

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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DISTRIBUIDORA DE DISCOS KAREN C. POR A.,  
KAREN RECORDS INC., and KAREN PUBLISHING  
COMPANY,

Plaintiffs,

**MEMORANDUM AND ORDER**

- against -

13 Civ. 5200 (NRB)

JUAN LUIS GUERRA SEIJAS and ALEXANDER P.  
HARTNETT a/k/a ALEXANDER P. HARTNETT,  
JR.,

Defendants.

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**NAOMI REICE BUCHWALD**  
**UNITED STATES DISTRICT JUDGE**

On July 25, 2013, Distribuidora de Discos Karen C. por A. ("DDK") and its Florida affiliates and licensees Karen Records Inc. and Karen Publishing Company (collectively, "plaintiffs") filed this action against Juan Luis Guerra Seijas ("Guerra"), alleging copyright infringement and various state-law claims. In late 2013, Guerra moved to dismiss or stay the case under the Colorado River abstention doctrine<sup>1</sup> or, in the alternative, to transfer to the Southern District of Florida. While that motion was pending, we solicited supplemental submissions from the parties addressing whether the complaint against Guerra adequately alleged copyright infringement, the sole claim upon

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<sup>1</sup> Colo. River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976).

which our subject-matter jurisdiction rested.<sup>2</sup> On May 6, 2014, the day after filing their supplemental submission, plaintiffs sought leave to file a motion to amend the complaint to replace their copyright infringement claim with one for misrepresentation under the Digital Millennium Copyright Act.<sup>3</sup> See 17 U.S.C. § 512(f). We granted plaintiffs' motion, and plaintiffs amended their complaint to state a DMCA claim and to add Guerra's attorney, Alexander Hartnett, as a second defendant. See Am. Compl., ECF No. 22.

Defendant have now moved to dismiss the Amended Complaint for failure to state a claim under subsection 512(f). For the reasons set forth below, we deny defendant's motion.

## **BACKGROUND**

### **I. The Agreements Between the Parties**

Between 1985 and 1992, Guerra, an international recording artist based in the Dominican Republic, entered into a series of agreements with DDK, a Dominican record company, under which DDK agreed to pay Guerra for certain rights to songs he promised to record. Am. Compl. ¶¶ 14-27. In 2006, Guerra and DDK entered into another agreement (the "2006 Agreement"), which released Guerra from his recording obligations and

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<sup>2</sup> DDK is incorporated in the Dominican Republic, and Guerra is a citizen of the Dominican Republic. Thus, we have no diversity or alienage jurisdiction over this case.

<sup>3</sup> Digital Millennium Copyright Act (DMCA), 17 U.S.C. §§ 512, 1201-1332, 28 U.S.C. § 4001.

established the parties' ongoing rights relating to the songs that Guerra had already recorded.<sup>4</sup> Id. ¶¶ 28-33.

All parties agree that the copyrights in the sound recordings have always belonged to plaintiffs, and plaintiffs have included their copyright registrations in the Amended Complaint. Id. ¶¶ 34-36; id., Ex. E; Tr. 8.<sup>5</sup> However, Guerra contends the 2006 Agreement granted him "administration rights," including the right to license the use of the songs and to collect publishing/songwriting royalties from licensees, beginning in October 2009. Def. Br. on First Mot. to Dismiss 4, ECF No. 5; Tr. 4-9. Plaintiffs dispute this interpretation, contending that the 2006 Agreement granted defendant no such rights. Tr. 13.

## **II. The Florida Action**

On June 20, 2011, more than two years before plaintiffs filed this case, Guerra filed an action in Florida against this case's plaintiffs and their two principals, Bienvenido Rodriguez and Isabel Rodriguez. See Compl., Guerra Seijas v. Karen Records, Inc., Case No. 11-18912 CA 22 (Fla. Cir. Ct., 11th Cir.) (the "Florida Action"), filed herein at ECF No. 5-5. In that case, Guerra seeks an accounting of the royalty

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<sup>4</sup> Although the 1985-2006 agreements were entered into by DDK, the rights granted to it were also granted to Karen Records Inc. and Karen Publishing Company as DDK's licensees. See Am. Compl. ¶ 27.

<sup>5</sup> Citations to "Tr." refer to the transcript of oral argument on Guerra's first motion to dismiss, held on February 20, 2014.

revenues he is owed under the 2006 Agreement, damages for breach of contract, and a declaration of "the parties' respective rights under the [2006] Release Agreement, including the ownership of the copyrights and rights to royalties." Am. Compl., Florida Action, filed herein at ECF Nos. 5-1 to 5-3. DDK and its affiliates have counterclaimed for fraudulent inducement and unjust enrichment, and are seeking monetary damages and rescission of the 2006 Agreement. See Am. Answer, Affirmative Defenses and Counterclaim, Florida Action, filed herein at ECF No. 5-6. We are informed that the Circuit Court is currently considering dispositive motions.

In addition to the Florida Action, there are two other cases currently being litigated between the parties. One is before Judge Oetken in this District and the other is in the Dominican Republic. Both have been stayed pending the Florida Action. See Stip. & Joint Mot. to Hold Case in Abeyance, Distribuidora de Discos Karen C. por A. v. Universal Music Grp., Inc., 13-cv-7706 (JPO) (S.D.N.Y. Jan. 21, 2014), ECF No. 12; Hartnett Aff. ¶ 7, Def. Br. on First Mot. to Dismiss, Ex. B (ECF No. 5-4).

### **III. Apple and iTunes**

Because it is relevant to the question of whether a federal claim exists, we begin by describing in some detail the allegations of how Apple conducts its iTunes business.

The Amended Complaint explains that the iTunes division of Apple Computers, Inc. ("Apple"), sells digital copies of songs to the public through the Internet. Am. Compl. ¶ 78. In order to sell music on iTunes, Apple licenses music from record labels and other entities. See id.

The Amended Complaint incorporates Apple's contract with "Karen Records & Publishing Co."<sup>6</sup> (the "Apple Contract") to sell music and music videos through iTunes. See Apple Contract, Am. Compl., Ex. F. This contract gives Apple non-exclusive rights for approximately three years (see Apple Contract § 1(k)) to:

- 1) reproduce and format plaintiffs' music and videos into versions compatible with Apple's digital rights managemant systems;
- 2) stream clips of plaintiffs' music and videos in order to promote the sales of full songs;
- 3) market, sell, and electronically distribute songs to iTunes customers;
- 4) reproduce and deliver associated artwork, such as album cover art; and
- 5) use plaintiffs' copyrighted material "as may be reasonably necessary or desirable for [Apple] to

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<sup>6</sup> We assume at this stage that this refers to one of the plaintiffs. For simplicity, we refer to Apple's counterparty as "plaintiffs."

exercise [Apple's] rights under the terms of this Agreement."

§ 2(a).

After the Apple Contract's effective date, plaintiffs were required to deliver "all existing COMPANY Content" as soon as reasonably possible.<sup>7</sup> § 3(a). Thereafter, plaintiffs were required to deliver all "just[-]cleared COMPANY Content and new releases . . . at least in time for [Apple] to begin selling [formatted copies] the earlier of a general release date . . . or when any other distributor is permitted to begin selling, or making commercially available, COMPANY Content in any format."

§ 3(a). The Apple Contract granted Apple the right to choose whether to sell music as individual songs or as full albums.

§ 3(b). Apple reserved sole discretion to set retail prices, but promised five days' notice before increasing such prices.

§ 5. Plaintiffs, meanwhile, were responsible for paying royalties (§ 4), selecting parental advisory warnings (§ 7), and providing any copyright notices (§ 10).

Apple promised to remove plaintiffs' music from iTunes on three days' notice if plaintiffs (1) lost the rights to the music or (2) believed that Apple's continued sale would harm

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<sup>7</sup> "COMPANY Content" was defined as "sound recordings owned or controlled by [plaintiffs] and in which [plaintiffs] ha[ve] cleared . . . the necessary rights to authorize electronic sales and sound recording performances by [Apple] pursuant to the terms of this Agreement." § 1(n).

plaintiffs' relationships with copyright owners. § 6(c). Separately, Apple reserved the right to unilaterally remove any content "in the event a third party claims that [Apple] is not authorized to sell or otherwise use such . . . Content or Artwork on the Online Store, in which case [plaintiffs] shall cooperate with [Apple's] reasonable requests towards handling such third party claim." § 6(d).

Apple permits third parties to submit such claims (or "take-down notices") through an online form. See Pl. Bf., Att. 2, ECF No. 26-2. Apple's form explains that most iTunes content is provided by third-party providers, and that Apple will work with the content provider to resolve a dispute. Id. at 1. The form requires a rights-holder's agent to submit his name, phone number, and email address, id. at 2, to list the disputed content, id. at 3-4, and to subscribe to the following statement:

I represent that the information in this submission is accurate and swear under penalty of perjury that I am the owner or agent authorized to act on behalf of the owner of the content being disputed. I have good faith belief that the disputed use is not authorized by the intellectual property owner, its agent, or the law.

Id. at 5.

In March 2013, Hartnett either sent Apple a letter (see Am. Compl. ¶ 37) or submitted a notice using Apple's online

form (see Pl. Bf. 4, ECF No. 26). This communication related to songs that Guerra had recorded under the 1985-1992 agreements, which were then being sold on iTunes pursuant to the Apple Contract. Am. Compl. ¶ 37. Hartnett's communication stated: "I represent Juan Luis Guerra who is the publisher of the musical compositions on this release. No license has been issued."<sup>8</sup> Id. ¶ 38. Apple responded by removing the songs from iTunes.<sup>9</sup> Id. ¶ 41.

#### **IV. The Present Action**

On July 25, 2013, plaintiffs filed their initial complaint alleging that Hartnett's letter constituted tortious interference with economic advantage, tortious interference with contract, slander of title, defamation, and copyright infringement. On June 11, 2014, plaintiffs filed their amended complaint, replacing the federal infringement claim with a claim for misrepresentation under the DMCA.

### **DISCUSSION**

#### **I. Pleading Standard**

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all factual allegations in the complaint and draw all reasonable inferences

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<sup>8</sup> In an affidavit, Hartnett states, without explanation, that he "drafted the letter in furtherance of our Florida litigation." Hartnett Aff. ¶ 5.

<sup>9</sup> On April 8, 2014, the parties stipulated to offer the songs for sale on iTunes, with the proceeds held in escrow. ECF No. 11.



in the plaintiff's favor. ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007); Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir. 1998). Nonetheless, "[f]actual allegations must be enough to raise a right of relief above the speculative level, on the assumption that all of the allegations in the complaint are true." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citation omitted). Ultimately, plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Id. at 570. If plaintiff "ha[s] not nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed." Id. This pleading standard applies in "all civil actions." Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (internal quotation marks omitted).

When determining the plausibility of a complaint, the Court may also consider documents attached to the complaint as exhibits and documents incorporated by reference in the complaint. Halebian v. Berv, 644 F.3d 122, 131 n.7 (2d Cir. 2011); Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 234 (2d Cir. 2008).

## **II. The Statute**

Congress enacted the DMCA in order to modernize the application of copyright law to the Internet and modern technology. Recognizing that technology service providers are

often not responsible for data that pass through their systems, Congress created a set of safe harbors to protect service providers from copyright liability. See 17 U.S.C. § 512. Subsections (c) and (f) are most relevant to the pending motion.

Subsection (c) provides a safe harbor to certain online "service providers"<sup>10</sup> whose users store infringing material. The most typical examples arise when a company "provid[es] server space for a user's web site, for a chatroom, or other forum in which material may be posted at the direction of users." H.R. Rep. 105-551(II), at 53 (1998).

To qualify for the safe harbor, the service provider must be unaware of infringement and (in cases where the service provider has the right and ability to control user storage) must not profit directly from the infringing material. § 512(c)(1). The service provider must also designate an agent to receive "take-down" notices, so that copyright holders can notify the service provider of infringing material. § 512(c)(2). If a service provider receives such a notice, then the service provider must expeditiously remove the infringing material. § 512(c)(1)(C).

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<sup>10</sup> For purposes of subsection (c), a "service provider" is "a provider of online services, or network access, or the operator of facilities therefor . . . ." § 512(k)(1)(B). We have no doubt that iTunes is an "online service[]" and Apple a "service provider." See, e.g., Wolk v. Kodak Imaging Network, Inc., 840 F. Supp. 2d 724, 744 (S.D.N.Y. 2012).

A take-down notice must contain certain elements before a service provider is required to remove infringing material. These include a signature of the copyright holder, a statement that the complaining party believes that use of the material is unauthorized, and a statement under penalty of perjury that the complaining party is authorized to act on behalf of the rights-holder. § 512(c)(3)(A)(i), (v), (vi).

A take-down notice may lack these elements and still trigger at least some response on the part of its recipient. If the notice (1) “[i]dentifi[es] . . . the copyrighted work” or a “representative list of [copyrighted] works,” (2) “[i]dentifi[es] . . . the material that is claimed to be infringing,” and (3) provides adequate contact information, then the service provider must “promptly attempt[] to contact the person making the notification” to cure whichever other elements may be missing. § 512(c)(3)(A)(ii)-(iv), (B)(ii).

At the same time that Congress created this and other safe harbors for technology companies, Congress created a private cause of action, with costs and attorneys’ fees, in favor of a true copyright owner who is injured by “[a]ny person who knowingly materially misrepresents under this section” “that material or activity is infringing” “as the result of [a] service provider relying upon such misrepresentation in removing or disabling access to the material.” § 512(f)(1).

**III. The Present Motion**

Defendants make two distinct arguments:

1) The DMCA makes a misrepresentation actionable only when a person makes the misrepresentation "under this section." § 512(f). This means that the notice containing the misrepresentation must have complied substantially with the elements listed in subparagraph 512(c)(3)(A), or else no federal action is available. Here, defendants' notice to Apple failed to comply substantially those elements, so plaintiffs' DMCA claim fails.

2) The DMCA makes a misrepresentation actionable only when a person makes the misrepresentation "under this section." § 512(f). This means that the notice containing the misrepresentation must have been directed towards infringement "by reason of the storage at the direction of a user," § 512(c)(1), or else no federal action is available. Here, no music was stored on iTunes at the direction of a user (in particular, not at plaintiffs' direction), so plaintiffs' DMCA claim fails.

We turn initially to defendants' first theory, and hold that a plaintiff may state a claim under subsection 512(f) even if the notice containing the alleged misrepresentation is, to some extent, technically deficient under subsection 512(c). We

conclude that Hartnett's communication was not so deficient as to fall outside the reach of subsection 512(f).

We then turn to defendants' second theory, and hold that a plaintiff may not state a claim under subsection 512(f) if the notice containing the alleged misrepresentation is not directed at "storage at the direction of a user." We cannot, however, decide at this stage whether iTunes actually stores music "at the direction of a user," and therefore cannot grant the motion to dismiss.

**A. A Misrepresentation Claim Under the DMCA May Be Predicated on a Technically Defective Take-Down Notice.**

A false take-down notice can be actionable under subsection 512(f) even if the notice is technically deficient. The more technical requirements of paragraph 512(c)(3) are intended to protect the service provider, not to protect individuals who intentionally make false demands. See Brave New Films 501(c)(4) v. Weiner, 62 F. Supp. 2d 1013, 1018 (N.D. Cal. 2009). If we held otherwise, then a person could submit a slightly deficient take-down notice with impunity.<sup>11</sup> At best, from the perspective of person submitting the false notice, the service provider would choose to overlook the technical defect and comply with the false take-down notice.

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<sup>11</sup> For example, the complaining party could omit the phrase "under penalty of perjury" from his statement that he is authorized to act on behalf of the copyright owner. See § 512(c)(3)(A)(vi).

At worst, the service provider would simply ignore the notice or request that the submitter cure the technical defect. Either way, under defendant's reading of the statute, the lying notifier would be immune from the liability (including attorneys' fees) that Congress wished to impose upon him. The words "under this section" cannot render subsection 512(f) so toothless.

At some point, a take-down notice may be so deficient that it is utterly unrecognizable as a take-down notice and therefore does not constitute a representation "under this section." This occurs when a purported take-down notice fails to substantially comply with elements 512(c)(3)(A)(ii) through (iv), because a notification that fails to satisfy these three elements carries no legal effect.<sup>12</sup> This conclusion is consistent with Twelve Inches Around Corp. v. Cisco Systems, Inc., where the court declined to apply subsection 512(f) to a take-down notice alleging trademark infringement on the grounds that element (iii) requires a DMCA take-down notice to identify a copyrighted work. No. 08-cv-6896 (WHP), 2009 WL 928077 at \*3-4 (S.D.N.Y. Mar. 12, 2009).

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<sup>12</sup> As described above, these elements require that a take-down notice identify certain basic information: the copyrighted work, the infringing material, and the complaining party's contact information. § 512(c)(3)(A)(ii)-(iv). If a take-down notice substantially complies with these three elements, then the service provider must take some action so that the complaining party may cure any other, more technical, defects. See § 512(c)(3)(B)(ii).

Here, plaintiffs have adequately pleaded that Hartnett's communication substantially complied with elements (ii) through (iv). Regardless of whether Hartnett used Apple's online form or sent a letter (presumably on his own letterhead),<sup>13</sup> it is plausible that Hartnett provided Apple with his contact information (element (iv)). Furthermore, it is evident that Apple received sufficient information to remove the disputed songs from iTunes, making it plausible that Hartnett identified the disputed material and its location on iTunes (elements (ii) and (iii)).

**B. A Misrepresentation Claim Under the DMCA Must Be Predicated on a Take-Down Notice That Is Not Directed Towards Activity that the DMCA Protects.**

A false take-down notice can be actionable under subsection 512(f) only when the notice is directed at activity protected by federal law. As to this point, we are in complete agreement with Rock River, 2011 WL 1598916 at \*16, 2011 U.S. Dist. LEXIS 46023 at \*41, which held that a take-down notice was "not a notification pursuant to the DMCA" when the notice did not complain of infringement "by reason of the storage at the direction of a user." There is simply no reason for the DMCA to concern itself with a person who does not abuse the federal rights and remedies of section 512. Thus, we must

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<sup>13</sup> Plaintiffs should clarify, at some point before the next motions, whether Hartnett allegedly sent a letter or submitted an online form.

examine whether iTunes falls within the scope of subsection 512(c)'s safe harbor.

C. We Cannot Decide at the Present Stage Whether Apple Stores Music on iTunes "at the Direction of a User."

The key question before us is whether Apple stores music on iTunes "at the direction of a user," 17 U.S.C. § 512(c)(1). If so, then Hartnett's communication was actionable under the DMCA; if not, then plaintiffs must proceed on their state-law causes of action.

Defendants argue that subsection 512(c) applies only to service providers who allow users to upload their own content independent of the service provider's intervention. Key examples are YouTube, Facebook, and Twitter, each of which freely allows individuals to register and post content. Unlike these "social media" companies, Apple does not allow ordinary users to sell their own content on iTunes at will. To support this argument, defendants cite several provisions in the Apple Contract, including those that recite that iTunes is "owned and/or controlled by iTunes," § 1.1(m), that Apple may use the licensed music "as reasonably necessary or desirable," § 2(a)(v), that Apple may sell the content in the format it believes to be most favorable for sales, § 3(b), and that Apple has wide discretion as to how to promote music on iTunes, § 9(b). Defendants also rely on Rock River, where the District



Court held at summary judgment that iTunes was outside the scope of subsection 512(c).

Plaintiffs argue that Apple does not choose what content is available for sale on iTunes, emphasizing that music can appear on iTunes only because users (such as plaintiffs) have authorized Apple to sell songs on iTunes. See Apple Contract § 3(b). Plaintiffs also cite the stipulation between Guerra and Karen as evidence that users have control over whether Apple sells music on iTunes, and plaintiffs suggest that Apple's editorial control is limited in practice because of the large number of songs available on iTunes. Plaintiffs distinguish Rock River on the grounds that the facts regarding Apple's administration of iTunes were undisputed in that case.

First, we believe that the Apple Contract does not settle the question of whether Guerra's music was stored on iTunes at Apple's or plaintiffs' direction. It is not clear who (if anyone) exercised discretion in selecting music for sale on iTunes once the Apple Contract was signed. On the one hand, the Apple Contract requires plaintiffs to deliver their entire catalog (with limited exceptions) for sale on iTunes. § 3(a). On the other hand, the contract may be fairly interpreted to require Apple to sell all of plaintiffs' music (perhaps within commercially reasonable limits) outside of the limited circumstances in which the contract explicitly permits Apple to

remove plaintiffs' music from iTunes. § 6(c), (d). The contract thus constrained both Apple's and plaintiffs' discretion as to whether to post songs to iTunes.

To the extent that the Apple Contract is relevant at all to our analysis, it cuts somewhat in plaintiffs' favor. Although the contract required plaintiffs to deliver to Apple every song that plaintiffs had the rights to deliver, the contract also assigned plaintiffs the duty to determine whether they possessed the appropriate distribution rights. See Apple Contract §§ 15(b), 17(b). This suggests that, to the extent that any selection occurred, it was plaintiffs who selected songs for sale on the basis of their own distribution rights.

Second, it may be the case that a service stores material "at the direction of a user" even when the service provider reserves broad legal rights to control how that material is presented and whether that material appears at all. For example, defendants Google's YouTube video service is a service within the scope of subsection 512(c). See Def. Reply Bf. 6, ECF No. 27 (citing YouTube as an example of a service that qualifies for § 512(c)); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 38-40 (2d Cir. 2012). But even Google retains absolute discretion to remove content from YouTube. See Terms of Service ¶¶ 6(F), 7(B), <https://www.youtube.com/static?>

template=terms (dated June 9, 2010; last visited Mar. 11, 2015).

The proper question is not whether Apple has the legal right to control how music appears on iTunes (as it surely does), but rather the degree to which, as a practical matter, Apple actually exercises its rights by organizing plaintiffs' music on iTunes manually or deciding how to promote plaintiffs' music.

The presence of some automated processing in between when plaintiffs upload music and when the music appears on iTunes for sale is not enough to take iTunes outside the scope of subsection 512(c). For example, in Io Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132, 1146 (N.D. Cal. 2008), the court considered uploads to the defendant's online video site to be "at the direction of a user" even though the defendant's software automatically processed the user's file to some degree. Likewise, YouTube is protected by subsection 512(c) even though Google itself adapts user-submitted videos into "thumbnail" clips that Google then displays next to other videos that Google's computed algorithm deems to be related." See Viacom, 676 F.3d at 39-40. As the Second Circuit explained, processed user-submitted media are considered to be stored at the direction of users so long as the processing "is closely related to, and follows from the storage itself," and

is 'narrowly directed toward providing access to material stored at the direction of users.'" Id. at 40 (quoting UMG Recordings, Inc. v. Veoh Networks, Inc., 620 F. Supp. 2d 1081, 1092 (C.D. Cal. 2008)). Indeed, this conclusion holds even when the service provider assigns a human being to perform light-weight screening or processing of user-submitted files. See Costar Grp. Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 702 (D. Md. 2001) (photographs were stored at direction of users even though service provider's employees screened photos to assess whether photos portrayed real estate).

Under this test, it is possible that the music on iTunes could be stored at the direction of users or at the direction of Apple.

On the one hand, it is possible that, despite having a legal right to control iTunes, Apple typically allows music distributors (including plaintiffs) to post music to iTunes without any intervention by Apple, except perhaps a fully or mostly automated process to format, encrypt, and catalog files for sale.

However, it is also possible that Apple routinely takes some initiative in deciding which songs appear on iTunes and how those songs appear. Apple advertises some songs prominently, offers customers free samples whose lengths differ for different songs, prices different songs in different ways,

and prevents customers from buying some songs [à la carte]. Even these functions would not negate the "storage at the direct of users" element if Apple performs these functions in a systematic, automated way for the purpose of "help[ing] customers locate and gain access to material stored at the direction of other users." Viacom, 676 F.3d at 40. But if Apple routinely performs material, discretionary, manual functions on incoming songs, then iTunes may well fall outside the ambit of subsection 512(c).<sup>14</sup>

In sum, the complaint simply does not state enough facts about iTunes for us to say what happens behind the scenes, so we cannot decide at the present stage whether iTunes stores music at the direction of users.


**CONCLUSION**

For the foregoing reasons, we deny defendants' motion. As we discussed in a telephone conference with the parties on February 23, 2015, the parties should proceed to discovery on the limited question of whether a distinctly federal claim is viable under subsection 512(f).

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<sup>14</sup> We wish to express no disagreement at this stage with Rock River's conclusion that Apple directs files to iTunes. However, at this pleading stage, we lack the full discovery record that was available to the District Judge in that case at summary judgment. If the record here bears out the same facts, we may well come to the same conclusion.

Dated: New York, New York  
March 26, 2015

  
NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Memorandum and Order have been mailed on this date to the following:

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