

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

2009 FEB 13 AM 11:45

GREGORY C. LANGHAM
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

CASE NO.

INFOMEDIA, INC., **'09 - CV - 00302** **ZLW-MEH** _____ DEP. CLK

Plaintiff,

v.

AIR-O-MATIC INC.,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff, InfoMedia, Inc., by and through undersigned counsel, for its Complaint for Declaratory Judgment against Air-O-Matic Inc., states as follows:

1. This is an action for declaratory judgment under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.
2. This Court has subject matter jurisdiction over Plaintiff's federal claims pursuant to 15 U.S.C. §§ 1121, and 28 U.S.C. §§ 1331 and 1338 in that this Complaint raises federal questions arising under the Lanham Act, 15 U.S.C. § 1125, arising out of interstate commerce.
3. Venue is proper in this judicial district under 28 U.S.C. § 1391 in that defendant, upon information and belief, has sold products or services which are the subject of this action in this district.
4. Defendant is subject to personal jurisdiction in Colorado pursuant to Colorado's long arm statute C.R.S. § 13-1-124.

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THE PARTIES

5. INFOMEDIA, INC. (“INFOMEDIA”) is a Colorado corporation with its principal place of business at 1401 South Taft Avenue, Suite 210, Loveland, CO 80537.

6. AIR-O-MATIC INC. (“AOM”), is a Florida corporation with its principal place of business at 7785 Baymeadows Way, Ste. 101, Jacksonville, FL 32256.

THE FACTS

7. In 2008, Apple, Inc. (“Apple”) introduced the “iPhone.” The iPhone is a revolutionary mobile phone that combines three products in one: a mobile phone, a music system, and portable Internet browser, all with a touch-screen user-friendly interface.

8. One feature that sets the iPhone apart from its competition is the large selection of software applications or “apps” available for the iPhone. Apps are programs that iPhone users can download from Apple’s App Store on the Internet for use on their iPhone. Apps “combine the power of the Internet with the simplicity of Multi-Touch technology, all on a 3.5-inch screen.”

9. Apps range in cost from free to \$0.99 and up. Apps vary in use and purpose from allowing a user to check movie times, train schedules, or read restaurant reviews, to play board games, crossword puzzles or figure out appropriate restaurant tips. Apps are created by independent developers who follow specific guidelines and submit their completed apps to Apple for Apple’s approval and sale to the general public.

10. INFOMEDIA is the developer of an iPhone app entitled “iFart Mobile” (“iFart”). iFart app purchasers who download the iFart app from the Apple iPhone App Store can use iFart to simulate flatulence noises on their iPhones.

11. The iFart novelty application boasts a number of unique features including a built-in security system designed to aurally surprise and discourage iPhone theft. iFart also features a "Sneak Attack" function using a timer that emits the sound of flatulence when it goes off. iFart Mobile simulates 20 different sounds of passing gas, from short toots (the "Butt Socket"), to longer drawn out farts (the "Wipe Out"), to every conceivable way of breaking wind in-between.

12. Defendant AOM is the developer of an iPhone app that competes with iFart Mobile. AOM's app is descriptively titled "Pull My Finger." AOM's app also simulates flatulence noises on iPhones. However, the apps function differently, have different interfaces, different "look and feel," and otherwise share little in common beyond their creators' desires to have a little fun with a laughter inducing bodily function.

13. The phrase "pull my finger," and derivations thereof, are generally known and widely understood in American society to be a joke or prank regarding flatulence. The prank begins when the prankster senses the deep stirrings of flatulence. The prankster then requests that an unsuspecting person "pull [his or her] finger." The prankster extends his index finger to the victim. As the victim pulls the prankster's finger his flatulence erupts so as to suggest a causal relationship between the pulling of the finger and the subsequent expulsion of gas.¹ In other words, the phrase "pull my finger" is understood to be a description of the act of passing gas.

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¹ "Pull my finger," *Wikipedia*, http://en.wikipedia.org/wiki/Pull_my_finger, last visited Feb. 10, 2009.

14. iFart and Pull My Finger are not alone. As of the date of filing this Complaint, the Apple iPhone App Store offered no fewer than 75 different flatulence simulation software applications from no fewer than 50 different developers.

15. In or about December 2008, Apple approved the iFart app for distribution through the App Store at a price of \$0.99 per download. In connection with this new app, INFOMEDIA issued a press release. The press release was distributed via PRWeb, an internet press release distribution service. The press release was entitled "iPhones Everywhere Are Now Free to Flatulate." ("INFOMEDIA press release"). A copy of the INFOMEDIA press release is annexed hereto as Exhibit "A."

16. The INFOMEDIA press release reported that "Placed on review for several months along with other innovative applications, Apple had remained silent as they sought to determine which kinds of applications would be "appropriate" for their audience. Despite its natural occurrence as a bodily function, Apple had made it clear that they didn't want apps asking people to pull my finger."

17. In response to the INFOMEDIA press release, and despite the common and widespread understanding of the phrase "pull my finger," AOM threatened INFOMEDIA with suit for trademark infringement as a result of its use of the phrase "pull my finger" in the INFOMEDIA press release.

18. As a gesture of good will, INFOMEDIA revised the press release in question.

19. On or about January 6, 2009, subsequent to the INFOMEDIA press release, AOM contacted Apple complaining about INFOMEDIA's "violating our client's trademark rights in the PULL MY FINGER mark, by using it prominently and repeatedly in the marketing of its

competing iFart app...” See correspondence dated Jan. 6, 2009, from Karen Koster Burr, attached hereto as Exhibit “B.”

20. AOM accused INFOMEDIA of “using laudatory quotes pulled from his own content on his own websites; planting negative reviews of the apps of his competitors and positive reviews of his own application, and disparaging his competition with false testimonials.”

21. Thereafter, on or about January 13, 2009, AOM demanded Apple remove the iFart Mobile app from the Apple App Store and cancel its developer contract with INFOMEDIA due to “improper abuse of the Apple Store and our trademark rights.” See correspondence dated Jan. 13, 2009, from Karen Koster Burr, attached hereto as Exhibit “C.”

22. In its January 13, 2009 complaint to Apple, AOM also accused INFOMEDIA of improperly promoting the INFOMEDIA product by “On iTunes, Mr. Comm [INFOMEDIA’S CEO] has posted the purported testimonials extolling the superiority of his app over our client’s—with quotes from his own website. He appears to have posted negative reviews of our app and those competing apps of others and glowing ones on his own.”

23. Apple refused to take action regarding the AOM complaint and response by INFOMEDIA, encouraging the parties to resolve the dispute among themselves. See correspondence dated January 26, 2009 from Jennifer Adams Draffen attached hereto as Exhibit “D.”

24. After Apple refused to take action regarding the iFart app, AOM, through its counsel, threatened INFOMEDIA directly with suit for infringement and unfair competition demanding immediate payment of tens of thousands of dollars to settle AOM’s claims. See correspondence dated Feb. 4, 2009, from Karen Koster Burr, attached hereto as Exhibit “E.”

25. In the correspondence dated February 4, 2009 from Karen Koster Burr, AOM restates the accusations listed above with the addition of two new accusations, first that INFOMEDIA infringed AOMs rights in naming a promotional video on YouTube.com “iFart Mobile – Pull My Finger” and second, that INFOMEDIA “spammed our customers chatting about our app on “Twitter.””

26. A real and actual case or controversy exists regarding Plaintiff’s use of the descriptive phrase “pull my finger” in connection with the marketing and promotion of its iFart product.

27. INFOMEDIA has retained undersigned counsel to bring this action and agreed to pay them a reasonable fee.

CLAIM FOR RELIEF - DECLARATORY JUDGMENT

28. The Plaintiff hereby incorporates Paragraphs 1 through 27 as if fully set forth herein.

29. This is an action for declaratory judgment under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

30. An actual case and controversy exists between the parties that may be adjudicated by this Court consistent with U.S. CONST. art. III, § 2, cl.1.

31. AOM has taken affirmative action against INFOMEDIA regarding its use of the common, descriptive phrase “pull my finger” in the INFOMEDIA press release, YouTube video, and product reviews that AOM wrongly claims infringe upon AOM’s rights.

32. INFOMEDIA has a reasonable apprehension of being a defendant in an infringement suit brought by AOM as a result of AOM's threats against INFOMEDIA that INFOMEDIA has committed infringement.

33. INFOMEDIA is entitled to bring this action to determine non-infringement because INFOMEDIA has a real and reasonable apprehension that if it continues to use the common, descriptive phrase "pull my finger" to refer to flatulence in connection with the marketing and promotion of its iFart app it will be subject to liability.

34. AOM has alleged that INFOMEDIA's use of the common, descriptive phrase "pull my finger" constitutes trademark infringement and unfair competition.

35. INFOMEDIA's use of the common, descriptive phrase "pull my finger" in the INFOMEDIA press release and the YouTube video was not as a brand name or source identifier for its product, but in the phrase's common English language slang sense to describe the act of flatulence.

36. INFOMEDIA's use of the phrase "pull my finger" in marketing materials for flatulence software is a fair use.

37. The statements by INFOMEDIA referenced in paragraphs 20 and 21 above are statements of opinion, not statements of fact, and are not actionable.

38. Any discussion of the AOM product via Twitter.com as alleged by AOM is not actionable.

39. INFOMEDIA seeks a declaration that its use of the common, descriptive phrase "pull my finger," and the other statements set forth herein, did not and will not infringe upon any valid rights of AOM, for the reasons that, *inter alia*, INFOMEDIA's use of the phrase "pull my

finger” was simply that of a descriptive phrase, is not protectable under federal trademark law as it is merely descriptive of the act of flatulence, was fair use, and even if the phrase “pull my finger” is protectable, that there is no likelihood of confusion between AOM’s use of the name “Pull My Finger” to describe its iPhone app and INFOMEDIA’s use of the common phrase “pull my finger” to describe the act of flatulence.

DEMAND FOR RELIEF

WHEREFORE, INFOMEDIA demands judgment as follows:

- A. A declaratory judgment that INFOMEDIA’s use of the phrase “pull my finger,” and derivations thereof, is lawful and does not infringe on any rights of AOM;
- B. Attorneys fees, costs and interest according to applicable law.
- C. Such other relief as this Court deems just and proper.

Dated: February 13, 2009.

Respectfully submitted,

s/Kevin E. Houchin

Kevin E. Houchin
HOUCHIN & ASSOCIATES, P.C.
425 West Mulberry • Suite 105
Fort Collins, Colorado 80521
Office: 970.493.1070
Fax: 970.484.0012
kevin.houchin@houchinlaw.com
Colorado Bar No. 35817
Attorneys for Plaintiff
InfoMedia, Inc.

-and-

s/Joel B. Rothman
Joel B. Rothman
Florida Bar No. 98220
jrothman@seidenlaw.com

s/Misha J. Kerr
Misha J. Kerr
Florida Bar No. 39652
mkerr@seidenlaw.com

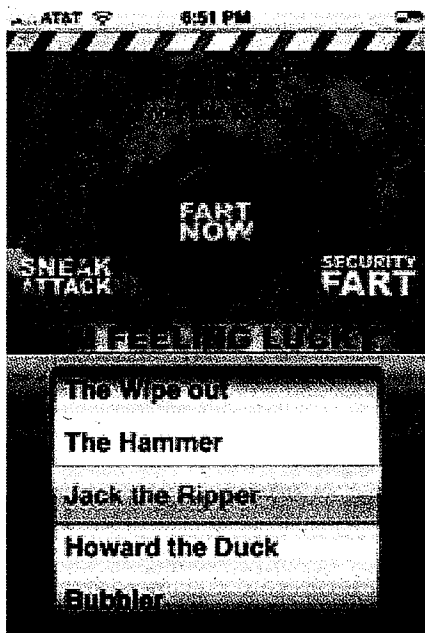
SEIDEN, ALDER, MATTHEWMAN & BLOCH, P.A.
7795 NW Beacon Square Blvd., Ste 201
Boca Raton, FL 33487
Telephone: (561) 416-0170
Facsimile: (561) 416-0171

Co-counsel for Plaintiff
InfoMedia, Inc.

Pending Application for CO Admission

HEAD: iPhones Everywhere are Now Free to Flatulate

INTRO: The Apple iTunes App Store has lifted the ban on some controversial applications and approved a much-demanded app which has people pulling each other's virtual fingers. iFart Mobile is now available for download in the app store for just .99.



GRAPHIC CAPTION: iFart Mobile - The Premier iPhone Fart Application

PULL QOUTE: "This app is a work of art, it's pure genius! the UI is great and easy to use. The brown color scheme is just lovely. Definitely the best \$.99 I've spent in the app store."

BODY: Loveland, CO (PRWEB) December 15, 2008 -- In a move that will undoubtedly lead to a rash of global gaseous expulsions, Apple computer has officially approved the iFart application for distribution through the iTunes App Store.

Placed on review for several months along with other innovative applications, Apple had remained silent as they sought to determine which kinds of

applications would be "appropriate" for their audience. Despite it's natural occurrence as a bodily function, Apple had made it clear that they didn't want apps asking people to pull my finger."

Apple's rejection and/or holding pattern of selected applications has made news throughout the web with articles written on The LA Times, Wired Magazine, The Guardian, TechCrunch, Venture Beat and other web sites. Many criticized Apple for their approval and selection process indicating that their censorship of applications was arbitrary.

This surprising move has led to a much-demanded novelty application now released to the entire iPhone and iPod Touch audience via the App Store.

iFart Mobile is a Digital Sound Machine and entertainment system which brings endless laughs and enjoyment to its users. Combined with more usefulness and functionality than some other popular applications, iFart has a built-in security system designed to surprise and discourage iPhone theft, as well as a "Sneak Attack" function that both Republicans and Democrats alike can agree on.

Reviews of iFart in the iTunes app store indicate that this release has brought a great deal of relief, both within the iPhone community and in user's gastrointestinal tract.

"This app is a work of art, it's pure genius! the UI is great and easy to use. The brown color scheme is just lovely. Definitely the best \$.99 I've spent in the app store."

"This is a hilarious application that has already entertained me for hours pulling pranks on people. Highly recommended!"

Experts agree that laughter can indeed make life more enjoyable. Combined with the ability to release a blast of flatulent goodness at the push of a button, iFart may have the ability to unite people of the world like never before.

iFart Mobile is available for download in the iTunes App Store for \$.99. More information and some very humorous copy can be found at the official website, <http://www.iFartMobile.com>. Email requests may be sent to ifart@got-zip.com.

###

From: Karen Koster Burr <
<mailto:kkosterburr344@gmail.com>
kkosterburr344@gmail.com
<mailto:kkosterburr344@gmail.com> >
Date: January 6, 2009 9:53:15 AM PST
To: <mailto:copyrightagent@apple.com>
copyrightagent@apple.com
<mailto:copyrightagent@apple.com> ,
<mailto:iplaw@apple.com> iplaw@apple.com
<mailto:iplaw@apple.com> ,
<mailto:appletm@apple.com>
appletm@apple.com
<mailto:appletm@apple.com>
Cc: Karen Koster Burr <
<mailto:kburr@addmg.com>
kburr@addmg.com
<mailto:kburr@addmg.com> >
**Subject: iPhone Application Developer
Infringement**

Dear Apple Legal Representatives,

Our firm represents Air-O-Matic, Inc., developer of mobile phone applications, including some for the iPhone. Air-O-Matic originated PULL MY FINGER, recently one of the leading iPhone app downloads.

Please direct us to the best process and recipient for a complaint against one of the participants in the iPhone app development program that is violating our client's trademark rights in the PULL MY FINGER mark, by using it prominently and repeatedly in the marketing of its competing iFART app, and engaging in unfair trade practices. In addition to abusing our mark, PULL MY FINGER, USPTO SN 77 635 715, the developer of this application being marketed on iTunes by Apple is using laudatory quotes pulled from his own content on his own websites; planting negative reviews of the apps of his competitors and positive reviews of his own application, and disparaging his competition with false testimonials. That the infringement by the developer posted on the Apple

site (and that Apple is profiting from as long as the material remains) is "knowing" and deliberate is confirmed by the developer's similar deceptive efforts on other sites, such as the PR Newswire article, where he posted an article masquerading as an objective review of his iFart application, and misused our mark in it to link to his own app. Although we obtained removal of the infringement there, the developer continues to misuse our mark on Apple and other sites controlled by him.

We would like to have his application removed from iTunes for violation of Apples various Agreements governing use of its site, marketing by Apple and the Development program.

Thank you in advance for your immediate assistance.

Karen Koster Burr, Esq.
Intellectual Property Attorney
Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A.
1301 Riverplace Blvd.
Suite 1916
Jacksonville, FL 32207
904 398 7000
www.addmg.com <<http://www.addmg.com/>>

Subject: Fwd: Apple Inc. (our ref: APP3647)
Date: Saturday, January 24, 2009 8:22 AM
From: Ken Burge <ken@infomediainc.com>
To: Joel Comm <joel@infomediainc.com>, Kevin Houchin <kevin.houchin@houchinlaw.com>
Conversation: Apple Inc. (our ref: APP3647)

See below.

Sent from my amazing iPhone

Try This:
----- ivotemobile.com -----

Begin forwarded message:

From: Joel Ownby <jownby@infomediainc.com>
Date: January 24, 2009 8:16:17 AM MST
To: Ken Burge <ken@infomediainc.com>
Subject: Fwd: Apple Inc. (our ref: APP3647)

Sent from my iPhone

Begin forwarded message:

From: Jennifer Adams Draffen <adamsdraffen@apple.com
<mailto:adamsdraffen@apple.com> >
Date: January 23, 2009 5:54:38 PM MST
To: Joel Ownby <jownby@infomediainc.com
<mailto:jownby@infomediainc.com> >
Cc: AppStoreNotices Notices <AppStoreNotices@apple.com
<mailto:AppStoreNotices@apple.com> >
Subject: Apple Inc. (our ref: APP3647)

Dear Sir or Madam,

We received a written notice from counsel for Air-O-Matic ("AOM") that AOM believes your application named iFart Mobile - #1 Fart Machine for All Ages infringes AOM's rights. A copy of

the notice is attached.

Accordingly, please take steps to review your application to ensure that it does not violate the rights of another party. If this includes removing your application from the App Store while you make changes, use the following steps:

Visit iTunes Connect at <<http://itunesconnect.apple.com/>>
<http://itunesconnect.apple.com> <<http://itunesconnect.apple.com>>

- 1) Select the "Manage Your Apps" area
- 2) Find the desired application in the list
- 3) Select "Remove From Sale"
- 4) Your application will no longer be available for sale on the App Store

Please remember that pursuant to your agreement with Apple, you are responsible for any liability to Apple because of a claim that your application infringes another party's rights, and also that we may remove your application if we believe that doing so is prudent or necessary. So that we don't take unnecessary steps, please let us know that this matter between you and AOM has been resolved within five days of this letter.

Thank you for your immediate attention.

Sincerely,

Jennifer Adams Draffen

JENNIFER ADAMS DRAFFEN | SENIOR COUNSEL | APPLE INC. | 1 INFINITE LOOP, MS 3-ITS, CUPERTINO, CALIFORNIA 95014 | T (408) 862-6116 | F (408) 974-9105 | ADAMSDRAFFEN@APPLE.COM
<<mailto:adamsdraffen@apple.com>>

THE INFORMATION IN THIS E-MAIL AND ANY ATTACHMENT(S) IS INTENDED SOLELY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENTS. THIS MESSAGE MAY BE AN ATTORNEY-CLIENT COMMUNICATION PROTECTED BY PRIVILEGE. IF YOU ARE NOT THE INTENDED RECIPIENT, YOU MAY NOT REVIEW, USE, COPY, FORWARD, OR OTHERWISE DISSEMINATE THIS MESSAGE. PLEASE NOTIFY US OF THE TRANSMISSION ERROR BY REPLY E-MAIL AND DELETE ALL COPIES OF THE MESSAGE AND ANY ATTACHMENT(S) FROM YOUR SYSTEMS. THE USE OF

THE SENDER'S NAME IN THIS MESSAGE IS NOT INTENDED AS AN
ELECTRONIC SIGNATURE UNDER ANY APPLICABLE LAW.

Begin forwarded message:

From: Karen Koster Burr <
<mailto:kburr@addmg.com>
kburr@addmg.com
<mailto:kburr@addmg.com> >
Date: January 13, 2009 8:35:38 AM PST
To: "" <mailto:'adamsdraffen@apple.com>
adamsdraffen@apple.com
<mailto:adamsdraffen@apple.com> "" <
<mailto:adamsdraffen@apple.com>
adamsdraffen@apple.com
<mailto:adamsdraffen@apple.com> >
Subject: FW: iPhone Application
Developer Infringement (our ref:
APP3647)

Dear Jennifer,
Thank you very much for your reply to my online
message. Please see below for further details on this
matter.

From: Karen Koster Burr
[<mailto:kkosterburr344@gmail.com>
mailto:kkosterburr344@gmail.com
<mailto:kkosterburr344@gmail.com>]
Sent: Tuesday, January 13, 2009 11:28 AM
To: Karen Koster Burr
Subject: Re: iPhone Application Developer Infringement
(our ref: APP3647)

Here is further detail from a letter I just drafted:

Our firm represents Air-O-Matic, Inc., creator of the Pull My

Finger™ iPhone™ application. (See, USPTO SN 77 635 715). This application was #1 in sales for entertainment iTunes apps and #1 in overall sales for a time. Several others have been inspired to mimic our app and even its name by offering similar applications under the Pull My Finger name, and we are still trying to deal with most of them directly. One of them, however, is systematically misusing our name and engaging in various forms of unfair competition to gain the advantage and steer those seeking our application to its own competing app called "iFart." The developer is InfoMedia, Inc., a Joel Comm company that has several community websites, including <<http://www.worldvillage.com>> <<http://www.worldvillage.com>> <<http://www.worldvillage.com>> and <<http://www.joelcomm.com>> <<http://www.joelcomm.com>> <<http://www.joelcomm.com>> .

On iTunes, Mr. Comm has posted the purported testimonials extolling the superiority of his app over our client's—with quotes from his own website. He appears to have posted negative reviews of our app and those competing apps of others and glowing ones on his own. Internet marketing to increase visibility of one's own name is one thing; misrepresentations of affiliation and efforts to collapse one brand into another clearly infringement. This activity on Apple's site is part of a pattern: Mr. Comm has also used our name in an article he posted on PR Newswire to link to *his* application and confuse customers regarding the distinction between the two brands; hyphenated the name of his app, iFart, to include ours on YouTube, and on other sites posting his video; and spammed our customers on Twitter with ads for his own app.

We would like the iFart application to be withdrawn from the Apple site and InfoMedia's developer contract to be cancelled for this improper abuse of the Apple Store and our trademark rights. His activity not only harms my client, but Apple is vulnerable to liability due to its role in selling, hosting and profiting from the app.

Thank you in advance for your swift assistance.



Karen Koster Burr, Esq.
Intellectual Property Attorney
Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A.

1301 Riverplace Blvd.
Suite 1916
Jacksonville, FL 32207
904 398 7000
<<http://www.addmg.com>> www.addmg.com <<http://www.addmg.com>> <<http://www.addmg.com>>



On Mon, Jan 12, 2009 at 8:00 PM, Jennifer Adams Draffen <<mailto:adamsdraffen@apple.com>> adamsdraffen@apple.com <<mailto:adamsdraffen@apple.com>> > wrote:

Dear Ms. Burr,

Your message has been forwarded to me for response. Would you please identify the name of both the application at issue and the name of the developer of the application?

Sincerely,

Jennifer

Jennifer Adams Draffen | Senior Counsel | Apple Inc. | 1 Infinite Loop, MS 3-ITS, Cupertino, California 95014 | T (408) 862-6116 | F (408) 974-9105 | adamsdraffen@apple.com <<mailto:adamsdraffen@apple.com>>

The information in this e-mail and any attachment(s) is intended solely for the personal and confidential use of the designated recipients. This message may be an attorney-client communication protected by privilege. If you are not the intended recipient, you may not review, use, copy, forward, or otherwise disseminate this message. Please notify us of the transmission error by reply e-mail and delete all copies of the message and any attachment(s) from your systems. The use of the sender's name in this message is not intended as an electronic signature under any applicable law.

Begin forwarded message:

From: Karen Koster Burr <<mailto:kkosterburr344@gmail.com>>
kkosterburr344@gmail.com
<<mailto:kkosterburr344@gmail.com>> >
Date: January 6, 2009 9:53:15 AM PST
To: <<mailto:copyrightagent@apple.com>>
copyrightagent@apple.com
<<mailto:copyrightagent@apple.com>> ,
<<mailto:iplaw@apple.com>> iplaw@apple.com
<<mailto:iplaw@apple.com>> ,
<<mailto:appletm@apple.com>>
appletm@apple.com
<<mailto:appletm@apple.com>>
Cc: Karen Koster Burr <
<<mailto:kburr@addmg.com>>
kburr@addmg.com
<<mailto:kburr@addmg.com>> >
**Subject: iPhone Application Developer
Infringement**

Dear Apple Legal Representatives,

Our firm represents Air-O-Matic, Inc., developer of mobile phone applications, including some for the iPhone. Air-O-Matic originated PULL MY FINGER, recently one of the leading iPhone app downloads.

Please direct us to the best process and recipient for a complaint against one of the participants in the iPhone app development program that is violating our client's trademark rights in the PULL MY FINGER mark, by using it prominently and repeatedly in the marketing of its competing iFART app, and engaging in unfair trade practices. In addition to abusing our mark, PULL MY FINGER, USPTO SN 77 635 715, the developer of this application being marketed on iTunes by Apple is using laudatory quotes pulled from his own content on his own websites; planting negative reviews of the apps of his competitors and positive reviews of his own application, and disparaging his competition with false testimonials. That the infringement by the developer posted on the Apple

site (and that Apple is profiting from as long as the material remains) is "knowing" and deliberate is confirmed by the developer's similar deceptive efforts on other sites, such as the PR Newswire article, where he posted an article masquerading as an objective review of his iFart application, and misused our mark in it to link to his own app. Although we obtained removal of the infringement there, the developer continues to misuse our mark on Apple and other sites controlled by him.

We would like to have his application removed from iTunes for violation of Apples various Agreements governing use of its site, marketing by Apple and the Development program.

Thank you in advance for your immediate assistance.

Karen Koster Burr, Esq.
Intellectual Property Attorney
Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A.
1301 Riverplace Blvd.
Suite 1916
Jacksonville, FL 32207
904 398 7000
www.addmg.com <<http://www.addmg.com/>>

History...

You forwarded this message on 2/9/09, 5:00 AM Forward
From: Jennifer Adams Draffen <adamsdraffen@apple.com>
Date: Monday, January 26, 2009 2:03 PM
To: Kevin Houchin <kevin.houchin@houchinlaw.com>
CC: AppStoreNotices <AppStoreNotices@apple.com>
Subject: Re: (R)egistered: Apple Inc. (our ref: APP3647) - INFOMEDIA RESPONSE

Dear Mr. Houchin,

Thank you for your response. We believe these disputes are best resolved among the parties themselves. Please communicate directly with the complainant.

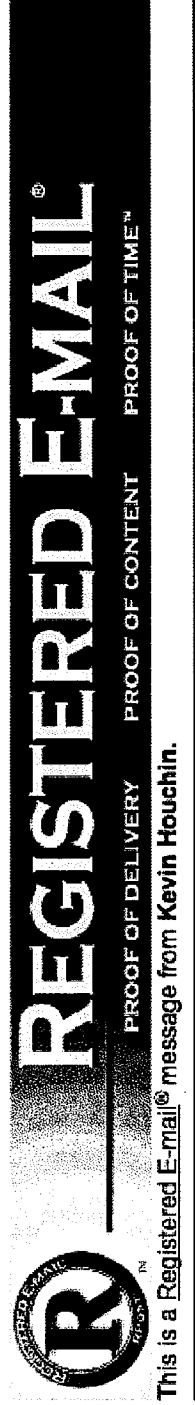
We will look forward to conformation from both parties that this issue has been resolved.

Sincerely,

Jennifer

JENNIFER ADAMS DRAFFEN | SENIOR COUNSEL | APPLE INC. | 1 INFINITE LOOP, MS 3-ITS, CUPERTINO, CALIFORNIA 95014 | T (408) 862-6116 | F (408) 974-9105 | ADAMSDRAFFEN@APPLE.COM
 THE INFORMATION IN THIS E-MAIL AND ANY ATTACHMENT(S) IS INTENDED SOLELY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENTS. THIS MESSAGE MAY BE AN ATTORNEY-CLIENT COMMUNICATION PROTECTED BY PRIVILEGE. IF YOU ARE NOT THE INTENDED RECIPIENT, YOU MAY NOT REVIEW, USE, COPY, FORWARD, OR OTHERWISE DISSEMINATE THIS MESSAGE. PLEASE NOTIFY US OF THE TRANSMISSION ERROR BY REPLY E-MAIL AND DELETE ALL COPIES OF THE MESSAGE AND ANY ATTACHMENT(S) FROM YOUR SYSTEMS. THE USE OF THE SENDER'S NAME IN THIS MESSAGE IS NOT INTENDED AS AN ELECTRONIC SIGNATURE UNDER ANY APPLICABLE LAW.

On Jan 26, 2009, at 10:20 AM, Kevin Houchin wrote:



This is a Registered E-mail® message from Kevin Houchin.

Dear Ms. Draffen,

Attached please find the response from InfoMedia, Inc. in the above mentioned matter.

We hope that you will agree with our analysis of this situation and close the matter promptly. Please advise regarding closure and/or any required next steps.

Have a great week.

Sincerely,

ALLEN

DYER

DOPPELT

MILBRATH &

GILCHRIST, P.A.

INTELLECTUAL PROPERTY ATTORNEYS

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February 4, 2009

Via electronic mail: Kevin.houchin@houchinlaw.com

Kevin E. Houchin, Esq.
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425 West Mulberry • Suite 105
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Re: Air-O-Matic vs. InfoMedia

Dear Kevin:

My client has considered InfoMedia's offer of direct communication but prefers to continue to communicate through attorneys at this juncture. Your client's actions have cost Air-O-Matic significant sales volume, revenues, and now legal fees to rectify. Air-O-Matic requires recompense to put the matter to rest.

Air-O-Matic is not ready to speak directly with your client because it has been financially harmed by InfoMedia's deliberate efforts to bump its app from its leading sales position on Apple through use of unfair trade tactics. *Pull My Finger* fell precipitously from being the #1 iPhone application as a direct result of InfoMedia's systematic efforts to profit from the *Pull My Finger* name and leverage the buzz around it. InfoMedia's efforts have been directed at merging *Pull My Finger* and *iFart* in the consumers' minds, so that searches for *Pull My Finger* pull up the *iFart* application.

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The PR Newswire article is a perfect example: masquerading as objective news, the article traces the odyssey of *Pull My Finger*, perhaps also that of *iFart*, we don't know, but only mentions *iFart*, even though at that time, *Pull My Finger* was the leading such application. Worse, *InfoMedia* used Air-O-Matic's *Pull My Finger* mark in the article to link to its own *iFart* page.

Another example is the title of his *YouTube* video: *iFart Mobile – Pull My Finger*. This same video, entitled the same way, was also posted on www.nowpublic.com. *InfoMedia* spammed our customers chatting about our app on *Twitter*. Apple iPhone apps reviews were stuffed with negative ones for every similar app but *iFart*, which quoted his own website for a supposed testimonial that it was better than *Pull My Finger*. *Google AdWords* improperly used the *Pull My Finger* mark as well. These are just the machinations we found. It all amounts to repeated trademark infringement and unfair trade practices that have resulted in substantial direct and indirect damages to Air-O-Matic.

The exact amount of financial harm for these unfair practices is difficult to calculate. Based on robust sales and interest in the *Pull My Finger* app prior to *InfoMedia*'s actions, Air-O-Matic estimates that it would have made at least \$500,000 through continued strong sales. Absent *InfoMedia*'s targeted negative campaign, hijacking of our customers and stealing of the power of the *Pull My Finger* mark, even if a substantial number of users considered *iFart* the superior application once it penetrated the marketplace through fair means, Air-O-Matic calculates that the improper use of its name decimated its theretofore wildly successful marketing campaign.

Finally, Air-O-Matic has suffered indirect damages as well. Goodwill that buoyed the *Pull My Finger* application would have been a powerful engine for launch of new applications.

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Air-O-Matic takes this matter very seriously. A minimum payment of \$50,000 would be required to settle this matter now. Naturally, as costs increase with drawn out process, the settlement figure would necessarily climb as well.

Please advise your client of Air-O-Matic's position and offer of settlement and communicate InfoMedia's reply by close of business February 13.

Sincerely,

A handwritten signature in cursive script that reads "Karen Koster Burr".

Karen Koster Burr