

THE LAW OFFICE OF JACK FITZGERALD, PC

JACK FITZGERALD (SBN 257370)

jack@jackfitzgeraldlaw.com

TREVOR M. FLYNN (SBN 253362)

trevor@jackfitzgeraldlaw.com

TRAN NGUYEN (SBN 301593)

tran@jackfitzgeraldlaw.com

Hillcrest Professional Building

3636 Fourth Avenue, Suite 202

San Diego, California 92103

Phone: (619) 692-3840

Fax: (619) 362-9555

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

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Case No.: 15-cv-464

CLASS ACTION

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

Plaintiff,

v.

BEATS ELECTRONICS, LLC,

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 Beats Electronics, LLC (“Beats”), and alleges the following upon its
4 own knowledge, or where it lacks personal knowledge, upon information and belief including
5 the investigation of its counsel.

6 **INTRODUCTION**

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

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

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

21 4. Because Beats operates the Beats Music Service without licenses for pre-1972
22 sound recordings, Beats is liable under California law for violation of Cal. Civ. Code §
23 980(a)(2), violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*, misappropriation, and
24 conversion.

25 5. Zenbu owns all right, title and interest, including common law copyright, in and
26 to a library of pre-1972 sound recordings, which includes at least one recording that Beats
27 has reproduced, distributed, and performed without paying Zenbu any royalties or licensing
28

1 fees, specifically “Sin City,” by The Flying Burrito Brothers, off the Album, “The Gilded
2 Palace of Sin,” which was fixed in 1969. Zenbu brings this action on behalf of itself and
3 similarly-situated owners of pre-1972 sound recordings that have been reproduced,
4 distributed, and performed by Beats without paying royalties or licensing fees.

5 **THE PARTIES**

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

8 7. Defendant Beats Electronics, LLC is a Delaware limited liability company with
9 its principal place of business at 8600 Hayden Place, Culver City, California 90232.

10 **JURISDICTION AND VENUE**

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

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

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

FACTS

1
2 11. The Beats Music Service is provided by Beats to paying and non-paying
3 members of the public throughout the United States. Beats delivers and streams music
4 through its website (www.beatsmusic.com), or via downloadable applications for Android,
5 Apple (iOS), and Windows smartphones and tablets. In marketing the Beats Music service,
6 Beats represents that subscribers have access to over 20 million songs, with “No ads. No
7 breaks. Just great music.”

8 12. Beats provides the Beats Music Service on a 14-day “free trial” basis for new
9 users, and on a subscription basis for \$9.99 per month, or \$99.99 per year, for one person on
10 up to three devices.

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

16 14. In order to stream music recordings to the public, Beats has reproduced and
17 copied, and continues to reproduce and copy, pre-1972 recordings, including to one or more
18 servers and storage devices, and uses technology or systems that result in a copy of pre-1972
19 recordings being distributed to its users and subscribers’ computers or storage devices.

20 15. Beats is aware that it does not have any license, right, or authority to reproduce,
21 perform, distribute, or otherwise exploit via the Beats Music Service any pre-1972 sound
22 recordings, including pre-1972 recordings owned by Zenbu.

23 16. Beats is also aware which of the recordings it reproduces, performs, and
24 distributes or otherwise exploits via the Beats Music Service are pre-1972 sound recordings.

CLASS ACTION ALLEGATIONS

25
26 17. Zenbu seeks to represent a class comprised of all owners of sound recordings of
27 musical performances that initially were “fixed” (i.e., recorded) prior to February 15, 1972,
28

1 which sound recordings were reproduced, performed, distributed, and/or otherwise exploited
2 by Beats via its Beats Music service, and for which Beats was not authorized or licensed to
3 reproduce, perform, distribute, or otherwise exploit.

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

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

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

- f. Whether Beats' reproduction, performance, distribution or other exploitation via the Beats Music Service of pre-1972 sound recordings constitutes misappropriation;
- g. Whether Beats' reproduction, performance, distribution or other exploitation via the Beats Music Service of pre-1972 sound recordings constitutes conversion;
- h. The proper equitable, injunctive, and prospective relief;
- i. The proper amount of actual or compensatory damages;
- j. The proper amount of restitution or disgorgement;
- k. The proper amount of punitive damages; and
- l. The proper amount of reasonable litigation expenses and attorneys' fees.

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

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

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

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

1 and expense to all parties and the court system resulting from multiple trials of the same
2 factual issues.

3 **CAUSES OF ACTION**

4 **FIRST CAUSE OF ACTION**

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

6 24. Zenbu realleges and incorporates the allegations elsewhere in the Complaint as
7 if fully set forth herein.

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

11 26. Through its unauthorized reproduction, performance, distribution, or other
12 exploitation via its Beats Music Service of pre-1972 sound recordings, including without
13 limitation those exclusively owned by Zenbu, Beats has infringed Zenbu's and the class
14 members' exclusive ownership interests in and to the pre-1972 recordings, in violation of
15 Cal. Civ. Code § 980(a)(2).

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

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

22 **SECOND CAUSE OF ACTION**

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

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

26 30. The Unfair Competition Law prohibits any "unlawful, unfair or fraudulent
27 business act or practice." Cal. Bus. & Prof. Code § 17200.

1 **Unfair**

2 31. Beats’ conduct as alleged herein was unfair because its conduct was immoral,
3 unethical, unscrupulous, or substantially injurious and the utility of its conduct, if any, did
4 not outweigh the gravity of the harm to its victims.

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

8 **Unlawful**

9 33. Beats’ conduct as alleged herein was “unlawful” within the meaning of the UCL
10 because it was in violation of Cal. Civ. Code § 980(a)(2).

11 **THIRD CAUSE OF ACTION**

12 **MISAPPROPRIATION**

13 34. Zenbu realleges and incorporates the allegations elsewhere in the Complaint as
14 if fully set forth herein.

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

18 36. Zenbu and members of the class (including through their predecessors in
19 interest), invested substantial time and money developing their pre-1972 sound recordings,
20 which were reproduced, performed, distributed, and otherwise exploited by Beats via the
21 Beats Music Service.

22 37. Because Beats does not obtain licenses to pre-1972 sound recordings, it does not
23 incur any of the costs that a licensee is otherwise obligated to pay in order to reproduce,
24 perform, distribute or otherwise exploit via the Beats Music Service pre-1972 recordings.

25 38. Beats has misappropriated, and continues to misappropriate, for its own
26 commercial benefit, the exclusive ownership interests in and to the pre-1972 sound
27
28

1 recordings, by reproducing, performing, distributing, or otherwise exploiting via the Beats
2 Music Service pre-1972 recordings.

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

6 40. As a direct and proximate consequence of Beats' violation of Cal. Civ. Code §
7 980(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 41. Beats acted with oppression, fraud, or malice or at least a conscious or reckless
10 disregard of the rights of Zenbu and the class members. Accordingly, Zenbu and each member
11 of the class is entitled to an award of punitive damages against Beats so as to discourage Beats
12 and others from engaging in the same behavior in the future.

13 **FOURTH CAUSE OF ACTION**

14 **CONVERSION**

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

17 43. 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 sound
19 recordings, including the artistic performances embodied in those recordings.

20 44. By reproducing, performing, distributing or otherwise exploiting via the Beats
21 Music Service pre-1972 sound recordings, Beats has converted for its own use the property
22 rights of Zenbu and each member of the class, in the pre-1972 recordings, and has
23 dispossessed Zenbu and each member of the class of their property rights.

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

1 46. As a direct and proximate consequence of Beats' violation of Cal. Civ. Code §
2 980(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 47. Beats acted with oppression, fraud, or malice or at least a conscious or reckless
5 disregard of the rights of Zenbu and the class members. Accordingly, Zenbu and each member
6 of the class is entitled to an award of punitive damages against Beats so as to discourage Beats
7 and others from engaging in the same behavior in the future.

8 **PRAYER FOR RELIEF**

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

- 12 a. An Order declaring this action to be a proper class action, appointing
13 Zenbu and its counsel to represent the class, and requiring Beats to bear
14 the cost of class notice;
- 15 b. An Order permanently enjoining Beats from, without license,
16 reproducing, performing, distributing, or otherwise exploiting via the
17 Beats Music Service pre-1972 sound recordings;
- 18 c. An Order permanently enjoining Beats, and its agents, servants, directors,
19 officers, principals, employees, representative, subsidiaries, parents,
20 affiliates, successors, assigns, and those acting in concert with them or at
21 their direction, from infringing, misappropriating, or converting, directly
22 or indirectly, Zenbu's and the class members' exclusive ownership
23 interests in and to the pre-1972 sound recordings, including the artistic
24 performances embodied in those recordings, including without limitation
25 by directly or indirectly reproducing, performing, distributing, or
26 otherwise exploiting via the Beats Music Service the pre-1972 recordings;
- 27
28

- 1 d. An Order requiring Beats to pay Zenbu and the class compensatory
- 2 damages on any cause of action where such damages are allowable;
- 3 e. An Order requiring Beats to pay Zenbu and the class restitution to restore
- 4 all funds acquired by means of any act or practice declared by the Court
- 5 to be unlawful or unfair;
- 6 f. An Order requiring Beats to disgorge or return all monies, revenues, and
- 7 profits obtained by means of any wrongful or unlawful act or practice;
- 8 g. An Order requiring Beats to pay punitive damages on any causes of action
- 9 so allowable based on Beats' knowing, willful, malicious, oppressive, or
- 10 reckless conduct;
- 11 h. An Order requiring Beats to pay pre- and post-judgment interest on any
- 12 monetary amounts awarded;
- 13 i. An Order requiring Beats to pay fees and costs, including reasonable
- 14 attorneys' fees, incurred in pursuing this action; and
- 15 j. An Order providing for all other such equitable relief as may be just and
- 16 proper.

17
18 ///
19 ///
20 ///
21 ///
22 ///
23 ///
24 ///
25 ///
26 ///
27 ///

JURY DEMAND

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

Dated: January 22, 2015

/s/ Jack Fitzgerald

By: Jack Fitzgerald

THE LAW OFFICE OF JACK FITZGERALD, PC

JACK FITZGERALD (SBN 257370)

jack@jackfitzgeraldlaw.com

TREVOR M. FLYNN (SBN 253362)

trevor@jackfitzgeraldlaw.com

TRAN NGUYEN (SBN 301593)

tran@jackfitzgeraldlaw.com

Hillcrest Professional Building

3636 Fourth Avenue, Suite 202

San Diego, California 92103

Phone: (619) 692-3840

Fax: (619) 362-9555

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