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9
10 Attorneys for Plaintiff
PAUL CHEEVER

11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14
15 PAUL CHEEVER,

16 Plaintiff,

17 v.

18 HUAWEI DEVICE USA, INC., and
19 HUAWEI TECHNOLOGIES, CO.,
LTD.,

20 Defendants.

Case No. 3:18-cv-6715

**PLAINTIFF'S COMPLAINT FOR
COPYRIGHT INFRINGEMENT**

DEMAND FOR JURY TRIAL

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1 Plaintiff Paul Cheever (“Plaintiff” or “Cheever”), by and through its
2 undersigned attorneys, for its Complaint against Defendants Huawei Device USA,
3 Inc. (“Huawei Device”) and Huawei Technologies, Co., Ltd. (“Huawei
4 Technologies”) (collectively, “Huawei”), hereby alleges and avers as follows:

5 **NATURE OF THE ACTION**

6 1. This is an action brought by Paul Cheever—an American musician,
7 music composer, and music producer—against Huawei—a global company that is
8 the world’s second largest smartphone maker. Specifically, this case involves
9 Huawei’s blatant, unauthorized, and unlawful distribution of tens of millions of
10 illegal copies of Cheever’s copyrighted audio recording, “A Casual Encounter,” in
11 the United States and throughout the world.

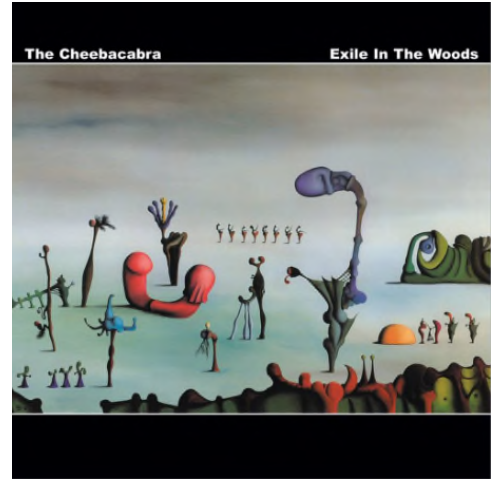
12 2. For the past two decades, Cheever has written, recorded, and sold
13 music under the moniker “The Cheebacabra.” Cheever’s vision for The
14 Cheebacabra has remained focused and singular—blend 1970s funk, soul, and jazz
15 in ways that are both new and authentic. Toward those ends, Cheever uses period-
16 specific musical instruments and recording techniques in crafting his songs.
17 Cheever even licenses period-specific cover artwork for his albums. The
18 Cheebacabra’s four album releases are shown below:

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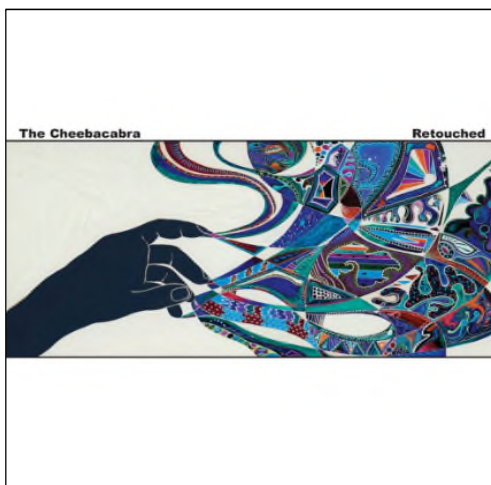
Metamorphosis (2003)



Exile in the Woods (2006)



Pass the Information (2012)



Retouched (2015)

The Cheebacabra's Albums

3. Cheever has steadfastly eschewed chasing musical fads. Instead, he has stayed true to his artistic goals and allowed his fan base to blossom organically. Consistent with his singular artistic vision, Cheever has chosen not to assign his copyrights in his sound recordings and musical compositions to publishers or record companies (and make a quick dollar in the process). Instead, Cheever has retained the copyrights to his audio recordings and musical compositions, so that he can control how and where his music is distributed and receive the rewards of his long-term investment.

1 4. Cheever self-releases his songs on vinyl and CD, as well as via digital
 2 downloads on his website, cheebacabra.com. Cheever receives about \$0.75 every
 3 time one of his audio recordings is purchased through his website. He also secured
 4 a deal with a digital music distributor that, among other things, pays him a royalty
 5 of around \$0.64 every time one of his audio recordings is downloaded through a
 6 digital music store (such as Google Play and iTunes).

7 5. Through Cheever’s diligent promotion of his music, including
 8 international live performances, tours, press, advertising, and radio campaigns,
 9 music lovers all over the United States and the world have discovered and
 10 purchased The Cheebacabra audio recordings.

11 6. Recently, while he was reviewing online comments about his music,
 12 Cheever made a shocking discovery. Huawei, the world’s second largest seller of
 13 smartphones, has unlawfully sold tens of millions of smartphones and tablets that
 14 include unlicensed copies of The Cheebacabra’s 2012 audio recording, “A Casual
 15 Encounter.” Some examples are shown below:





Huawei's Santa Clara Office

12. On information and belief, Defendant Huawei Technologies is the parent company of Huawei Device and a company organized under the laws of the People's Republic of China, with a principal place of business at Bantian, Longgang District, Shenzhen, People's Republic of China. Huawei Technologies and/or its U.S. subsidiaries (including Huawei Device) collectively employ more than 1,900 people in the United States. Directly and/or through its subsidiaries, Huawei Technologies designs, manufactures, distributes, markets, and sells Huawei-branded smartphones and tablets in the United States and worldwide.

13. Joinder of Huawei Device and Huawei Technologies as defendants is proper because the allegations of infringement contained herein are asserted against them jointly and severally, or, in the alternative, arise out of the same series of transactions or occurrences relating to their copying and distribution of Cheever's copyrighted work.

14. On information and belief, Huawei was founded in 1987, began selling phones in 2004, and began selling smartphones (*i.e.*, mobile phones with an operating system capable of storing files and running downloaded applications) in 2009.

1 under foreign law (Count II) pursuant to 28 U.S.C. § 1367. This Court also has
2 diversity jurisdiction over this claim pursuant to 28 U.S.C. § 1332 because the
3 parties are diverse in citizenship and the amount in controversy exceeds \$75,000.

4 19. Huawei is subject to this Court’s specific and general personal
5 jurisdiction pursuant to due process and/or the California Long Arm Statute due at
6 least to its substantial business in this State and District, including: (1) at least part
7 of its infringing activities alleged herein; and (2) regularly doing or soliciting
8 business, engaging in other persistent conduct, and/or deriving substantial revenue
9 from goods sold and services provided to California residents.

10 20. Venue is proper in this District pursuant to 28 U.S.C. § 1391 and §
11 1400(a) because, as discussed above, Defendants are amenable to personal
12 jurisdiction in this District and have committed unlawful acts of infringement in
13 this District.

14 **INTRADISTRICT ASSIGNMENT**

15 21. This is an Intellectual Property Action to be assigned on a district-wide
16 basis pursuant to Civil Local Rule 3-2(c).

17 **FACTUAL BACKGROUND**

18 **The Cheebacabra**

19 22. Paul Cheever’s career in music began more than 20 years ago. At the
20 age of 18, he was pulled into the inner circle of the legendary Dust Brothers, the
21 GRAMMY-winning songwriting and music production team known for their
22 groundbreaking collaborations with The Beastie Boys, Beck, Santana, and many
23 others. The experience gave him a thorough education on music production,
24 recording and audio engineering techniques, and song composition.

25 23. After three years working with the Dust Brothers, Cheever departed to
26 focus on his own musical productions. Shortly thereafter, he began to write, record,
27 and produce music under the name The Cheebacabra.

28 24. Cheever had a specific vision for The Cheebacabra—blend 1970s

1 funk, soul, and jazz in ways that are both new and authentic to the greats of the time
2 period. Cheever purchased dozens of period-specific musical instruments,
3 including a Rhodes electric piano, Clavinet, Sequential Circuits Prophet 5
4 synthesizer, Juno 60 synthesizer, ARP string ensemble, Moog Voyager synthesizer,
5 Wurlitzer electric piano, and more. He acquired period-specific recording
6 equipment and researched the recording techniques used in that time period. He
7 also built an extended network of notable musicians, engineers, and visual artists
8 from that period.

9 25. Cheever has eschewed the mainstream and instead followed an
10 uncompromising artistic vision for The Cheebacabra. To maintain the integrity of
11 his vision, instead of assigning his copyrights in his sound recordings and musical
12 compositions to publishers or record companies, he has retained all of those rights
13 so that he can maintain control how his music is distributed and marketed, and can
14 receive the benefits of his long-term investment.

15 26. Cheever released *Metamorphosis*, his first album as The Cheebacabra,
16 in 2003. In 2012, he released his third album as The Cheebacabra, *Pass the*
17 *Information*, featuring seventeen tracks that he wrote, produced, and mixed.
18 Cheever also played numerous instruments on the album, including an assortment
19 of synthesizers, pianos, drums, and percussion instruments. His *Pass the*
20 *Information* album included the audio recording “A Casual Encounter.”

21 27. At considerable expense, Cheever self-released the audio recording “A
22 Casual Encounter” in a variety of media formats, including vinyl, CD, and digital
23 download. Cheever receives \$0.75 every time one of his audio recordings is
24 purchased as a digital download through his website, cheebacabra.com. He
25 contracted with a digital music distribution company to distribute his audio
26 recordings to digital download stores such as iTunes and Google Play. Under this
27 agreement, Cheever receives 91% of the amount collected from third-party digital
28 download stores, resulting in a payment of about \$0.64 for each download of one of

1 his audio recordings.

2 28. Over time, Cheever's hard work and drive have begun to pay off. In
 3 August 2012, *Performer* magazine named *Pass the Information* "Vinyl of the
 4 Month," writing: "One of the things that makes or breaks a funk album's power is
 5 the ability for the music to immediately set the mood, and once the first flute loop
 6 ends and the synths and slinky guitar lines melt into the mix, you're instantly
 7 transported to a world of afros, low-riding Cadillacs and velvet hats." Music
 8 retailer *DustyGroove.com* referred to *Pass the Information* as having "perfect
 9 production...like a recreation of some hip 70s studio band." Cheever has sold
 10 Cheebacabra audio recordings all over the world, including in the United States,
 11 Canada, Mexico, Europe, Asia, Australia, and South America. Below are
 12 photographs taken in two record stores in Japan showing Cheever's *Pass the*
 13 *Information* album prominently displayed for sale:



28 **The Cheebacabra's Worldwide Popularity**

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The Cheebacabra's Worldwide Popularity

The Infringement

29. In August 2018, Cheever noticed numerous puzzling user comments on a YouTube video featuring one of the audio tracks on *Pass the Information*, “A Casual Encounter.” One commenter had written: “who is here after the update of the Huawei?” Other commenters responded: “I m here after buying my Huawei p20 pro !” (sic), “Huawei p9,” “Huawei Mate 10 Lite,” “Huawei Nova 2 Plus,” “Huawei p9 lite.” Cheever began to wonder why individuals who appeared to be recent purchasers of Huawei phones were commenting on an online video of his song.

30. During a trip to Canada, Cheever came across one Huawei smartphone model—the Huawei P20—at a store. He inspected a floor model of the phone and was shocked to discover that it had a copy of his “A Casual Encounter” audio recording on it. He noticed that the Huawei P20 Pro on display at the store also featured a copy of his audio recording.

1 31. Cheever purchased a P20 from the store. Later, when he unboxed and
2 turned it on, he confirmed that Huawei *had preloaded an unauthorized copy of his*
3 *“A Casual Encounter” audio recording onto the phone.* Although the audio
4 recording was Cheever’s song, the track title had been changed from “A Casual
5 Encounter” to simply “Encounter.” An image of the screen displaying Cheever’s
6 song on the P20 is shown below:



22 32. The Huawei P20 that Cheever purchased included his audio recording
23 as a standalone audio file. In fact, Cheever’s audio recording was one of only three
24 audio recordings preloaded onto the phone. These audio recordings are stored on
25 the phone as a FLAC file—a common file format for digital audio downloads that
26 is similar to the MP3 format but is of much higher audio quality. Indeed, on his
27 website, Cheever sells digital downloads of his audio recordings in the same FLAC
28 format, and typically receives around \$0.75 per download.

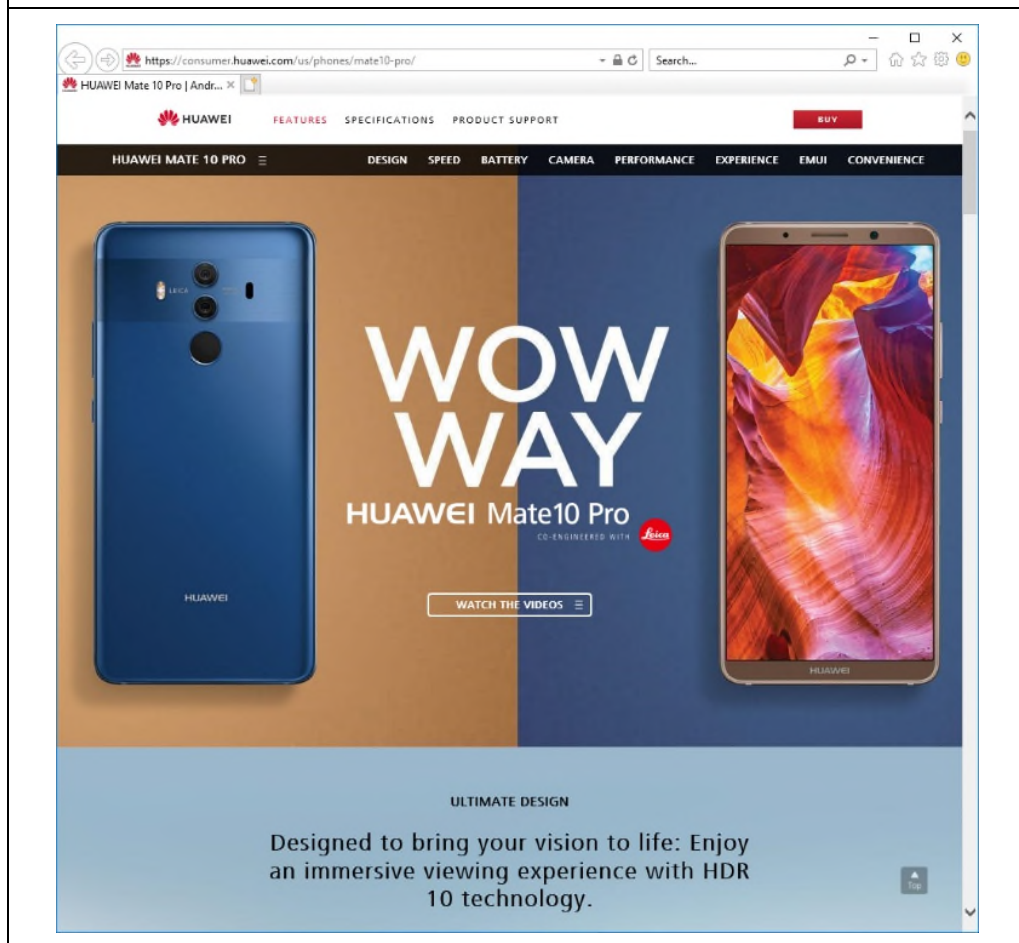
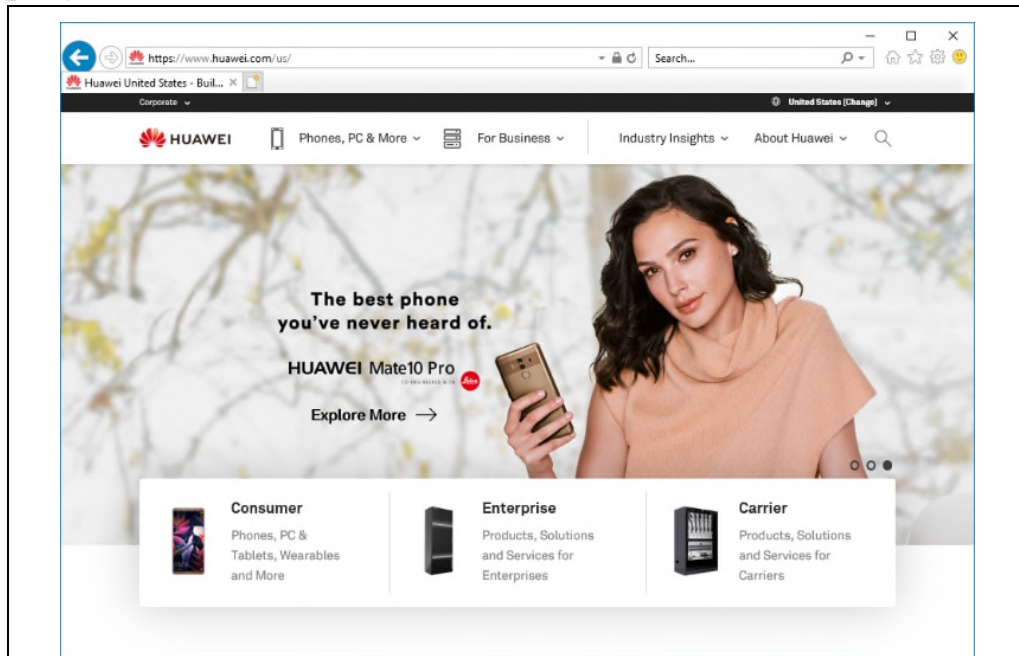
1 33. The P20 also allows an end user to use the FLAC file of “A Casual
2 Encounter” just as they could any other digital audio file. End users can use the
3 phone’s “music” application to play the file. They can use the phone’s “files”
4 application to copy the file to other devices and share copies of the file with other
5 users. And they can use third-party applications, such as video editing applications,
6 to create derivative works. Images of the P20’s “music” and “files” applications
7 confirming that Cheever’s audio recording was preloaded onto the phone as a
8 standalone FLAC file are shown below:



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24 34. Cheever also visited Huawei’s U.S. website to determine whether
25 Huawei was selling phones in the United States that included a copy of his audio
26 recording.

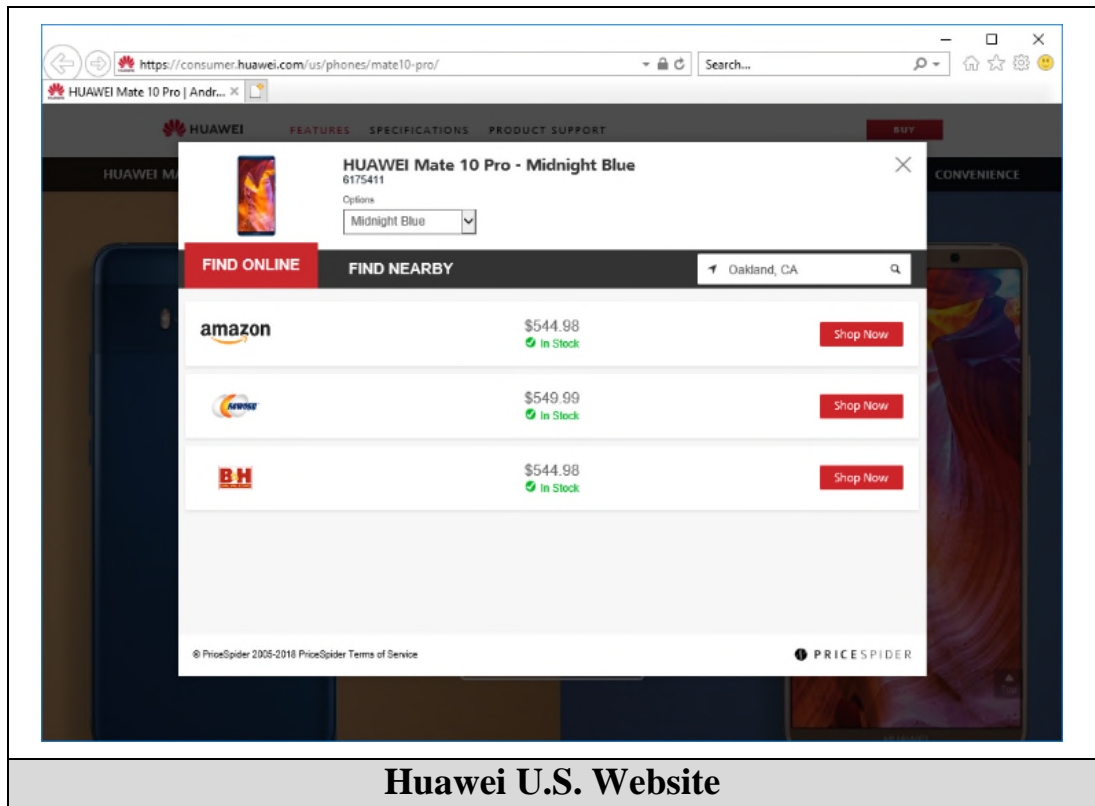
27 35. Huawei’s U.S. website advertises Huawei’s Mate 10 Pro phone as
28 “The best phone you’ve never heard of,” features a photo of spokesperson and

1 *Wonder Woman* star Gal Gadot, and offers links to buy the phone via numerous
2 third-party resellers. Screenshots from the Huawei U.S. website are shown below:



28 **Huawei U.S. Website**

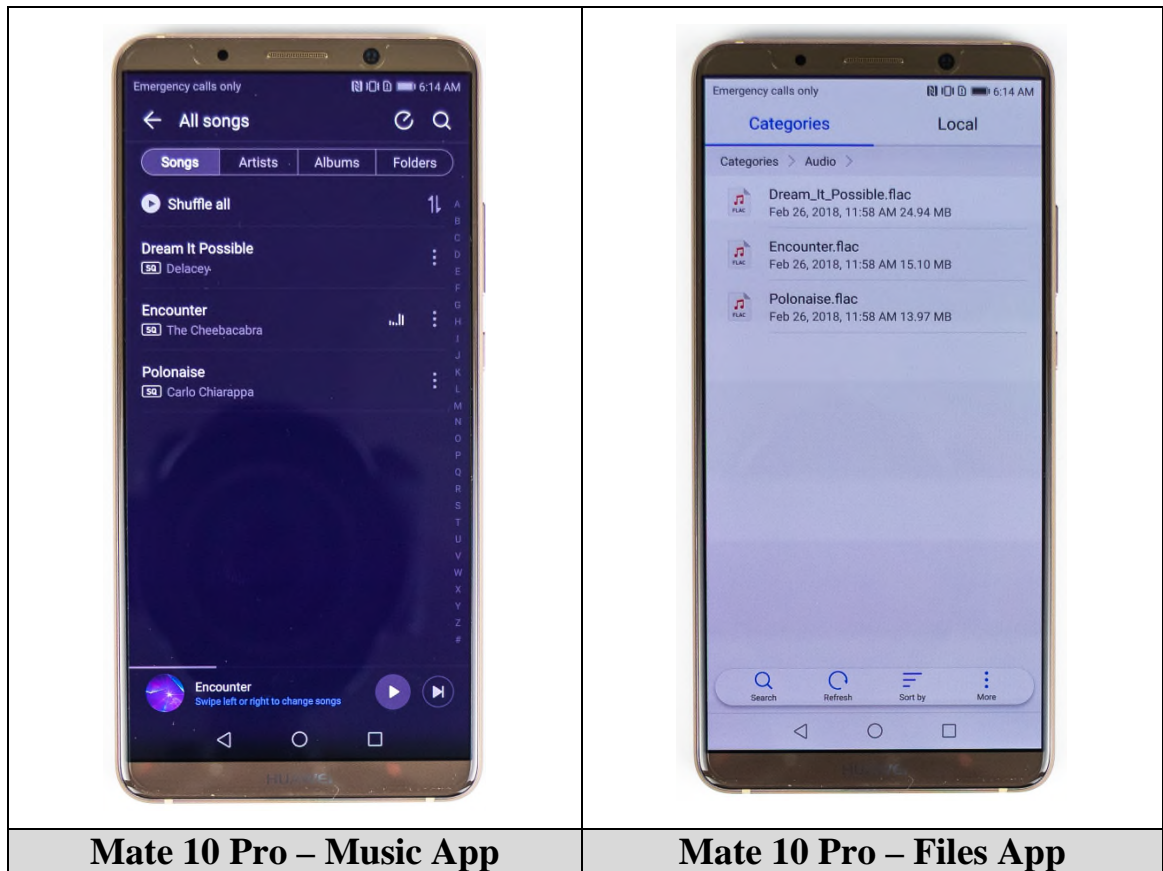
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36. Following one of the links on Huawei’s website, Cheever purchased a Huawei Mate 10 Pro phone via Amazon.com. It was delivered to him in the United States the same day.

37. Cheever quickly confirmed that the Huawei Mate 10 Pro phone he purchased from Amazon.com featured an unauthorized copy of his audio recording, and that the track title had also been changed from “A Casual Encounter” to simply “Encounter.” As with the Huawei P20 he had purchased in Canada, his song was one of three pre-downloaded audio recordings on the smartphone. As with the Huawei P20, the audio recording was loaded on the Mate 10 Pro as a standalone FLAC file, which permits users to play the file and send copies of it to other devices and users. Images of the Mate 10 Pro’s “music” and “files” applications confirming that Cheever’s audio recording was preloaded onto the phone as a standalone FLAC file with the name “Encounter.flac” are shown below:

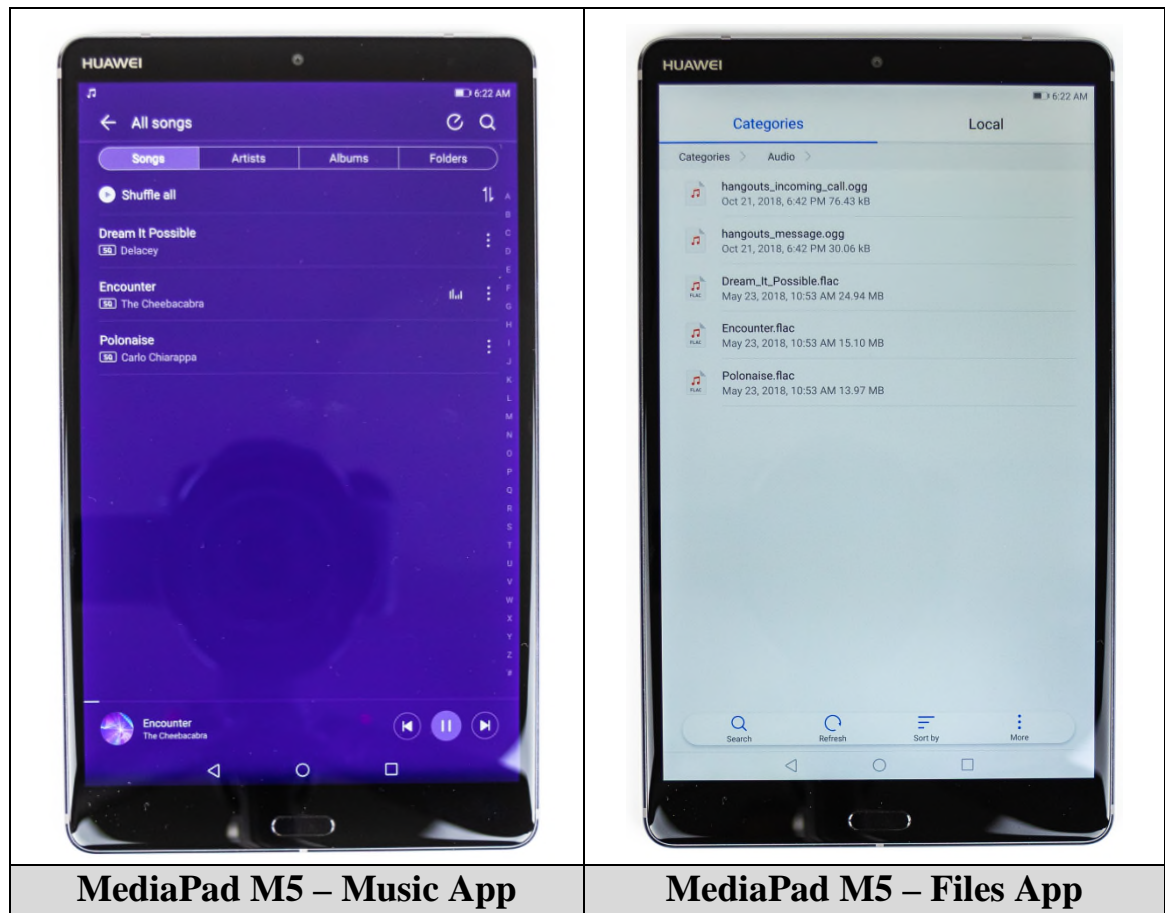
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38. Cheever also discovered evidence that Huawei had included copies of “A Casual Encounter” on other smartphone models. For example, he discovered a YouTube video discussing the Huawei Mate 20 Lite, which showed that this model also included his track. Cheever arranged for the purchase of the Huawei Mate 20 Lite from Amazon.com, which was delivered to an address in this district. Subsequent investigation showed that Cheever’s audio recording was preloaded onto the device as a standalone FLAC file.

39. Cheever subsequently discovered evidence that Huawei’s newest phone, the Mate 20 Pro, features Cheever’s audio recording preloaded onto the device as a standalone FLAC file. On information and belief, Huawei regards the Mate 20 Pro as its new flagship smartphone—it retails for \$1,215 and represents Huawei’s attempt to compete directly with Apple’s most expensive smartphone, the iPhone XS Max.

1 40. Cheever recently discovered that Huawei is also selling tablets with
 2 unlicensed copies of the sound recording “A Casual Encounter.” Cheever
 3 purchased a Huawei MediaPad M5 from a Fry’s Electronics store and confirmed
 4 that his audio recording was preloaded onto the device as a standalone FLAC file.
 5 Images of the MediaPad M5’s “music” and “files” applications confirming that
 6 Cheever’s audio recording was preloaded onto the tablet as a standalone FLAC file
 7 with the name “Encounter.flac” are shown below:



23 41. Cheever also arranged for the purchase of a Huawei MediaPad M5 Pro
 24 from Amazon.com, which was delivered to an address in this district. This device
 25 also features “A Casual Encounter” as a pre-downloaded, standalone FLAC file.

26 42. Cheever never gave Huawei permission to reproduce or distribute
 27 copies of the sound recording “A Casual Encounter.”

28 43. On information and belief, dozens of Huawei’s phone models,

1 including but not limited to Huawei P9, P9 Lite, P10, P20, P20 Lite, P20 Pro, Y5,
2 Mate 9, Mate 10, Mate 10 Lite, Mate 10 Pro, Mate 20, Mate 20 Lite, Mate 20 Pro,
3 Mate 20 X, and Nova 2 Plus, were sold with Cheever's audio track pre-loaded on
4 them.

5 44. Huawei's phone sales have climbed dramatically in recent years. It
6 has been reported that Huawei sold 140 million smartphones in 2016
7 ([https://www.androidheadlines.com/2016/12/huaweis-vp-huawei-sold-140-million-](https://www.androidheadlines.com/2016/12/huaweis-vp-huawei-sold-140-million-smartphones-in-2016.html)
8 [smartphones-in-2016.html](https://www.androidheadlines.com/2016/12/huaweis-vp-huawei-sold-140-million-smartphones-in-2016.html)) and 153 million smartphones in 2017
9 (<https://wccftech.com/huawei-153-million-phones-2017/>).

10 45. In August 2018, it was widely reported that Huawei had overtaken
11 Apple Inc. to become the world's second-largest smartphone seller, behind only
12 Samsung, and that Huawei expects to ship 200 million smartphones globally by the
13 end of the year ([https://www.scmp.com/tech/china-tech/article/2155933/huawei-](https://www.scmp.com/tech/china-tech/article/2155933/huawei-track-ship-200-million-handsets-2018-bringing-it-within-reach)
14 [track-ship-200-million-handsets-2018-bringing-it-within-reach](https://www.scmp.com/tech/china-tech/article/2155933/huawei-track-ship-200-million-handsets-2018-bringing-it-within-reach)).

15 46. In view of these facts, and on information and belief, Huawei has sold
16 tens of millions of smartphones and tablets (if not many more) that included
17 unlawful copies of Cheever's audio recording.

18 19 **COUNT I**

20 **(Violation of the Copyright Act, 17 U.S.C. § 101 *et seq.*)**

21 47. Cheever repeats, realleges, and incorporates herein by reference the
22 allegations in the foregoing paragraphs as if fully set forth herein.

23 48. Cheever is the sole owner of the U.S. copyright in all rights, titles, and
24 interests in the sound recording "A Casual Encounter," as well as in the underlying
25 musical composition, which are protected by a pending federal copyright
26 registration, application number 1-6903474187.

27 49. Huawei's reproduction and distribution of unauthorized copies of the
28 sound recording "A Casual Encounter" infringes Cheever's exclusive rights in

1 violation of the Copyright Act, 17 U.S.C. § 101 et seq.

2 50. Huawei did not seek or receive permission to reproduce or distribute
3 copies of the sound recording “A Casual Encounter.”

4 51. Huawei’s conduct has been at all times knowing, willful, and with
5 complete disregard of Cheever’s rights.

6 52. As a proximate cause of Huawei’s wrongful conduct, Cheever has
7 been irreparably harmed and Huawei has been unjustly enriched.

8 53. The infringement is continuing as Huawei continues to sell and
9 distribute smartphones and tablets featuring “A Casual Encounter” as a pre-
10 downloaded sound recording.

11 54. Pursuant to 17 U.S.C. § 504(b), Cheever is entitled to damages,
12 including the substantial profits of Huawei, as will be proven at trial.

13 55. In the alternative, pursuant to 17 U.S.C. § 504(c), Cheever is entitled
14 to statutory damages.

15 56. Cheever is entitled to his costs, including reasonable attorneys’ fees,
16 pursuant to 17 U.S.C. § 505.

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COUNT II

19

(Violation of Foreign Copyright Laws of Signatories to Berne Convention)

20

21 57. Cheever repeats, realleges, and incorporates herein by reference the
22 allegations in the foregoing paragraphs as if fully set forth herein.

22

23 58. Cheever is the owner of all rights, title, and interest in the copyrights to
24 the audio recording “A Casual Encounter.”

24

25 59. Pursuant to the Berne Convention for the Protection of Literary and
26 Artistic Works, all dispositions of the law are equally applicable to creative works
27 regardless of country of publication and the nationality of their authors, so long as
28 the author’s nation of origin is a signatory to the Berne Convention.

28

60. Cheever is a citizen and national of the United States and the United

1 States is a signatory to the Berne Convention.

2 61. Pursuant to the Berne Convention, national treatment for foreign
3 works is given without any formality. As a consequence, Cheever's copyrighted
4 work is protectible under the foreign law of any Berne Convention signatory
5 without any formality (such as any copyright registration requirement that nation
6 might have).

7 62. On information and belief, Huawei has distributed unauthorized copies
8 of the sound recording "A Casual Encounter" in foreign countries that are
9 signatories to the Berne Convention. Accordingly, Huawei has directly, vicariously
10 and/or contributorily infringed, and unless enjoined, will continue to infringe
11 Cheever's copyrights in violation of the copyright laws of numerous foreign
12 countries, including, *inter alia*, the United Kingdom (United Kingdom Copyright,
13 Designs and Patent Act 1988, § 96 *et seq.*), France (Code of Intellectual Property,
14 Art. L122-4 *et seq.*), Germany (Act on Copyright and Related Rights, § 97 *et seq.*),
15 Canada (Copyright Act of Canada, R.S.C., 1985, c. C-42, § 27 *et seq.*), Mexico
16 (Federal Law on Copyright, Art. 14 *et seq.*), the People's Republic of China
17 (Copyright Law of the People's Republic of China, Art. 47 *et seq.*), and Japan
18 (Copyright Act, Art. 112 *et seq.*).

19 63. Huawei has received substantial benefits in connection with the
20 unauthorized reproduction and distribution of the sound recording "A Casual
21 Encounter."

22 64. All of Huawei's acts are and were performed without the permission,
23 license, or consent of Cheever.

24 65. As a result of the acts of Huawei alleged herein, Cheever has suffered
25 and is suffering substantial damage in the form of diversion of trade, loss of profits,
26 injury to goodwill and reputation, and the dilution of the value of his rights, all of
27 which are not yet fully ascertainable.

28

PRAYER FOR RELIEF

WHEREFORE, Cheever prays for judgment against Defendants as follows:

A. An award of damages pursuant to 17 U.S.C. § 504(b), including actual damages, and Defendants’ profits as will be proven at trial, or in the alternative, statutory damages pursuant to 17 U.S.C. § 504(c);

B. An award of attorneys’ fees and full costs pursuant to 17 U.S.C. § 505 and other applicable law;

C. For Defendants’ infringement not subject to the U.S. Copyright Act, an award of damages pursuant to the applicable foreign laws;

D. Prejudgment and post-judgment interest according to law;

E. A permanent injunction requiring Defendants to cease directly and indirectly infringing and/or participating in the infringement of any of Cheever’s rights protected under the law; and

F. For other and further relief as this Court may deem just and proper.

Dated: November 5, 2018

BYRON RAPHAEL LLP

By: /s/ Tim Byron
TIM BYRON

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DEMAND FOR JURY TRIAL

Plaintiff Paul Cheever hereby demands a jury trial pursuant to Fed. R. Civ. P. 38 on all issues raised in the Complaint.

Dated: November 5, 2018

BYRON RAPHAEL LLP

By: /s/ Tim Byron
Tim Byron

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