

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

THE ROMANTICS a/k/a MASTER BEAT, INC.,  
a Michigan corporation; WALLY PALMAR;  
MIKE SKILL; and COZ CANLER,

Plaintiffs,

vs.

Case: 2:07-cv-14969  
Judge: Roberts, Victoria A  
Referral MJ: Majzoub, Mona K  
Filed: 11-20-2007 At 04:21 PM  
CMP THE ROMANTICS ET AL V. ACTIVISI  
ON PUB ET AL (DA)

ACTIVISION PUBLISHING, INC.; a California  
corporation; HARMONIX MUSIC SYSTEMS,  
INC.; a Massachusetts corporation; REDOCTANE,  
INC., a California corporation; and WAVEGROUP  
SOUND, a California corporation.

Defendants.

WILLIAM H. HORTON (P31567)  
SEAN M. WALSH (P48724)  
ELIZABETH A. FAVARO (P69610)  
Attorneys for Plaintiffs  
GIARMARCO, MULLINS & HORTON, P.C.  
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☎ (248) 457-7000

**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

NOW COME Plaintiffs, by their attorneys, GIARMARCO, MULLINS & HORTON, P.C.,  
and pursuant to FRCP 65 move this Honorable Court for a preliminary injunction enjoining  
Defendants, during the pendency of this action, from advertising, offering for sale, selling,  
distributing or otherwise making or selling the video game, "Guitar Hero Encore, Rocks the  
80s" ("the Game") or otherwise using the identities, persona, and distinctive sound of

Plaintiffs in connection with the Game, for the reasons stated in the accompanying brief and pursuant to the proposed order attached to that brief.

GIARMARCO, MULLINS & HORTON, P.C.

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

WILLIAM H. HORTON (P31567)  
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Dated: November 20, 2007

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**BRIEF RE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

Plaintiffs are entitled to a preliminary injunction. Absent injunctive relief, Defendants will continue to use a sound-alike imitation of a Plaintiffs' famous song, "What I Like About You," to drive sales of their video game "Guitar Hero Encore, Rocks the 80s." Defendants' actions violate Plaintiffs' exclusive rights in their identities, persona, and distinctive sound. In addition, Defendants' actions create the false and misleading impression that Plaintiffs

endorse Defendants' product.

## FACTS

Plaintiffs Palmar, Skill, and Canler are the members of the popular band "The Romantics." Plaintiffs have performed individually and as "The Romantics" for almost 30 years and have sold millions of copies of their recordings worldwide. Exhibit A, Affidavit of Walter Palamarchuk at ¶12. Plaintiff Master Beat, Inc. owns the registered trademark for the name "The Romantics" and is the entity through which the band typically conducts business.

The individual Plaintiffs wrote or made famous the song "What I Like About You (the "Song"). Both individually and collectively, Plaintiffs are identified with the Song and derive a substantial income from their regular performances of the Song, as well as the licenses for the publishing and recording rights. *Id.* at ¶14. These licenses have led to the Song's use in movies such as "Shrek 2," the Disney remake of "Freaky Friday," and "The Simpsons Movie," among others, and in various advertising campaigns including Budweiser, Barbie dolls, and the Los Angeles Dodgers baseball team. *Id.*

Defendants Activision Publishing, Inc., Harmonix Music Systems, Inc., and RedOctane, Inc. publish, develop, and distribute interactive entertainment software products (collectively referred to as "publisher Defendants"). The publisher Defendants have published, developed, and distributed the video game series, "Guitar Hero," the object of which is for the player to play musical notes from a famous song on a simulated guitar in the same order and at the same time as those displayed on a video screen. The vast majority of the songs on the Guitar Hero series are performed by Defendant WaveGroup.

In July 2007, Defendants released the game, "Guitar Hero Encore, Rocks the 80s"

(the "Game"), which contains the Song. Plaintiffs' fans reported to them that they believed the Game contained the Song as performed by Plaintiffs. Exhibit A at ¶15. However, investigation revealed that the Song is not the Master, which is regularly licensed for commercial use, but instead a sound-alike imitation recorded by Defendant Wave Group. *Id.* at ¶16. Defendants do not have the permission of Plaintiffs or have compensated Plaintiffs to use the Master or to imitate the distinctive sound, persona and identity of the band.

Plaintiffs further investigation revealed that the Song on the Game was not the Master, but rather a sound-alike imitation which confused fans. One of Plaintiffs' attorneys, Michael Novak, contacted Defendant Activision to discuss the issue with the person in charge of licensing. This person, Jason Bodell, confirmed that the Song was not the Master, but a "re-record." Exhibit B. Mr. Novak also spoke with one of Activision's lawyers, who also confirmed the Song was an imitation and admitted that "maybe they [Defendant WaveGroup] did too good a job":

He [Activision's General Counsel] confirmed that the song was not the master but a "re-record." He told me that a company from San Francisco called Wave Group Sound had recorded the song for use on Guitar Hero. I asked him if he had any concerns that the song was a sound-alike and he said that "maybe they did too good a job."

Exhibit B at ¶17 (emphasis added).

Likewise, in an just a few days ago – on November 13, 2007 – a WaveGroup executive admitted that WaveGroup tried to imitate the songs on Guitar Hero as closely as possible to "make the songs as true to the originals as possible" and to "create the illusion" that they are the original. Exhibit C.

The Guitar Hero series has been one of the most successful game series ever

produced. The Game has been gaining momentum since its release in July, presumably due in part to the Song, which Plaintiffs never gave any of the Defendants permission to imitate for their own commercial advantage. Plaintiffs bring this action and seek injunctive relief to prevent further violations of their rights.

### LAW

FRCP 65 provides for the issuance of preliminary injunctions. The Sixth Circuit has specified four factors which trial courts should consider in determining whether a preliminary injunction should be issued:

1. Whether the plaintiff will suffer irreparable injury if the injunction is denied;
2. Whether the harm to the plaintiff if the injunction is denied will outweigh the harm to the defendant if the injunction is granted;
3. Whether the public interest would be served by issuing a preliminary injunction; and
4. Whether the plaintiff is likely to prevail on the merits.

E.g., Stile v Copley Township, 115 F Supp 2d 854, 859 (ED Mich 2000).

"No single factor is determinative as to the appropriateness of equitable relief," and, in general "the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent an injunction." Detroit Plumbing & Mechanical Contractors Assn v Dept of HEW, 418 F Supp 585, 586 (ED Mich 1976). Thus, if the likelihood of success on the merits is great, a lesser showing on the other three elements is required.

## PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS AND WILL BE IRREPARABLY HARMED

The law is clear regarding the unauthorized use of sound-alike recordings: they cannot be used for commercial gain and such use specifically prohibited by the Lanham Act as a false endorsement. Absent injunctive relief, Defendants will continue to develop, publish, and distribute copies of the Game containing the imitation of Plaintiffs' song to drive sales.

### 1. Right of Publicity.

Michigan has long recognized the right of a person to be free from unauthorized publicity for commercial purposes. E.g., Pallas v Crowley, Milner & Co, 322 Mich 411 (1948) (The Michigan Supreme Court answered affirmatively the question: "Does the unauthorized publication of another's photograph for the purpose of advertising or commercial gain give rise to an action for damages by the person whose photograph is thus published?"); Carson v Here's Johnny Portable Toilets, Inc, 698 F2d 831, 837 (6<sup>th</sup> Cir 1983) ("a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes.") (applying Michigan law); Lewis v Legrow, 258 Mich App 175, 193 (2003) ("Michigan has long recognized the common-law tort of invasion of privacy. . . [which includes] the appropriation of another's likeness for the defendant's advantage.").

The use and commercial exploitation of a song that imitates a singer's distinctive sound constitutes a violation of the singer's right of publicity. Waits v Frito-Lay, 978 F2d 1093 (9<sup>th</sup> Cir 1992). In Waits, the court upheld the jury verdict finding that Frito-Lay's use of

a singer impersonating Tom Waits' voice on a commercial to sell snack chips violated Waits' right of publicity. The holding was based on Waits' evidence that people who were familiar with his voice actually thought he had performed on the commercial, that his voice was distinguishable from other singers, and that his voice was widely known.

The Waits sound-alike case is not unique. For example, in Midler v Ford Motor Co, 849 F2d 460 (9<sup>th</sup> Cir 1988) the Ninth Circuit held that singer Bette Midler had a claim for violation of her right of publicity in her distinctive voice. There, Ford Motor Co hired Ms. Midler's back-up signer to perform on a Ford television commercial. Viewers were led to believe the singer was Ms. Midler. The court held that Defendants' deliberate imitation of Midler's distinctive, widely-known voice to sell their product violated her right of publicity. As the court explained:

A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. . . . The singer manifests herself in the song. To impersonate her voice is to pirate her identity.

Id. at 463. Accord: Tin Pan Apple, Inc v Miller Brewing, 1194 US Dist Lexis 2178 (SDNY 1994) (Exhibit D).

This is what Defendants here have done – they have pirated Plaintiffs' identity, persona, and distinctive sound for their own commercial advantage without Plaintiffs' consent and to Plaintiffs' detriment. Defendants have admitted that they try to imitate the songs on the Game as closely as possible to "create the illusion" that they are original. Exhibit C. When pressed by Plaintiffs' attorney in this regard, Defendant Activision's General Counsel stated that Defendant WaveGroup might have done "too good a job" in their imitation of "the Romantics." Exhibit B at ¶17. Defendants' unauthorized sound-alike of Plaintiffs' Song –



which has sold hundreds of thousands of copies – is directly aimed at driving sales of its Game. Why else would Defendants so widely publicize the Guitar Hero series and the release of this Game? See Exhibit C.

2. Lanham Act.

Plaintiffs also have a likelihood of success on their Lanham Act (trademark) claim, as Defendants' imitation of Plaintiffs' song to drive their sales of the Game amounts to a false endorsement.

Courts have recognized false endorsement claims for the unauthorized use of any symbol or device, including an artist's distinctive sound or voice, which is likely to mislead consumers as to the artists' endorsement of a product. See, e.g. Waits, 978 F2d at 1106-1107 (explaining that a distinctive sound constitutes a commercial "mark"); Allen v Men's World Outlet, Inc, 679 F Supp 360 (SDNY 1988); Dallas Cowboys Cheerleaders, Inc v Pussycat Cinema, Ltd, 604 F2d 200 (2d Cir 1979); Tin Pan Apple, Inc v Miller Brewing Co, 1994 US Dist LEXIS 2178 (SDNY 1994) (Exhibit D).

To determine whether consumer confusion is sufficiently likely to justify an injunction, courts use a totality of the circumstances approach and consider, among other things: (1) evidence of actual confusion; (2) the strength of the mark; (3) the similarity between the original and copied work; (4) the defendant's good faith; (5) the quality of defendant's product; and (6) the sophistication of the buyers. Tin Pan Apple, Inc at 6; Lang v Retirement Living Publishing Co, Inc 949 F2d 576, 580 (2d Cir 1991).

Evidence of actual confusion by consumers weighs strongly in favor of injunctive relief. Tin Pan Apple, Inc at 15-6. In Tin Pan Apple, the individual plaintiffs formed the band, "Fat

Boys," which became famous for its unique musical and performing style and its appearance. Defendants' beer commercial included an imitation band, which copied the Fat Boys' style, appearance, and sound. In holding that injunctive relief was appropriate, the court relied heavily upon affidavits from Plaintiffs describing how fans had informed the group that they were certain that Fat Boys actually appeared in the commercial. The court stated:

Fans of the Fat Boys are members of the public and consumers of the group's musical and vocal services. Their declarations, as recounted by West, manifest a form of confusion closely analogous to that held sufficient in Dallas to justify equitable relief.

1994 US Dist LEXIS 2178 at 5. See also Dallas Cowboys Cheerleaders, 604 F2d at 205 ("The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement.").

Here, Plaintiffs' evidence is equally compelling and justifies injunctive relief. In his sworn-to affidavit, Plaintiff Palamarchuk stated that fans had informed him that they actually thought that the rendition of the Song on the Game was the version performed by the Romantics. Exhibit A at ¶15. Even in the face of prior disputes over similar sound-alikes (Exhibit B at ¶16) Defendants admitted that they deliberately tried to imitate the artists whose songs appear on the Game in an effort to "create the illusion" that the songs are the originals. Exhibit C. To the extent that the "re-records" sound exactly alike the originals, as in this case, Defendants further admit that "maybe [Defendant WaveGroup] did too good a job." Exhibit B at ¶17. Indeed, Defendants know how to

3. Unfair Competition.


Plaintiffs will also prevail on their state law claim of unfair competition. Michigan law

on unfair competition uses the same likelihood of confusion analysis as federal trademark law. Wynn Oil Co v American Way Serv Corp, 943 F2d 595, 605 (6<sup>th</sup> Cir 1991); Carson, 698 F2d at 833; Two Men & A Truck/Int'l, Inc v Two Men and a Truck/Kalamazoo, Inc, 949 F Supp 500, 503 (WD Mich 1996). Thus, for the same reasons described above, Plaintiffs are likely to succeed on their unfair competition claim.

### CONCLUSION

Plaintiffs will be irreparably harmed without immediate injunctive relief. Plaintiffs request that this Court enjoin Defendants from further development, publication, and sale or distribution of Guitar Hero games containing Plaintiffs' Song.

GIARMARCO, MULLINS & HORTON, P.C.

By: 

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Dated: November 20, 2007

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

THE ROMANTICS a/k/a MASTER BEAT, INC.,  
a Michigan corporation; WALLY PALMAR;  
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vs.

Case No.: 07-  
HON.  
MAGISTRATE JUDGE

ACTIVISION PUBLISHING, INC.; a California  
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Troy, Michigan 48084-5280  
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---

AFFIDAVIT OF  
WALTER PALAMARCHUK

---

WALTER PALAMARCHUK, p/k/a Walter Palmar, deposes and says:

1. I am a recording artist and a member of the band "The Romantics." I can competently testify as to the facts contained in this affidavit.
2. I was one of the founding members of The Romantics in 1977. In 1979,

the band signed a recording contract with Nemperor Records. We subsequently released the album called "The Romantics" which included the song "What I Like About You" (the "Song"). I believe the album has sold more than one million copies.

3. The Romantics have released five albums, including another platinum album in 1984 entitled "In Heat" which contained the hit "Talking in Your Sleep." In addition, the band has toured throughout North America, Europe, Japan, Australia, and South America and continues to tour today.

4. In addition to our own regular performances of the Song, The Romantics also derive a substantial income from licensing the original studio recording ("Master") of the Song. The Master of the Song has been licensed for use in movies such as "Shrek 2," the Disney remake of "Freaky Friday," and "The Simpsons Movie." It has also been used in advertising campaigns for Budweiser, T.G.I. Friday's restaurants, Barbie dolls, and the Los Angeles baseball team.

5. Earlier this year, fans informed us that they had heard The Romantics' performance of the Song on the "Guitar Hero Encore, Rocks the 80s" video game (the "Game"). However, when I checked with our business manager, I was informed that we had not received a royalty for the Song from any of the Defendants, which lead me to believe that Defendants had not used the Master. When I listened to the Song on the Game, I confirmed that the Song on the Game was not the Master, although it was a very good imitation.

6. We subsequently confirmed from Defendants that the Song that appears on the Game is not the Master as recorded by The Romantics. Instead, it is a sound-alike imitation.

7. When we confirmed that the Song on the Game was not the Master, I was very upset because the band had worked very hard over many years to develop and use its distinctive sound, especially when performing the Song. Instead, without permission or compensation, Defendants held out the Song on the Game to be the Master and that the band had agreed to such a use.

Further affiant sayeth not.

I DECLARE THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY INFORMATION,  
KNOWLEDGE AND BELIEF.

\_\_\_\_\_  
WALTER PALAMARCHUK, p/k/a Walter Palmar

Dated: November 20, 2007

# **EXHIBIT B**



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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---

AFFIDAVIT OF  
MICHAEL A. NOVAK

---

MICHAEL A. NOVAK deposes and says:

1. I am an attorney licensed in Michigan and California. I practice primarily in the area of entertainment law, representing recording artists, television and radio personalities, authors and other persons in the entertainment industry, including The

Romantics. If called as a witness, I can competently testify as to the facts contained in this affidavit.

2. After consulting with my clients in this case, on November 7, 2007, I contacted Defendant Activision by telephone and requested to speak with the person in charge of obtaining licenses or clearances for the Guitar Hero series of video games.

3. The following day, November 8, 2007, I spoke with Jonathan Bodell, who told me he was the Music Department Coordinator for Activision and was in charge of obtaining licenses or clearances of music on Guitar Hero. I told him I represented The Romantics and asked what licenses or clearances Activision had for The Romantics' song "What I Like About You" for use on Guitar Hero Encore, Rocks The 80s.

4. He told me that Activision had obtained a publishing license from the holder of the publishing copyright, EMI. He told me that Activision had not licensed the master recording of the song, but rather the song on Guitar Hero was a "re-record."

5. I asked him whether he was concerned that the performance of "What I Like About You" on Guitar Hero was a sound-alike imitation of The Romantics. He told me the "studio" had been told not to do a sound-alike because Activision had had a problem with a sound-alike song previously.


6. On November 14, 2007, I spoke by telephone with Gregory D. Deutsch, Vice President of Business & Legal Affairs for Activision. I understood that he was an attorney for Activision. I told him I was a lawyer who represented The Romantics and was calling about Activision's use and performance of The Romantics' song "What I Like About You" on Guitar Hero. He confirmed that the song was not the master but a "re-record." He

told me that a company from San Francisco called WaveGroup Sound had recorded the song for use on Guitar Hero.

7. I asked him if he had any concerns that the song was a sound-alike and he said that "maybe they did too good a job." He said he would listen to the song on the game and call me back. He never called me back.

Further affiant sayeth not.

I DECLARE THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY INFORMATION,  
KNOWLEDGE AND BELIEF.

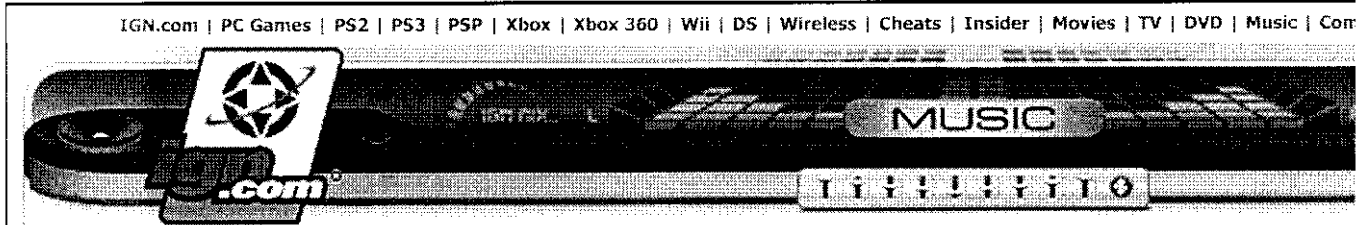
  
MICHAEL A. NOVAK

Dated: November 20, 2007

# **EXHIBIT C**

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IGN » Entertainment » Music » Features

## Guitar Hero III: Behind The Music

Will Littlejohn of WaveGroup discusses the sounds that populate the game.

by IGN Staff

**November 13, 2007** - WaveGroup might not be well known outside of hardcore videogame circles, but the California based collective of musicians and engineers has an output which is heard the world over thanks to their participation in the uber successful Guitar Hero franchise, as well as other musically oriented games such as Karaoke Revolution, Dance Dance Revolution, and Beatmania.

With the recent release of Guitar Hero III: Legends of Rock, not to mention all of the Guitar Hero in-game soundtracks being made available via digital download, we thought it was a good time to get in touch with the WaveGroup and grill them on their work with the popular games.

We caught up with Will Littlejohn who is the CEO and president of WaveGroup. He has produced and mixed over 400 full length songs featured in Guitar Hero, Guitar Hero II, and Guitar Hero Encore: Rock's the 80's, Guitar Hero III: Legends of Rock, amongst others. To date, WaveGroup has created audio content for over 70 interactive titles.



**IGN Music: How did Wavegroup first come to be attached to the Guitar Hero franchise?**

**Will Littlejohn:** We've actually been involved from the very beginning. We had worked with Harmonix on the Karaoke Revolution series of games for Konami, and had a great relationship with them. When Red Octane approached Harmonix with the Guitar Hero idea, they in turn approached us about doing the music for the game. We thought it was a great concept, and jumped on board immediately.

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**IGN Music: How many musicians actually worked on the music for the games?**

**Will Littlejohn:** I don't know an exact count, but I'd guess somewhere between 70-80 players and vocalists to date. Also, there are about a dozen hardworking engineers and assistants who help to create the songs.

**IGN Music: What instruments were utilized?**

**Will Littlejohn:** That's a great question, and gives me an idea for a side project. I'm gonna make a giant list of all the specific instruments that have been used in the series and post it on our site (www.wavegroup.com). In the meantime, I'll give you some estimates. We've probably used 10 different drums kits, with dozens of different snares. Maybe 50-60 guitars, everything from vintage Les Pauls to the famous \$30 Kay that Nick Gallant played in the behind the scenes video on GHII. In the bass department, I'd estimate 20-30 different instruments. Keyboards are mostly synths and virtual instruments, but we have tracked acoustic piano, as well as some vintage stage keyboards. For special instruments, I've talked before about the old metal fan we rounded up for the beginning of "Iron Man". To get the sound of that intro vocal, which I actually did myself, we researched the song and found out how it was done the first time. After finding a similar one on eBay, we tracked the vocal thorough the fan to get the sound. We've played motorcycles in "Radar Love", used amp noise as an instrument in "Hush", riffed with bone cracking in "Balls To The Wall", smacked some crotales in "YYZ", you get the idea.



**IGN Music: Where and when did each of the recording sessions take place for the various games?**

**Will Littlejohn:** Most of the recording and production work is done in our two facilities in the San Francisco bay area. However, we also do sessions all over the country, depending on the players and their schedules. Several of our players are also formidable engineers, so they sometimes record themselves in their own spaces. For most of the songs, we tend to do them one at a time, with the whole recording process devoted to the sound of that particular tune. Drum miking, guitar amps, instruments, as well as the players themselves are chosen specifically for each individual song. As for when, I'd have to say that we record literally at all times of the day and night. We've gotten stunning performances at 3 in the morning, and 3 in the afternoon.

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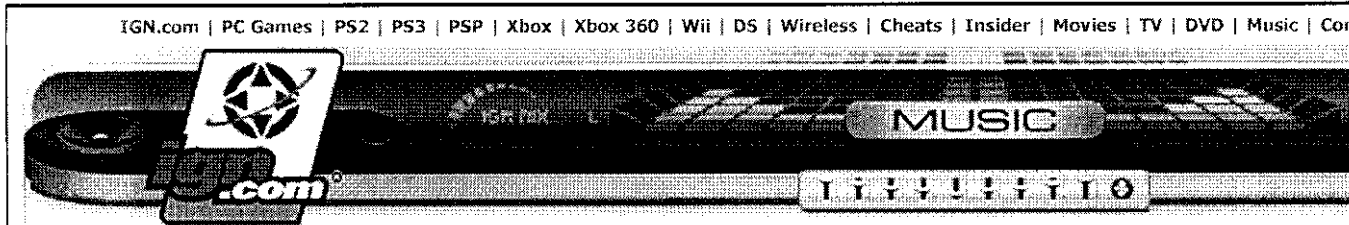
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# Guitar Hero III: Behind The Music

by IGN Staff

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## IGN Music: How involved was Wavegroup and the various musicians in choosing the 97 songs that were used in the various games?

**Will Littlejohn:** Actually, as a group we were fairly hands off in the process of choosing the songs. We did submit our suggestions, but Harmonix and Red Octane really were in charge of vetting the list and getting the licenses to do the songs. Hats off to them for some really incredible selections. Marcus Henderson, one of our guitarists, was on the selection committee for GHIII as he actually worked for Red Octane them at the time.



## IGN Music: What goes through one's mind when setting about to cover some of the classic rock tunes of all time?

**Will Littlejohn:** All of the things you can imagine. Can we do the song justice? How do we capture the real essence of this song? Who the hell can sing THAT?? Seriously, we generally live with the songs for a bit before even attempting to choose the players and vocalists we want to involve. Then we approach the players, and see if the songs strike a chord in them, as we want every song to be played by people who are really into the tune. People playing the game are going to live inside of these recordings, so they better be played with passion.

## IGN Music: Was the decision to produce enhanced versions of many of the songs up to the Wavegroup musicians or was that something mandated by Red Octane?

**Will Littlejohn:** It has be a mixture of ideas from our side, as well as suggestions from the Harmonix team for GHI, GHII, and GH 80's. With GHIII, we've worked with Neversoft in the same capacity. Sometimes the developers have already determined that a song is perfect for the game, but might need a little extra juice to make it really fun to play. In that case, we're given the direction to add a solo or enhance the arrangement in some way. In other cases, we would come up with ideas in the studio, and write the new parts ourselves. One of our favorite things to do is be evil and create nasty little solos at the very end of songs, just take keep everyone on their toes.



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**IGN Music: How did you decide when to embellish, tweak, add flourishes, etc. to some of the songs?**

**Will Littlejohn:** I'd say that probably 70 percent of the tweaks are thought up in the studio, during the recording sessions. The rest are ideas that we come up with while we are getting to know the songs in pre production, or are requested by the developers. We're always thinking about the game gems, and what makes guitar parts really fun in Guitar Hero, so this spurs good ideas at all stages. Above all though, we really make sure that the additions are true to the song and the original artist. Stylistically, we really try to capture the original players.

**IGN Music: What is the background of the musicians who were involved in Guitar Hero? Are any of them in other bands?**

**Will Littlejohn:** The players and vocalists are from very diverse backgrounds. Many are professional studio musicians, some are in working bands, and some are casual players with a unique ability. I won't go into listing individual people, but it's safe to say that you've probably seen some of them at concerts or a local club somewhere.



**IGN Music: Is it tough being "behind the scenes" so to speak and covering the music of others rather than having your own original material in the games?**

**Will Littlejohn:** Yeah, in some ways it can be frustrating. We have always wanted to put in some of our own material, but have always been completely slammed with deadlines to submit our stuff. That being said, we do get to record killer songs with the attention they deserve, so it's not so bad. The irony being that we have lots of songs piled up around here, and no time to pitch them to the developers. Maybe in the next game....

**IGN Music: When performing the tracks are you more conscious about how the song will work within the context of the game or just making it rock as hard as it can?**

**Will Littlejohn:** As I've said, we're always keeping an eye on the gameplay aspect, but the song has to absolutely rock first and foremost. The whole thing about the game is the illusion of being a rock star, and you can't do that without shredding performances.

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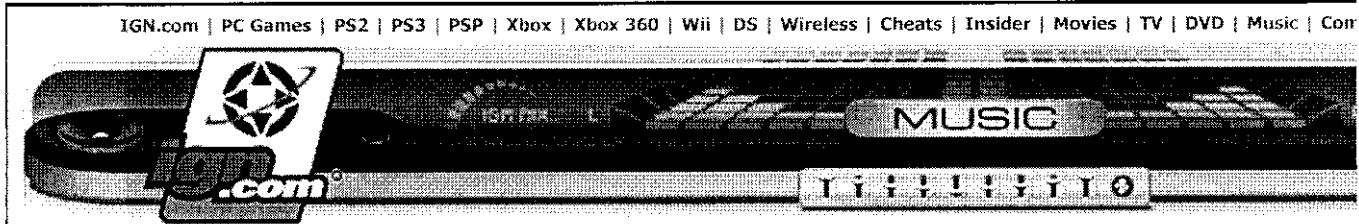
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**IGN Music: How many different guitarists were used throughout the recordings and how much of their input was given to the added solos? (i.e. were they allowed to riff or was it pretty structured)?**

**Will Littlejohn:** I believe we have worked with 7 different guitarists in the series. They all have unique strengths, and bring their own styles to the songs. Regarding the solos, most are the creations of the guitarists themselves. I would give them loose direction, such as what we were trying to accomplish with the solos musically, and they would run with it. Once in a while I'll jump in the session and work directly with the guitarist on melodies, but they are the ultimate creators.

**IGN Music: What do you think about the legions of "air guitarists" and gamers who play the game? Is it your wish that they might discover the joy of music and actually decide to pick up a real guitar or are you happy with them just enjoying the fantasy?**

**Will Littlejohn:** It's funny, I just watched the *South Park* episode with Stan and Kyle playing Guitar Hero, and loved how they thought playing a real guitar was for old people. It's hysterical and a little frightening. For me, the game is a big deal, as it makes the real feeling of playing an instrument accessible to everyone. I think there is no substitute for the real thing, but this game gives everyone a taste without the commitment to years of practice on a real instrument. However, lots of people are being exposed to the magic of making music in this secondary way and running with it. This is now almost becoming an art form all unto itself. There really are guys out there like Stan and Kyle, who do spend all of their time playing this game, and have no interest in learning to play for real. Do I wish they discover the joy of making music on a real instrument? Sure, but I'm also okay with spreading the feeling of making music on a real instrument. Ultimately, music is being enjoyed and that's what important.

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**IGN Music:** When recording the songs was it your intention to be as true to the original recordings as possible or did you set out to make them stand apart from their counterparts?

**Will Littlejohn:** We've always wanted to make the songs as true to the originals as possible, with any departures directly benefiting gameplay. This is why we're really careful not to get too crazy with the arrangements. It's a fine line between covering a song in the original artist's style and taking the song in your own direction. Our job has always been to create the illusion for the player of being a part of the song, and you can't do that if the song doesn't resonate with the player because they don't like the recording. It's interesting to see the reactions of people to these recordings, because of the emotional attachment they have to certain songs.

**IGN Music:** Did you get any feedback from any of the original artists about the covers? You know did somebody call up and remark that they totally dug how you expanded their solo or tweaked the song a certain way? Have any of the original musicians given you guys kudos for your work?

**Will Littlejohn:** I've heard stories from a few of the musicians about some nice comments, but I haven't heard from anyone directly.

**IGN Music:** Which Guitar Hero was the most challenging to work on? Was there one installment that offered up songs that required a lot more attention, detail, and tweaking?

**Will Littlejohn:** In terms of difficulty, all of the games were challenging in their own way. We are fanatics about detail, so every edition was a lesson in patience. Also, every Guitar Hero game has the really insane couple of songs that take lots of extra production time to complete. Overall, I'd have to say that the 80's edition was the most challenging because of a very tight schedule. "Play With Me" didn't help either...

**IGN Music:** Which of the songs in all of the variations of the game proved to be the most challenging to record and put your own unique Wavegroup stamp on?

**Will Littlejohn:** Let's see. "Play With Me" almost killed Doug Doppler, the guitar player. He worked for weeks on that song, and should be commended for utter insane dedication. I tortured him with every measure in that song, and he came through with a smile. "More Than A Feeling" on GHI was a real monster, with very exacting guitars and vocals. This time the kudos goes out to Rich Elkerton for singing the highest notes ever reached by a human male. Of course, you can't leave out "Freebird," and "Hanger 18," and "YYZ," and...I guess I can't give you one song.

**IGN Music:** Are there any songs that you wish had been included on the games, specific songs that you know you could have done supreme justice to?

**Will Littlejohn:** Ha! That list could go on forever...As a matter of fact, every day we're coming up with new songs we'd love to do.


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# **EXHIBIT D**

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TIN PAN APPLE, INC., SUTRA RECORDS, INC., FOOLS PRAYER MUSIC, INC. and MARK MORLES, DARREN ROBINSON and DAMON WIMBLEY (together p/k/a the "FAT BOYS"), Plaintiff, v. MILLER BREWING CO., INC., BACKER & SPIELVOGEL, INC. and JOE PISCOPO, Defendants.

88 Civ. 4085 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK

1994 U.S. Dist. LEXIS 2178; 30 U.S.P.Q.2D (BNA) 1791; Copy. L. Rep. (CCH)  
P27,238

February 23, 1994, Decided

February 24, 1994, Filed

**COUNSEL:** [\*1] For Plaintiffs: RICHARDS & O'NEIL, New York, NY, Jonathan Zavin, Esq., Lawrence S. Kamerman, Esq., Of Counsel.

For Defendants: DAVIS & GILBERT, New York, NY, Howard J. Schwartz, Esq., Howard Wingrad, Esq., Of Counsel.

**JUDGES:** HAIGHT, JR.

**OPINION BY:** CHARLES S. HAIGHT, JR.

**OPINION**

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

In this action alleging copyright infringement, Lanham Act violations, and pendent state statutory and common law claims, defendants' motion to dismiss the first amended complaint under *Rule 12(b)(6)*, *Fed. R. Civ. P.*, was granted in part and denied in part in an opinion reported at 737 *F. Supp.* 826 (S.D.N.Y. 1990), familiarity with which is assumed. Following extensive discovery, defendants now move for summary judgment under *Rule 56* dismissing the plaintiffs' surviving claims.

I

*Standards for Granting or Denying Summary Judgment*

Under *Fed.R.Civ.P. 56(c)*, the moving party is entitled to summary judgment if the papers "show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." On such a motion, "a court's responsibility is to assess whether there are any factual issues [\*2] to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Coach Leatherware Co., Inc. v. Ann Taylor, Inc.*, 933 *F.2d* 162, 167 (2d Cir. 1991) (citing *Knight v. U.S. Fire Insurance*, 804 *F.2d* 9 (2d Cir. 1986), cert. denied, 480 U.S. 932, 94 L. Ed. 2d 762, 107 S. Ct. 1570 (1987)) (citation omitted). The responding party "must set forth specific facts showing that there is a genuine issue for trial." *Fed.R.Civ.P. 56(e)*. "The non-movant cannot 'escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts,' . . . or defeat the motion through 'mere speculation or conjecture.'" *Western World Ins. Co. v. Stack Oil, Inc.*, 922 *F.2d* 118, 121 (2d Cir. 1990) (citations omitted). While the party resisting summary judgment must show a dispute of fact, it must also be a material fact in light of the substantive law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." [\*3] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

II

*The Copyright Infringement Claims*

The Copyright Act furnishes the governing law for plaintiffs' copyright infringement claims. Where proof of unauthorized copying of protectible material rises to the level where no reasonable juror could find otherwise, a copyright holder is entitled to summary judgment on the issue of infringement. *Rogers v. Koons*, 960 *F.2d* 301,



307 (2d Cir.), *cert. denied*, 121 L. Ed. 2d 278, 113 S. Ct. 365 (1992). Conversely, and more pertinent to the present motion, where the similarity demonstrated pertains solely to noncopyrightable material, summary judgment for the accused infringer is appropriate. *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 915 (2d Cir. 1980).

Plaintiffs' second amended complaint, filed after this Court's opinion on defendants' motion to dismiss, alleges in its first claim that the Miller Beer television commercial produced and performed by defendants infringed plaintiffs' [\*4] registered copyrights in a number of musical compositions listed in P 16 of the pleading. The second claim alleges that defendants infringed plaintiffs' copyrights in the sound recordings of those compositions.

Subsequent discovery sharpened the focus of plaintiffs' claims. In responses to defendants' interrogatories, plaintiffs now say that the musical composition defendants copied is called "Stick 'Em," and the sound recording defendants copied is that of the same composition. Plaintiffs identify the Particular "musical and lyrical phrases" defendants copied as including, *inter alia*, the sounds designated as the 'Brrr' and 'Hugga Hugga' sounds." Plaintiffs' response to defendants' interrogatory no. 5 (second set). The composition "Stick 'Em" is one of several compositions appearing on a video tape made by the individual plaintiffs, professionally known as the "Fat Boys," which at the pertinent times was available for purchase at retail stores.

Plaintiffs obtained Composition Copyright Registration Number PA 229-080 for the composition "Stick 'Em" and Sound Recording Copyright Registration Number SR 59-448 for the same work. Specifically, Registration Number PA 229-080 is for [\*5] the work titled "Stick 'Em"; the specified nature of the work is "words & music"; the authors are plaintiffs Morales and Robinson; and the copyright claimant is plaintiff Fools Prayer Music, Inc., "as per songwriters agreement." Registration Number SR 59-448 is on a form the Copyright Office apparently uses for sound recordings; the "nature of material recorded" is designated as "musical"; the title of the work is "Fat Boys SUS-1015 (album)", a reference to the album comprising "Stick 'Em" and a number of other works; and plaintiff Sutra Records, Inc. is identified as both the author of the work and copyright claimant.

The Copyright Act provides that a certificate of registration "shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. § 410(c). The certificate "establishes a presumption of originality in the work registered." *Business Trends Analysts, Inc. v. The Freedonia*

*Group, Inc.*, 700 F. Supp. 1213, 1231 (S.D.N.Y. 1988). The presumption of originality conferred by a certificate of registration is inherent in the statutory scheme, since only [\*6] "original works of authorship" are entitled to copyright protection. 17 U.S.C. § 102(a). See also *Rogers v. Koons*, *supra*, at 307 ("Since the [Copyright Act] protects authors' exclusive rights to their works, the cornerstone of that law is that the work protected must be original."). In *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988), a case involving a musical composition, the Second Circuit said that "on the issue of originality, as compared to the issue of compliance with statutory formalities, it is even clearer that copyright registration created a presumption of validity under the 1909 [Copyright] Act." That presumption applies *a fortiori* to the case at bar, arising under the 1976 Copyright Act, since "unlike the 1976 Act, . . . the 1909 Act does not say that the certificate of registration shall constitute prima facie evidence 'of the facts stated therein.'" *Id.* at 1064.

In *Koons v. Rogers* the Second Circuit, while recognizing that the copyrighting of a whole work "does not mean that every element of it is copyrighted; copyright protection [\*7] extends only to those components of the work that are original to the creator," went on to say: "But the quantity of the originality that need be shown is modest - only a dash of it will do." *Id.* at 307. In *Gaste v. Kaiserman* the Second Circuit, considering the originality of a musical work, noted that "the originality requirement for obtaining a copyright is an extremely low threshold, unlike the novelty requirement for securing a patent. . . . [A] showing of virtually any independent creativity will do." 863 F.2d at 1066.

The prima facie evidence of copyright validity resulting from the certificate shifts to the alleged infringer "the burden of proving to the contrary." *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 193 (2d Cir. 1985).

These principles are pertinent to the case at bar because defendants contend, at least with respect to plaintiffs' composition copyright for "Stick 'Em," that the sounds "Brrr" and "Hugga-Hugga", standing alone, are not protectible. Defendants analogize the "Brrr" and "Hugga-Hugga" sounds "to a drumbeat, or to any other percussion effect." "As such," the argument continues, [\*8] "while a particular pattern or sequence of these sounds may constitute original musical expression, a single Brrr or Hugga-Hugga sound, like a single drumbeat, does not." Main brief at 18. Defendants submit an affidavit of Earl V. Spielman, a musicologist, who expresses the opinions that the only "significant similarities" between the copyrighted work and the commercial are these two vocal percussion effects," and that only "a particular pattern or sequence of percussion sounds . . . can constitute original musical expression." Spielman's

analysis of the two works causes him to conclude that "the rhythmic patterns created by the respective vocal effects are not similar"; and "because their rhythmic durations are distinctly different from one another there is no indication of copying." Affidavit at PP 8-10.

The threshold issue in copyright infringement cases is originality, not copying. Within the context of the composition copyright, plaintiffs stress that the Copyright Office issued Registration Number PA 229-080 for the "words & music" of "Stick 'Em". They criticize Spielman's analysis as focusing too narrowly on the Brrr and Hugga-Hugga sounds, while disregarding their copyrighted [\*9] function as lyrics. Plaintiffs offer the declaration of John Leland, a writer and critic specializing in popular music, who states that plaintiff Robinson, who generates the Hugga-Hugga sound, "was one of the first rap artists to be known nationally for creating human beat box sounds," thereby earning the industry nickname "the Human Beat Box." Leland also says the Brrr and Hugga-Hugga sounds "were uniquely associated with the Fat Boys"; he adds that "I am unaware of any other rap act that used the lyric/sound 'Hugga-Hugga' or the trilling 'Brrr' lyric sound created by the Fat Boys." Declaration at P 16.

When the originality of a copyrighted work is at issue, it becomes a question of fact for the jury to resolve. See the jury charge appearing in 3 Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions* (4th ed. 1987) at § 99.04, p. 808 (advising the jury in copyright actions that "[the] first disputed issue is originality," and going on to define that concept). This fact question is withheld from the jury only if the accused infringer persuades the trial court that, as a matter of law, plaintiff's work which defendant allegedly copied was not original and hence [\*10] not protectible. The defendant bears the burden of that persuasion in order to overcome the presumption of validity accorded the copyright registration: in this case, registration of the words and music of plaintiffs' work "Stick 'Em." See *Gaste v. Kaiserman at 1065-66*. In *Gaste* Judge Conner submitted to the jury all disputed issues, including that of the validity of the copyright. Affirming a judgment in plaintiff's favor, the Second Circuit held that the trial judge was right to do so, saying of the song at issue: "On the evidence presented by both sides, we cannot say as a matter of law that Gaste's 'Pour Toi' was not original enough to be accorded copyright protection." In *Levine v. McDonald's Corp.*, 735 F. Supp. 92, 99 (S.D.N.Y. 1990), Judge Patterson followed *Gaste* in denying the accused infringer's motion for summary judgment, holding that the jury could find plaintiff's composition "sufficiently creative to warrant copyright protection."

In the case at bar, I conclude that defendants are not entitled to summary judgment dismissing plaintiffs'

composition copyright claim on the ground of copyright invalidity. I hold that a jury could [\*11] find that the Hugga-Hugga and Brrr sounds, used as lyrics in the copyrighted work, are sufficiently creative to warrant copyright protection, quite apart from the rhythmic patterns or durations demonstrated by that work and the commercial. These sounds are more complex than the single drum beat hypothesized in Spielman's affidavit, and in that complexity lies, arguably at least, the fruit of creativity. The relatively few cases considering originality in musical compositions do not point clearly in either direction; they are too fact-specific to do so. While they may not prevail, plaintiffs are entitled to test their claim of originality at trial, where they will have the assistance of a jury instruction concerning the registration's presumption of validity. On this motion for summary judgment, having that presumption in mind and, as I must, resolving ambiguities and drawing reasonable inferences against the moving party, I hold that summary judgment on this issue is not appropriate.

The next issue is copying. In infringement cases copying may be proved by direct evidence, a "rare scenario," *Rogers v. Koons at 307*. "Because copiers are rarely caught red-handed, copying has traditionally [\*12] been proved circumstantially by proof of access and substantial similarity." *Gaste v. Kaiserman at 1066*.

In the case at bar, there is direct evidence of copying that a jury would be entitled to consider. Deposition testimony indicates that defendant Miller wished to promote its beer to younger consumers. An employee of defendant Backer & Spielvogel, Inc., Miller's advertising agency, asked one of the Fat Boys' agents if the Boys would appear with defendant Piscopo in a humorous television commercial for Miller Lite Beer. Plaintiffs rejected that overture out of hand. A Backer employee then purchased a Fat Boys videotape that included the "Stick 'Em" work and made it available to the production team for the commercial. The videotape cover portrayed the Fat Boys in distinctive dress. The Backer employee in charge of production gave wardrobe instructions that Piscopo was to be dressed "as a fat rapper, loosely based on the Fat Boys, a popular black rap group." In casting the commercial for backup artists to appear with Piscopo, the casting agent was instructed to look for black actors "a la the Fat Boys and a la Run-DMC." Run-DMC was another prominent rap group. Its dress and style [\*13] were significantly different from the Fat Boys, which the commercial closely resembles. The writer of the commercial acknowledged listening to the music on the Fat Boys videotape to get the "feel of the sound." Plaintiffs' expert John Mahoney, a musician and music producer, submits an affidavit expressing his opinion that the sound track of the commercial "contained material sampled from the Fat Boys, most probably from 'Stick Em.'"

Affidavit at P 16. "Sampling" in this context means actually physically copying the sounds from one recording to another.

In addition to this evidence of direct copying, plaintiffs rely upon the similarities between "Stick 'Em" and the commercial in respect of the lyrics (Brrr and Hugga-Hugga) and the sound recording. When portions of "Stick 'Em" are juxtaposed with the commercial, as on an exhibit to the affidavit of plaintiff's counsel Jonathan Zavin, the similarities are striking.

Defendants disclaim any copying and put forward explanations for the evidence that would seem to suggest it. They stress that Mahoney was unable to specifically identify which portion of a Fat Boys sound recording defendants sampled (or copied). Mahoney explains that inability [\*14] by the fact that the producers of the commercial discarded the unmixed master tape, which would have permitted a more precise electronic analysis; nevertheless, he adheres to his opinion that sampling of the "Stick 'Em" sound recording occurred. It is common ground that if defendants did sample plaintiffs' copyrighted sound recording, they infringed that copyright, whatever may be said of the composition copyright.

I need not recount the conflicting evidence and contentions at length. The contested issue of copying is not appropriate for summary disposition.

For the foregoing reasons, defendants' motion for summary judgment dismissing plaintiffs' copyright infringement claims is denied.

### III

#### *The Trademark Claims*

Individual plaintiffs Morales, Wimbley and Robinson adopted the name "Fat Boys" to identify their musical performing group. On application by plaintiff Tin Pan Apple, the United States Patent and Trademark Office issued to the group Service Mark Registration Number 1,351054 on July 23, 1985. Plaintiffs allege that they have entered into license agreements for use of the name "Fat Boys" for numerous products, including clothing and toys; that the Fat Boys have become well-known [\*15] for their unique musical and performing style; that the public associates Morales, Wimbley and Robinson specifically with the Fat Boys by reason of their physical size, style of performance and costuming; and that the Fat Boys, by reason of their "message" of abstinence and probity, have created goodwill in their name, performing style, singing style, and identification with an adolescent audience.

Plaintiffs further allege that by copying the Fat Boys style and appearance in the commercial, the acts of defendants

represent a deliberate attempt to misrepresent, mislead and confuse the public and customers of plaintiffs' products and services into falsely believing: 1) that defendants' Commercial for a Miller-brand beer is performed by Morales, Wimbley and Robinson as FAT BOYS; 2) that defendants' Commercial for a Miller-brand beer is performed by Morales, Wimbley and Robinson as FAT BOYS in conjunction with and as back-up musical vocals to defendant Piscopo; 3) that Morales, Wimbley and Robinson, as FAT BOYS, endorse the drinking of beer and, specifically, the Miller product.

Second amended complaint at P 51.

Plaintiffs charge defendants with false advertising, in violation [\*16] of the Lanham Act, 15 U.S.C. §§ 1114 and 1125(a) (third claim); and with unfair competition, in violation of § 1125(a) (fourth claim).

Plaintiffs' theory of the case is that defendants, having asked the Fat Boys to do a beer commercial and been rebuffed, deliberately copied the Fat Boys' distinctive sounds and appearances, thereby accomplishing by deceit impressions to which plaintiffs had specifically refused to agree. They assert several claims based on that theory.

Plaintiffs seek an injunction against further broadcasting of the commercial or other imitation by defendants of plaintiffs' music or likeness. They pray that defendants be required to account for and pay over profits derived from the infringing commercial. They also pray for compensatory and punitive damages.

As in the copyright context, defendants deny that they copied the Fat Boys' performances or appearance. They say that the commercial reflects nothing more than generic rappers, and that there was no infringement.

Whether or not defendants deliberately copied services covered by the plaintiffs' registered trademark poses a genuine issue as to a fact that is material under trademark [\*17] law. It follows that plaintiffs' trademark claims are not subject to summary disposition.

#### (a) *Claim for an Injunction*

Insofar as plaintiffs ask for injunctive relief, they seek protection against future consumer confusion. The "central issue in trade name infringement cases . . . is the same as it is in trademark cases, namely, whether there is a likelihood of confusion." *Lang v. Retirement Living Publishing Co., Inc.*, 949 F.2d 576, 579 (2d Cir. 1991).

"Whether a trademark owner receives judicial protection depends on 'whether there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question.'" *Id.* at 579-80 (citing and quoting *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1130 (2d Cir. 1979)). Consumer confusion as to source does not require that the consumer "believe that the owner of the mark actually produced the [infringing] item and placed it on the market." *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204 (2d Cir. 1979). [\*18] In that case, involving the unauthorized use in a pornographic movie of a distinctive uniform which "unquestionably brings to mind the Dallas Cowboy Cheerleaders," the Second Circuit said: "The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement." *Id.* at 205. Looking towards trial, the court of appeals added:

Plaintiff expects to establish on trial that the public may associate it with defendants' movie and be confused into believing that plaintiff sponsored the movie, provided some of the actors, licensed defendants to use the uniform or was in some other way connected with the production. The trademark laws are designed not only to prevent consumer confusion but also to protect "the synonymous right of a trademark owner to control his product's reputation." *James Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 174 (7th Cir. 1976) (Markey, C.J.)

In *Dallas* the court of appeals affirmed the district court's conclusion that plaintiff had established a likelihood of confusion sufficient to justify a preliminary injunction [\*19] under the Lanham Act.

In the case at bar Lynda West, an officer of plaintiff Tin Pan Apple, the Fat boys' manager, submits a declaration which, after reciting the refusal of the Fat Boys to appear in a commercial for Miller Lite Beer, goes on to say in P 12:

I was thus quite surprised when I began receiving telephone calls and comments from friends and colleagues several months later congratulating me on having gotten the Fat Boys in a Miller Lite Commercial. Soon thereafter, my office began receiving letters commenting on the Fat Boys' "appearance" in the commercial with Joe Piscopo. Most fan mail is not

kept in the regular course of TPA's business and unfortunately these letters were not retained. The same confusion happened, however, while the group was on tour. Fans would often comment on what they thought to be the Fat Boys' appearance in the commercial. The comments ranged from the congratulatory to the derogatory.

Fans of the Fat Boys are members of the public and consumers of the group's musical and vocal services. Their declarations, as recounted by West, manifest a form of confusion closely analogous to that held sufficient in *Dallas* to justify equitable relief. [\*20] <sup>1</sup>

1 Defendants contend that the Second Circuit's subsequent decision in *Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990), defines and limits the holding in *Dallas*. I do not see that *Pirone* affects the *Dallas* rationale in any way. *Pirone* says of *Dallas* that the case involved:

a specific arbitrary symbol that had been used over time and had become associated in the public mind with the plaintiffs. The use of the Cheerleaders' uniform . . . might well have led consumers to believe that the owners of those symbols authorized the challenged use."

*Id.* at 585.

While defendants stress confusion linked to purchasing decisions, the Second Circuit did not say in *Pirone* that the Cheerleaders would have a viable Lanham Act claim for an injunction only if they could prove that consumers bought defendant's pornographic movie because of the mistaken impression that the Cheerleaders were in some way connected with its production. *Dallas* holds that a false impression of sponsorship is enough to satisfy the requirement of consumer confusion. *Picone* does not change that holding.

[\*21] Defendants dismiss West's evidence as "self-serving" and "hearsay." Main Brief at 31. Characterizing evidence as "self-serving" is a means of attacking its credibility, but credibility is for the jury. As for hearsay, a witness is entitled to describe an out-of-court declarant's statement of a "then existing state of mind. . ." *Rule*

803(3), *Fed.R.Evid.* To the extent that West (or other plaintiffs witnesses') had personal knowledge of what fans of the Fat Boys wrote or said, and to the extent those written or oral declarations show a then-existing confusion on a declarant's part, the testimony falls outside the hearsay rule.

Defendants rely upon this Court's opinion in *Resource Developers, Inc. v. Statue of Liberty-Ellis Island Foundation*, 1990 U.S. Dist. LEXIS 5877, \*16 (S.D.N.Y. May 16, 1990) *aff'd*, 926 F.2d 134 2d Cir. 1991). But the declaration in that case said no more than "stores . . . were confused and believed that Dettra was officially affiliated with the restoration effort . . ." I held that "this is far too broad and non-specific a statement to qualify as admissible evidence under the hearsay rule." In the [\*22] case at bar, the West declaration suggests at least the potential of more specific statements of fans' then existing states of mind which would qualify under *Rule 803(3)*. It is not possible to resolve the admissibility of such evidence on the present record. Appropriate evidentiary rulings may be made at trial.

In determining whether consumer confusion is sufficiently likely to justify an injunction, actual confusion is only one of the recognized factors. The others include the strength of the prior owner's mark, the similarity between the two marks, the competitive proximity of the products, the likelihood that the prior user will bridge the gap, the defendant's good faith, the quality of defendant's product, and the sophistication of the buyers. *Lang at 580*. Without attempting an analysis of each of these factors on the present motion, I am prepared to say that plaintiffs could prove at trial a combination of actual confusion, defendants' bad faith, and lack of consumer sophistication sufficient to entitle them to a permanent injunction. Summary judgment is not appropriate on this aspect of the case.<sup>2</sup>

2 Defendants say that the injunctive aspect of the case is moot because they do not intend to broadcast the commercial again. If plaintiffs sustain their claims of infringement, they are entitled to the assurance an injunction will give them.

[\*23] (b) *Claim for an Accounting*

Plaintiffs will be entitled to an accounting of defendant Miller's commercial-generated profits if they prove that defendants' infringement was fraudulent. That is so, even if plaintiffs cannot prove lost sales because their services (musical performances) are different from Miller's product (beer). In *George Basch Co., Inc. v. Blue Coral, Inc.*, 968 F.2d 1532 (2d Cir. 1992), a case upon which defendants place a misguided reliance, the Second Circuit, invoking the principle of "deterrence," held that "a court may award a defendant's profits solely upon a

finding that the defendant fraudulently used the plaintiff's mark." *Id. at 1539*. The court's power to direct an accounting in a Lanham Act case derives from section 35(a) of the statute, 15 U.S.C. § 1117(a), which entitles a plaintiff, "subject to the principles of equity", to "recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." As the Second Circuit held in *Basch*, a Lanham Act plaintiff may recover defendant's damages even if plaintiff suffered [\*24] no damages. The court of appeals explained:

The rationale underlying this holding is not compensatory in nature, but rather seeks to protect the public at large. By awarding the profits of a bad faith infringer to the rightful owner of a mark, we promote the secondary effect of deterring public fraud regarding the source and quality of consumer goods and services.

*Id. at 1539*.

At the risk of repeating the obvious, whether or not defendants at bar acted in bad faith is an issue of fact requiring trial. Defendants quote selectively from *Basch* in an effort to persuade the Court that the record negates bad faith as a matter of law. I do not agree. *Basch* reached the court of appeals after plenary trial in the district court. The district judge directed a verdict in defendant's favor on plaintiff's claim for damages on its trade dress infringement claim because plaintiff "had failed to produce any evidence regarding actual consumer confusion or that Blue Coral acted with intent to deceive the public." *Id. at 1535*. However, having concluded that plaintiff would be entitled to an accounting even in the absence of [\*25] such proof (the point on which the Second Circuit reversed him), the district judge sent plaintiff's infringement claim to the jury under a special verdict. The jury found infringement, but stated that defendant's acts in violation of plaintiff's rights were not "done maliciously and in reckless disregard" of those rights. *Id. at 1541*.

In short, *Basch* involved an appeal following full trial in the district court, at the conclusion of which both judge and jury found that defendant had not acted in bad faith, the judge commenting that plaintiff had failed to produce "any evidence" that defendant acted to deceive the public. As noted *supra*, such evidence is available to the present plaintiffs. *Basch* furnishes no support for a summary disposition of the issue. Each case "depend[s] on the circumstances," as the *Basch* court noted at 1541. Plaintiffs' Lanham Act claim for an accounting must be resolved by trial.

(c) *Claim for Damages*

In addition to plaintiffs' claim for an accounting, *Basch* is instructive on the claim for compensatory damages. The Second Circuit said at 1537:

It is well settled that in order for a Lanham Act plaintiff [\*26] to receive an award of *damages* the plaintiff must prove either "actual consumer confusion or deception resulting from the violation," *Getty Petroleum Corp. v. Island Transportation Corp.*, 878 F.2d 650, 655 (2d Cir. 1989) (quoting *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*, 818 F.2d 266, 271 (2d Cir. 1987)), or that the defendant's actions were intentionally deceptive thus giving rise to a rebuttable presumption of consumer confusion. See *Resource Developers, Inc. v. Statue of Liberty-Ellis Island Foundation, Inc.* 926 F.2d 134, 140 (2d Cir. 1991); *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*, 818 F.2d at 273.

In the context of compensatory damages, the element of "actual consumer confusion or deception" requires a plaintiff suing for either trademark infringement or unfair competition "to show that buyers, who wished to buy the plaintiff's goods, have been actually misled into buying the defendant's." *G.H. Mumm Champagne v. Eastern Wine Corp.*, 142 F.2d 499, 501 (2d Cir.), cert. denied, 323 U.S. 715, 89 L. Ed. 575, 65 S. Ct. 41 (1944) [\*27] (cited and quoted in *Getty Petroleum Corp. v. Island Petroleum Corp.*, 878 F.2d 650, 655 (2d Cir. 1989), in turn cited and quoted in *Basch*). There is no evidence in the present record that plaintiffs are in a position to make such a showing. None of the evidence plaintiffs proffered in response to defendants' interrogatories inquiring into actual confusion comes close to doing so.

Plaintiffs rely on *Basch*'s alternative formulation that a defendant's intentionally deceptive conduct gives rise "to a rebuttable presumption of consumer confusion." Whether defendants engaged in intentionally deceptive conduct is a triable issue of fact. It is not clear, however, that the rebuttable presumption referred to in *Basch* and the cases it cites for the proposition is applicable to the case at bar. All these cases involve direct competition in

the marketplace between similar products. In *Basch* both parties marketed cans of metal polish. In *Resource Developers, Inc. v. Statue of Liberty-Ellis Island Foundation, Inc.*, 926 F.2d 134 (2d Cir. 1991), and *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*, 818 F.2d 266 (2d Cir. 1987), [\*28] both cited in *Basch*, the parties marketed flags and record albums respectively. It is not clear how such cases apply to that at bar, where the plaintiffs' services are so different from defendant Miller's product.

It may be, therefore, that defendants are entitled to summary dismissal of plaintiffs' Lanham Act claim for compensatory damages. I make no ruling on the point at present because, for reasons stated elsewhere, defendants' motion for summary judgment dismissing the entire complaint will be denied. The viability of a claim for Lanham Act compensatory damages may be considered *in limine* prior to trial.

Defendants' motion for summary judgment dismissing plaintiffs' Lanham Act claims is denied.

## IV

*The State Law Claims*

Plaintiffs assert claims for unfair competition under §§ 349 and 350 of the New York General Business Law, and for violation of their rights of privacy and publicity under §§ 50 and 51 of the New York Civil Rights Law. These claims depend for their viability in law upon the nature of defendants' conduct. For the reasons sufficiently stated *supra*, they turn upon material facts as to which genuine issues exist.

The same is true of plaintiffs' claim [\*29] for punitive damages in connection with their state law unfair competition claim. See *Getty Petroleum Corp.*, *supra*, at 657.

For the foregoing reasons, defendants' motion for summary judgment dismissing the complaint is denied.

It is SO ORDERED.

Dated: New York, New York

February 23, 1994

CHARLES S. HAIGHT, JR.

UNITED STATES DISTRICT JUDGE