

# McDermott Will & Emery

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Lynne M.J. Boisineau  
Attorney at Law  
lboisineau@mwe.com  
+1 949 757 7108

December 15, 2009

VIA E-MAIL AND FEDERAL EXPRESS  
(chrisjshull@gmail.com)

REPLY REQUESTED

Mr. Christopher J. Shull  
Shullian Productions, LLC  
120 Deerfield Dr.  
Cherry Hill, New Jersey 08034  
USA

Re: Unauthorized Use of "AUTOMAGICALLY"  
Client-Matter No. 081676-0010

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Dear Mr. Shull:

We represent TuneUp Media ("TuneUp") in its intellectual property matters. TuneUp is the owner of United States Trademark Application No. 77/646,827 and 77/646,830 for the marks AUTOMAGICALLY and YOUR MUSIC COLLECTION IS A MESS TUNEUP FIXES IT AUTOMAGICALLY. As you may know, TuneUp provides software which is specifically designed to "clean up" an individual's digital music library or collection by correctly labeling songs and inserting missing cover art. TuneUp launched its product in December 2008 and, since that time, TuneUp has been using the AUTOMAGICALLY mark consistently with its product and on its website.

Under federal law, Section 43 of the Lanham Act, 22 U.S.C. §1125 states in relevant part:

(a)(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

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It has recently come to TuneUp's attention, that you are using the term "auto-magically" on your website and on Apple.com ([www.apple.com/downloads/macosx/ipod\\_itunes/getlyrical.html](http://www.apple.com/downloads/macosx/ipod_itunes/getlyrical.html)) in connection with your Get Lyrical software. Your use of "auto-magically" in connection with this software is likely to result in actual confusion amongst consumers who will conclude that there is either a relationship between TuneUp and Shullian Productions, or who will be outright confused as to the products and their source of origin.

The AUTOMAGICALLY mark is an enormously valuable asset of TuneUp. Therefore, TuneUp strongly objects to your use of "auto-magically" in connection with your software. To preserve the integrity of the AUTOMAGICALLY mark, and to maintain its legal rights in the mark, TuneUp cannot permit you to use "auto-magically" in any manner likely to cause confusion or likely to reduce the distinctiveness of the mark. Your use of a mark so nearly identical to that of TuneUp constitutes trademark infringement, unfair competition, false advertising and passing off. In addition, your adoption of a nearly identical mark is reflective of an intent to trade on the goodwill that TuneUp has developed in the AUTOMAGICALLY mark at substantial expense.

Accordingly, we hereby demand that you immediately and permanently cease use of "auto-magically" on your website as well as in the description of your software on Apple.com. Furthermore, we demand that you immediately and permanently cease and desist use of any other confusingly similar mark and confirm that you will not adopt any confusingly similar mark now or at anytime in the future.

Given the gravity of this matter, we must receive your written assurances, as outlined above, by **December 22, 2009**. Therefore, please sign and return this letter within the afore-mentioned timeframe to evidence your compliance and agreement with our request. Without such written assurances, TuneUp will have no option but to consider other forms of relief to which it may be entitled.

This letter is written without prejudice to any of TuneUp's rights and remedies, all of which are expressly reserved.

Sincerely,



Lynne M.J. Boisineau

cc: TuneUp Media, Inc.

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ACKNOWLEDGED AND AGREED:

**Shullian Productions, LLC**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_