadero Center
San Francisco, California 94111

Dear Ms. Alban:

I represent Digital Music News (“DMN”), a blog devoted to issues and events pertaining to the digital side of the music industry. Over the past few months, DMN has covered the release of Apple’s iTunes Radio. After DMN obtained a copy of the standard contract that Apple has imposed in independent labels, it concluded that the contract’s terms were unfair and, in their mandatory nature, rather bullying. DMN wrote about this problem.¹ To illustrate the reasons for its conclusions, and to enable its readers to judge for themselves, DMN posted a copy of the contract on Scribd, and linked from a story to the contract.

DMN learned from some of its readers, who needed to see the document to understand DMN’s analysis, that the contract was no longer accessible at the linked location. DMN discovered that the reason that the contract was no longer available online was that a case assistant from your firm had, on Apple’s behalf, sent a takedown notice under the Digital Millennium Copyright Act (“DMCA”) to Scribd, averring under penalty of perjury that the posting of the contract infringed Apple’s copyright. The takedown notice is accessible at <http://www.citizen.org/documents/AppleTakedown.pdf>

Apple should know better. Although Apple may not have been pleased by DMN’s coverage, the solution was not to suppress the information that DMN had provided. Certainly, the contract includes sufficient original expression to be copyrighted, but the posting was plainly fair use. The contract was posted for reasons of newsworthiness, a transformative and essentially non-commercial use. The posting of the contract in no way interfered with the market for the document, which is not sold, after all. Indeed, the purpose of the takedown was not to protect legitimate copyright interests, but to suppress criticism, which could well be deemed copyright misuse. In issuing the DMCA

¹Such stories appear at http://www.digitalmusicnews.com/permalink/2013/06/13/apple_inferior, at <http://www.digitalmusicnews.com/permalink/2013/06/25/developing-apple>, and at <http://www.digitalmusicnews.com/permalink/2013/06/24/merlin>.

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takedown, Apple was required to consider the fair use reasons for the posting, and the filing of the notice implicitly represented that the posting was not fair use. Consequently, we believe that the takedown was wrongful.

We are, however, focused on the future. Today, DMN has published a new story entitled *Who's Screwing You Worse: iTunes Radio, or Pandora*, <http://www.digitalmusicnews.com/permalink/2013/11/21/itunespandoraworse>, and it has included links to the contract which is now hosted on its own server. http://www.digitalmusicnews.com/wp-content/uploads/2013/11/iTunes_Americas_-Music_v16.pdf In the event Apple serves a DMCA notice on DMN, or on its upstream provider, or if Apple takes any other action against the availability of the contract, we will assume that Apple has decided to litigate the fair use issue. We will be ready to accommodate such a choice.

Sincerely yours,


Paul Alan Levy