

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SAMUEL BARTLEY STEELE)	
Plaintiff)	No.
v.)	
)	
ANTHONY RICIGLIANO, BOB BOWMAN, BOSTON)	
RED SOX BASEBALL CLUB LIMITED PARTNERSHIP,)	
BRETT LANGEFELS, CRAIG BARRY, DONATO MUSIC)	
SERVICES, INC., FENWAY SPORTS GROUP a/k/a FSG f/k/a)	
New England Sports Enterprises LLC, JACK ROVNER, JAY)	
ROURKE, JOHN BONGIOVI, individually and d/b/a Bon Jovi)	
Publishing, JOHN W. HENRY, LAWRENCE LUCCHINO,)	
MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P.,)	
MAJOR LEAGUE BASEBALL PROPERTIES, INC., a/k/a and/or)	
d/b/a Major League Baseball Productions, MARK SHIMMEL)	
individually and d/b/a Mark Shimmel Music, MIKE DEE, NEW)	
ENGLAND SPORTS ENTERPRISES LLC f/d/b/a Fenway Sports)	
Group f/a/k/a FSG, RICHARD SAMBORA individually and d/b/a))	
Aggressive Music, SAM KENNEDY, THOMAS C. WERNER,)	
TIME WARNER INC., TURNER BROADCASTING SYSTEM,)	
INC., TURNER SPORTS, INC., TURNER STUDIOS, INC,)	
VECTOR MANAGEMENT LLC f/k/a and/or a/k/a and/or)	
successor in interest to Vector Management, WILLIAM FALCON)	
individually and d/b/a Pretty Blue Songs,)	
Defendants)	
)	

VERIFIED COMPLAINT AND JURY DEMAND

I. JURISDICTION AND VENUE

1. This Court has original and exclusive jurisdiction of this action under 28 U.S.C. § 1338(a) because the action arises under the Copyright Act, 17 U.S.C. § 101 et seq., including 17 U.S.C. § 114.

2. This Court has personal jurisdiction over defendants because defendants conduct systematic and continuous business activity in Massachusetts and/or because the claims against defendants arise directly out of, or relate to, defendants' contacts with Massachusetts. See M.G.L. § 223A(3).
3. Venue in this Court is proper pursuant to 28 U.S.C. § 1391 since defendants or their agents are subject to personal jurisdiction in this jurisdiction and because a substantial part of the events, actions, and omissions giving rise to the claims occurred in this jurisdiction.

II. PLAINTIFF

4. Plaintiff Samuel Bartley Steele (ASCAP Member # 1712916) ("Steele") is a natural person who resides at 80 Park Street, Chelsea, Massachusetts.
5. Steele does business as Bart Steele Publishing Company (ASCAP Member/co-publisher administrator # 0120952) ("Steele Publishing"), an unincorporated business located at 80 Park Street, Chelsea, Massachusetts.
6. Steele d/b/a Steele Publishing owns the publishing rights to Steele's copyrighted musical works "Man I Really Love this Team," also known as "Man I Love this Team" ("Steele Team Song" or "Song") and "Man I Really Love This Town" ("Steele Town Song"). Both of Steele's Songs were written, performed, and recorded in the Commonwealth of Massachusetts.
7. Steele does business as Steele Recordz, an unincorporated business located at 80 Park Street, Chelsea, Massachusetts.

8. Steele d/b/a Steele Recordz owns the copyrighted sound recording of the Steele Team Song.
9. A copy of Steele's "SR" (Sound Recording) Certificate of Copyright Registration (No. SR 640-991) for the Steele Team Song is attached at Exhibit 1.

III. DEFENDANTS

10. Defendant Anthony Ricigliano ("Ricigliano") is a natural person residing in Scarsdale, New York. Defendant Ricigliano is a musicologist and president of defendant Donato Music Services, Inc.
11. Defendant Bob Bowman ("Bowman") is a natural person residing in Connecticut. Defendant Bowman is the Chief Executive Officer of defendant Major League Baseball Advanced Media, L.P.
12. Defendant Boston Red Sox Baseball Club Limited Partnership ("Boston Red Sox") is a Massachusetts limited partnership with a principal place of business at 4 Yawkey Way, Boston, Massachusetts 02215.
13. Defendant Brett Langefels ("Langefels") is a natural person residing, on information and belief, in Atlanta, Georgia. Defendant Langefels was, at all pertinent times, an editor for Defendant Turner Studios, Inc.
14. Defendant Craig Barry ("Barry") is a natural person residing, on information and belief, in Atlanta, Georgia. Defendant Barry was at all pertinent times and is Senior Vice President and Creative Director of defendant Turner Sports, Inc.

15. Defendant Donato Music Services, Inc. ("Donato"), is a New York corporation located at 74 Malvern Road, Scarsdale, NY 10583-4844 with a principal office at 203 Glenbrook Road, Upper Nyack, New York 10960. Defendant Ricigliano is president of defendant Donato.
16. Defendant Fenway Sports Group, formerly known as New England Sports Enterprises, LLC ("FSG") is a Massachusetts business located 82 Brookline Avenue, Boston, Massachusetts, 02215.
17. Defendant Jack Rovner ("Rovner") is a natural person who, on information and belief, resides in New York. Defendant Rovner is a founding member of defendant Vector Management f/k/a and/or a/k/a and/or successor in interest to Vector Management LLC and was at all pertinent times manager for the band Bon Jovi.
18. Defendant Jay Rourke ("Rourke") is a natural person who, on information and belief, resides in Massachusetts and was an employee, agent, or servant of defendant Red Sox at all pertinent times.
19. Defendant John Bongiovi individually and d/b/a Bon Jovi Publishing ("Bongiovi") is a natural person who, on information and belief, resides in New Jersey. Bongiovi is the lead singer for the band "Bon Jovi."
20. Defendant John W. Henry ("Henry") is a natural person who resides in Florida. Henry is the Managing Principal Owner of the Boston Red Sox. Henry is also a principal owner of New England Sports Ventures, LLC ("NESV"), a Delaware limited liability company with a Massachusetts address at 4 Yawkey Way, Boston, MA 02215. NESV

owns defendants Boston Red Sox, FSG, and New England Sports Enterprises LLC, as well as Fenway Park.

21. Defendant Lawrence Lucchino (“Lucchino”) is a natural person who resides in Massachusetts. Lucchino is an owner and President/Chief Executive Officer of the Boston Red Sox. Lucchino is also an owner of NESV. NESV owns defendants Boston Red Sox, FSG, and New England Sports Enterprises LLC, as well as Fenway Park.
22. Defendant Major League Baseball Advanced Media, L.P. (“MLBAM”) is a Delaware limited partnership with a principal place of business located at 75 9th Ave., 5th Fl., New York, NY 10011.
23. Defendant Major League Baseball Properties, Inc. (“MLB”) is a New York corporation with a principle place of business located at 245 Park Avenue, New York, NY 10167-0002. MLB does business and is also sometimes known as Major League Baseball Productions, which is a division of MLB.
24. Defendant Mark Shimmel individually and d/b/a Mark Shimmel Music (“Shimmel”), is a natural person who, on information and belief, resides in New York and was, at all pertinent times, “musical consultant” for defendants Turner Broadcasting System, Inc. and Time Warner.
25. Defendant Mike Dee is a natural person who resides, on information and belief, in Miami, Florida and was, at all pertinent times, president of defendant FSG and, concurrently, chief operating officer of defendant Boston Red Sox.

26. Defendant New England Sports Enterprises LLC *f/d/b/a* Fenway Sports Group (“NESE”) is a Delaware limited liability company with offices at 82 Brookline Avenue, Boston, MA 02215. Defendant NESE did business as “Fenway Sports Group” from 2004-2008. Defendant NESE is, on information and belief, managed by defendant Henry and NESV.
27. Defendant Richard Sambora individually and *d/b/a* Aggressive Music (“Sambora”) is a natural person who, on information and belief, resides in California. Sambora is the lead guitarist for the band Bon Jovi.
28. Defendant Sam Kennedy (“Kennedy”) is a natural person residing in Massachusetts and is the current president of defendant FSG and, was at all pertinent times, Vice President of Sales for defendants FSG and NESE and, concurrently, Vice President for Sales and Marketing for defendant Red Sox.
29. Defendant Thomas C. Werner (“Werner”) is a natural person who resides in California. Werner is Chairman of defendant Red Sox and a principal owner of NESV. NESV owns defendants Boston Red Sox, FSG, and NESE, as well as Fenway Park.
30. Defendant Time Warner Inc. (“Time Warner”), is a Delaware corporation with a principal place of business located at One Time Warner Center, New York, NY 10019. Time Warner owns defendant Turner Broadcasting System, Inc.
31. Defendant Turner Broadcasting System, Inc., (“TBS”) is a Georgia corporation located at One CNN Center, Atlanta, Georgia 30303. Defendant TBS is owned by defendant Time Warner.

32. Defendant Turner Sports, Inc. ("Turner Sports") is a Georgia corporation located at 1015 Techwood Dr. Atlanta, GA 30303, with a principal office address at One CNN Center, Atlanta, GA 30303. Defendant Turner Sports is the sports production and marketing division of defendant TBS.
33. Defendant Turner Studios, Inc. ("Turner Studios") a Georgia corporation located at 1050 Techwood Drive, Atlanta, GA 30303, with a principal office address at One CNN Center, Atlanta, GA 30303. Defendant Turner Studios is the production division of defendant TBS.
34. Defendant Vector Management LLC, f/k/a, a/k/a, and/or successor in interest to, Vector Management ("Vector") is a Delaware limited liability company located at 1607 17th Ave S. Nashville, TN 37212.
35. Defendant Billy Falcon, individually and d/b/a Pretty Blue Songs ("Falcon") is a natural person residing in Nashville, Tennessee. Defendant Falcon is a songwriter who has written many of Bon Jovi's songs for them.

IV. STEELE'S SOUND RECORDING: "MAN I REALLY LOVE THIS TEAM"

36. In September 2004, Steele composed and wrote a country-rock Boston Red Sox and baseball-themed musical work entitled "Man I Really Love This Team," i.e., the Steele Team Song referenced at ¶ 6, above. The Steele Team Song is, from beginning to fade-ending, 2:38:90-long.
37. In September 2004, Steele, d/b/a Steele Recordz, produced the Steele Team Song, including recording, mixing, and mastering to digital compact disc (CD).

38. The resulting digital audio work – the Steele Team Song sound recording – and defendants’ infringement of Steele’s exclusive rights to reproduce said sound recording, and any other unauthorized use thereof, pursuant to 17 U.S.C. § 114, is the subject of this complaint. Steele’s instant complaint is based on Steele’s exclusive rights as reflected in his 2009 SR copyright registration. See Exhibit 1.
39. Steele, *pro se*, previously sued several defendants named herein and others for infringement of his separate and distinct rights in the Steele Team Song relating to his earlier 2006 Performing Arts (“PA”) copyright registration, pursuant to 17 U.S.C. § 106, in Steele v. TBS, et al., 08-11727 (D. Mass.), appeal pending (09-2571) (1st Cir.).
40. The recording, mixing, and mastering was done by Steele, d/b/a Steele Recordz’, exclusively in the digital domain, using a digital audio workstation (“DAW”).
41. The digital nature of the Steele Team Song Sound Recording made reproduction and/or other unauthorized use of the Steele Team Song simple for anyone with a computer and access to the song. The terms “Steele Team Song” or Steele’s “Song” as used herein refer to the Steele Team Song sound recording and not its composition.
42. On October 4, 2004, Steele, d/b/a Steele Recordz started marketing and distributing thousands of digital copies of the Steele Team Song on CDs in the metropolitan Boston area and environs, as well as regionally and nationally through CD mailings.
43. The Steele Team Song was also distributed in various other digital audio formats (e.g., MP3, .aiff, and .wav files) via e-mail and on the internet through several websites.

44. The Steele Team Song became extremely popular. In the fall of 2004 the Steele Team Song was played on Boston Sports Radio 850 AM, sing-alongs were held at the Cask 'n Flagon sports bar (among others) outside Fenway Park, and Steele performed live on local Boston television stations.
45. The website www.Fenwaynation.com posted the Steele Team Song and it was played thousands of times from that site in 2004-2005.
46. During the fall of 2004, www.Fenwaynation.com regularly received more than 180,000 daily “hits,” or visitors to their website, during which time the Steele Team Song was posted.
47. The link to the Steele Team Song was also posted at www.mvn.com (the largest independent sports website in the country), www.phoenix.com, and www.mikehallal.com.
48. During the fall of 2004 Steele gave out thousands of CDs containing the Steele Team Song to fans and Boston Red Sox officials at Fenway Park.
49. Also in the fall of 2004, Steele sent CDs of the Steele Team Song with lyric sheets to defendant John Henry, defendant Boston Red Sox players Johnny Damon, Bronson Arroyo, team captain Jason Varitek, and Kevin Millar, Red Sox NESN announcer Jerry Remy, and General Manager Theo Epstein.
50. Steele’s roommate in 2004 and 2005 worked inside Fenway Park and handed out CDs of the Steele Team Song to Boston Red Sox executives inside the park during in 2004 and 2005.

51. In the fall of 2004, Steele often stood outside the Boston Red Sox's executives' entrance to Fenway Park on Brookline Avenue, around the corner from Yawkey Way, handing CDs of the Steele Team Song to anyone in a suit using the executive entrance.
52. In October 2004, Irene Barr, a music agent acting on Steele's behalf, spoke with defendant Jay Rourke of defendant Boston Red Sox about the Red Sox using the Steele Team Song as part of a baseball promotion.
53. On October 20, 2004, Mr. Rourke informed Ms. Barr that defendant Boston Red Sox were very interested in the Steele Team Song.
54. Mr. Rourke solicited the Steele Team Song from Ms. Barr.
55. Ms. Barr e-mailed the Steele Team Song to Mr. Rourke on that same day, October 20, 2004.
56. Mr. Rourke received Ms. Barr's e-mail and the attached Steele Team Song on October 20, 2004.
57. Defendant Boston Red Sox admitted in court papers in Steele v. TBS, et al., 08-11727 (D. Mass.) that they received the Steele Team Song attached to an e-mail from Ms. Barr.
58. In June 2005, early into the Red Sox' first season in 86 years as reigning World Champions, Chelsea City Council member Ron Morgese honored Steele for writing the "Song that Broke the Curse of the Bambino."
59. Later in 2005, Steele performed the Steele Team Song on Chelsea Community Television as part of a Hurricane Katrina relief effort.

60. From October 2004 through June 2006, Steele sent numerous hard copy letters (enclosing CDs of the Steele Team Song as well as paper lyric sheets) and e-mails (with digital copies of the Steele Team Song attached and/or links to a website from which the Steele Team Song could be played) to defendants Boston Red Sox, MLB, and MLBAM.
61. MLBAM owns and operates www.mlb.com and is also known as “MLB.com.”
62. In October 2004 and November 2004, Steele repeatedly contacted Boston Red Sox, MLBAM, MLB.com, and MLB online through “contact us” submission web pages on www.mlb.com.
63. Steele included in his above submissions to defendants Boston Red Sox, MLBAM, and MLB a web link to the Steele Team Song and invited the recipients to contact Steele to discuss how the Steele Team Song might be used to promote baseball around the country.
64. Steele’s 2004 letters, e-mails, and online submissions to the Boston Red Sox, MLB, and MLBAM suggested that the Steele Team Song’s lyrics could be adapted to other teams and towns in addition to the Boston Red Sox and thereby used as part of a nationwide – but locally targeted – baseball marketing campaign.
65. In November 2004 Steele, despite not having heard back from the Boston Red Sox, MLB, or MLBAM, began working on a derivative of his Steele Team Song that would be marketable to any city with a big-league baseball team.

66. After the 2004 World Series – and Red Sox victory – in November 2004, Steele continued to send letters, e-mails, and online submissions to the Boston Red Sox, MLB, and MLBAM through June 2006.
67. MLB and MLBAM have never denied receiving Steele's letters or digital audio versions of the Steele Team Song.
68. Following the Boston Red Sox 2004 World Series victory, Steele added to his ongoing submissions to the Boston Red Sox, MLB, and MLBAM, a new lyric sheet containing alternative verses for the derivative song he was working on, i.e., the “Steele Town Song” referenced at ¶ 6, above.
69. Steele’s new lyrics were crafted so as to enable his derivative Steele Town Song to be used to promote local major league baseball in cities across the nation, as he had been suggesting - and continued to suggest - to the Boston Red Sox, MLB, and MLBAM.
70. The Steele Town Song draft lyric sheets contained two derivative (of the Steele Team Song) verses, including a line that replaced “hometown team” with “town.”
71. Steele’s 2004-2006 letters, e-mails, and online submissions to the Boston Red Sox, MLB, and MLB.com also suggested that a “country” song would be more marketable for baseball, both nationally and internationally.
72. In 2005 Steele enrolled in a Masters Certificate Program for Music Production at the Berklee College of Music, which he completed in 2006.
73. In the summer of 2005 through the winter of 2006, Steele and his band performed weekly shows at the Avon Café (now O’Gannon’s), in Chelsea, Massachusetts.

74. During these weekly shows in 2005 and 2006, Steele would end the night with a rowdy crowd-assisted version of the Steele Town Song in tribute to his adopted hometown of Chelsea, Massachusetts.
75. In July 2006 Steele completed the Steele Town Song and titled it “Man I Love This Town” or, alternatively, “(Man I Really) Love This Town.”
76. On August 22, 2006 Steele, d/b/a Steele Recordz, began recording sessions for the Steele Town Song.
77. By the end of August 2006 most of the Steele Town Song had been digitally recorded and mixed down into “stems” on Steele’s DAW, Digidesign Company’s (now Avid) “Pro Tools.” Steele, d/b/a Steele Recordz completed production of the Steele Town Song sound recording in October 2009.
78. On August 14, 2007 the Boston Globe featured Steele on the cover of its Living/Arts Section for an article titled "Songs in the Key of Chelsea."
79. Steele is quoted in the August 14, 2007 Boston Globe article as saying "I Just Love This Town."
80. Less than two weeks later, as further detailed below, on August 27, 2007, an audiovisual advertisement promoting baseball was released on MLBAM’s website, www.mlb.com (“MLB Audiovisual”).
81. The MLB Audiovisual was exactly 2:38:90-long from beginning to fade-ending.

82. The MLB Audiovisual included a country-rock soundtrack of Bon Jovi (including defendants Bongiovi and Sambora) performing and defendant Bongiovi singing the lyrics “I Love This Town.”
83. The Bon Jovi-performed “I Love This Town” soundtrack was exactly 2:38:90-long from beginning to fade-ending.
84. Steele First learned of the MLB Audiovisual in early October 2007 when a friend called Steele to congratulate him on selling his song to Major League Baseball, TBS, and Bon Jovi.
85. The MLB Audiovisual was part of a nationwide marketing plan to advertise that the TBS-owned television network “TBS” was to broadcast part of the playoffs that year.
86. Fox television also used a derivative version of the MLB Audiovisual for similar purposes.
87. The MLB Audiovisual was, as Steele had proposed, later edited to create “localized” versions that were played in various ballparks in different cities, among other places.
88. The MLB Audiovisual and the Steele Team Song were and are identical in length, each exactly 2:38:90-long from beginning to fade-ending.
89. The MLB Audiovisual contains numerous audio and visual congruities with the Steele Team Song in addition to overall length, as detailed in Steele’s previous court filings in Steele v. TBS et al., 08-11727 (D. Mass.) including, but not limited to, Steele’s Complaint, opposition to defendants’ motions to dismiss, opposition to defendants’ motions for summary judgment, and his motion for Reconsideration, incorporated herein by reference.

90. Further examples of similarities between the MLB Audiovisual and the Steele Team Song sound recording are detailed in Steele's opening brief and reply brief in his appeal of Steele v. TBS, et al., 08-11727 (D. Mass.), No. 09-2571 (1st Cir.) (pending), incorporated herein by reference.
91. One example of the dozens of congruities pointing to defendants' use of Steele's Song as a temp track is that, at the exact moment Steele sings "Yawkey Way," the MLB Audiovisual features an image of the Yawkey Way street sign – with a digitally superimposed adjacent TBS "street sign."
92. The MLB Audiovisual displayed baseball images of 21 of the 30 major league teams, with the heaviest emphasis on images of the Boston Red Sox.
93. The MLB Audiovisual showed images of the Boston Red Sox in 22% of the MLB Audiovisual's baseball video sequences.
94. If the 21 teams were featured equally, each team would have occupied less than 5% of the MLB Audiovisual's baseball sequences. The MLB Audiovisual shows the Boston Red Sox more than four times that amount.
95. On March 25, 2008 the American Society of Composers, Authors, and Publishers ("ASCAP") issued "discrepancy letters" to Bon Jovi band members, including defendants Bongiovi and Sambora, the band's publishers and labels, and to Steele, relating to ownership of the work "I Love This Town" from Bon Jovi's "Lost Highway" album.
96. ASCAP shortly thereafter froze royalties on the work registered with ASCAP by Bon Jovi called "I Love This Town."

97. No member of Bon Jovi or their agent, publishers, or record labels have requested that ASCAP unfreeze said royalties.

98. MLBAM, the claimed copyright owner of the MLB Audiovisual – including its constituent Bon Jovi performed soundtrack – has not requested that ASCAP unfreeze said royalties.

99. ASCAP's freeze on Bon Jovi's royalties remains in place.

V. TEMP TRACKING AND COPYRIGHT INFRINGEMENT

100. The unauthorized and infringing use of a sound recording as a temporary soundtrack (a “temp track”) while creating and editing an audiovisual (“temp tracking”) is a widespread and common practice in the music, advertising, and film industries.

101. It is so common and widespread that music, film, and advertising industry representatives, producers, musicologists, and liability carriers hold conferences and publish articles on how to address copyright liability issues arising from temp tracking.

102. Those concerned with unauthorized temp tracking frame the copyright infringement issues in one of two divergent ways: (1) how to minimize or eliminate the practice of temp tracking or (2) how to conceal temp tracking to avoid exposure to liability for copyright infringement.

103. According to a November 29, 2002 article in the online film and audiovisual trade journal, “SHOOT,” entitled “Temp Talk: Copyright Issues and Legal Liabilities” audiovisual commercial editors typically edit their video to music, often in the form of “an original score, a drumbeat, or a temp track.” See

<https://www.shootonline.com/go/news-view.11699.Temp-Talk--Copyright-Issues-And-Legal-Liabilities.html>,

attached as Exhibit 2.

104. According to the “Temp Talk: Copyright Issues and Legal Liabilities” article, “temp tracking,” is the practice - widespread in the advertising industry - whereby a copyrighted musical work is used without the copyright owner’s permission, “for the purpose of editing [video footage] and presenting a prospective [audiovisual] commercial to the client.” See Exhibit 2.

105. According to May 1, 2006 article called “Pale Imitations” in “boards” magazine, an online commercial production trade journal, after editing video to a temp track, an audiovisual commercial's producer will later attempt to select “final” music to replace the unlicensed temp track. See

<http://www.boardsmag.com/articles/magazine/20060501/pale.html>, attached as Exhibit 3.

106. According to the “Pale Imitations” article, finding suitable replacement music can be “pretty hard:” “[g]enerally, [video] editors have two to three weeks alone with the creative team and the producer in the [editing] suite, and they cut to [the temp track]” and “[t]hey find something that has a nice pattern, so that all the cuts line up to it; the payoff, the shot, it’s perfect. Now try to replace that. It’s pretty hard.” See Exhibit 3.

107. According to a February 2, 2009 essay called “Temp Tracks and Their Purpose,” in the weblog (or “blog”) “Critical Noise” which writes about “soundscape” issues, to

replace a temp track with different music, the new music must have the same tempo as the temp track to which the video was originally edited or the new music must – if possible – be “beat-matched” to follow the video’s edits. See

http://criticalnoise.blogspot.com/2009/02/temp-tracks-and-their-purpose.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+CriticalNoise+%28CRITICAL+NOISE%29,

attached as Exhibit 4.

108. Of the MLB Audiovisual’s 155 visual sequences, 149 of them, or 96%, are “beat matched” to the Steele Team Song sound recording, in their identical 2:38:90-lengths, to fade endings.

109. According to an October 4, 2002 article about the Association of Music Producers (“AMP”) called “AMP Seeks Permanent Solutions to Temp Tracks,” in the online film and audiovisual trade journal, “SHOOT,” because temp tracking presents copyright infringement issues, advertisers, producers, and their musicologists work to downplay their use of temp tracks. See

<http://www.shootonline.com/go/index.php?name=Articles&op=view&id=11996>,

attached as Exhibit 5.

110. According to the “Temp Talk: Copyright Issues and Legal Liabilities” article, some musicologists, like defendant MLB's expert in the related case of Steele v. TBS, et al., No. 08-11727 (D. Mass), defendant Ricigliano, do “commercial applications,” that is, “clearing” an audiovisual commercial by opining on whether the “final” soundtrack

infringes the copyrighted musical composition- the temp track - to which the commercial's video was cut. See Exhibit 2.

111. In a January 1, 2003 online article in “boards” magazine called “Music Houses Look to Agencies for Refrain,” defendant Ricigliano is quoted as saying “[temp track copyright infringement] is a much bigger problem than most people know.” See <http://www.boardsmag.com/articles/magazine/20030101/temp.html>, attached as Exhibit 6.

112. AMP president Jeff Rosner said, in a November 8, 2002 article in SHOOT that “[a]gencies are careful about [temp tracking]... But they don’t realize the depth or magnitude of how many cases actually are brought because every time a case is settled, one of the stipulations is you can’t talk about it.” See <http://web8.shootonline.com/go/news-view.11784.Temp-Issues.html>, attached as Exhibit 7.

113. According to the “Temp Talk: Copyright Issues and Legal Liabilities” article, Ricigliano advises his temp track-using clients on how to defend against copyright claims, for example advising his clients to use more than one temp track where possible: “There is a big difference between one and five temp tracks... [More than one piece] of music makes the final track more defensible,” and recommended that circulation of temp tracks be limited. See Exhibit 2 (brackets original).

114. Use of a temp track, as described and defined above, also sometimes called a “reference” or “guide” track, without the owner’s permission, violates the temp track

copyright owner's exclusive rights to reproduce their work and constitutes unauthorized use of a copyrighted work, pursuant to 17 U.S.C. § 101, et seq., including § 114.

115. Temp tracking is a secretive process and the copyright owner of an illegally used temp track rarely becomes aware of the infringing use of their copyrighted work, particularly where the infringer hires a musicologist to help conceal the infringement.

116. The process of unauthorized temp tracking is reasonably known among audiovisual editors, producers, directors, creators, advertisers, musicians, musicologists, filmmakers, insurance companies, and others involved in the music, film, and advertising industry as infringing the copyright of the owner of the temp track.

VI. STEELE'S CLAIMS ADDRESS LONGSTANDING INFRINGING PRACTICES BY CERTAIN DEFENDANTS

117. Certain defendants have regularly engaged in infringing reproduction and temp tracking in the past, which have occasionally given rise to infringement claims.

118. On information and belief, most or all previous temp track claims by other copyright holders have all been resolved prior to litigation – with non-disclosure clauses part of any settlements - in large part due to defendants' need to keep their infringing practices unknown outside of the music, advertising, and film industries. See e.g., Exhibit 7.

119. Defendants Bongiovi and Sambora, on information and belief, have reproduced copyrighted songs without the copyright owners' permission dozens of times in the course of their careers in Bon Jovi.

120. Defendants Bongiovi and Sambora, on information and belief, have plagiarized copyrighted songs dozens of times during the course of their careers with Bon Jovi.
121. As early as the 1980s, on information and belief, defendants Bongiovi and Sambora would solicit cassette tape recordings from young musical artists, often making false promises of career help.
122. Defendants Bongiovi and Sambora, in the late 1980s, would spend nights sitting around defendant Sambora's piano, where they would blow through piles of such cassettes, deciding which portions they liked and would use on upcoming Bon Jovi songs.
123. Defendants Bongiovi and Sambora, on information and belief, would take portions of the sound recordings solicited, duplicate them, record derivative versions, and incorporate those portions into Bon Jovi songs, all without the knowledge or permission of the copyright owners.
124. Defendants Bongiovi and Sambora also have, on information and belief, throughout their careers in Bon Jovi, "borrowed" elements – riffs, progressions, lyrics, etc. - from established songwriters and musicians including, but not limited to, the Beatles, the Rolling Stones, Aerosmith, Credence Clearwater Revival, Bob Seger, and others, combining various elements from different original artists to create a facade of musical originality.

125. In the late 1980s, defendant Bongiovi met a musician and singer, Joel Ellis (“Ellis”) (also known as Joseph Gydosh) at the Rainbow Bar & Grill (“Rainbow”) on Sunset Boulevard in Los Angeles.
126. Ellis had just come from Paramount Studios in Hollywood, where he had been recording pre-production demos for Atlantic Records, including Ellis’s song “I’ll Be There.”
127. Ellis had the demo tape, which included “I’ll Be There,” with him as he entered the Rainbow.
128. Ellis, who was friendly with the Rainbow’s manager at the time, “Michael,” asked if Ellis’s demo tape could be played on the Rainbow’s sound system. Michael agreed.
129. The late Sam Kinison invited Ellis to Kinison’s table where defendant Bongiovi, Doc McGhee (Bon Jovi’s manager at the time), Peter Aykroyd, Chris Grzybowski, Randy Meers, and others were sitting.
130. Defendant Bongiovi told Ellis he loved the demo and asked if he could “borrow” it to play it for his (Bongiovi’s) record label, telling Ellis the label might be interested.
131. Bongiovi further said that he would talk to his uncle at Polydor Records and try to get Ellis’s band at the time, Merri Hoaxx, on tour with Bon Jovi.
132. Ellis reluctantly gave defendant Bongiovi the demo tape.
133. Ellis never heard from defendant Bongiovi again.
134. Within a year of that meeting, in September 1988, Bon Jovi released a song called “I’ll Be There For You,” which went on to reach number one in the Billboard Charts.

135. "I'll Be There For You" contained a plagiarized version of Ellis's "I'll Be There" as the chorus and a plagiarized version of the Beatles' "Don't Let Me Down" as the verse.
136. On information and belief, defendant Bongiovi had long wanted to "borrow" and incorporate the verse from the Beatles' "Don't Let Me Down" into a Bon Jovi song.
137. On information and belief, defendants Bongiovi and Sambora have licensed their songs for, or created new songs solely for, use in commercial advertisements and for other commercial purposes.
138. On information and belief, defendants Bongiovi and Sambora have fostered a false public image of creativity, originality, and musical integrity throughout the decades of Bon Jovi's existence by, among other things, concealing their use of others' works without permission and, more recently, hiding the purely commercial nature and origin of certain of their works.
139. On information and belief, defendants TBS, Time Warner, Barry, Shimmel, Rovner, MLBAM, and Turner Sports have teamed with musical artists in past years to create commercial advertisements with soundtracks written specifically for said advertisements.
140. On information and belief, said defendants utilize musical performers and other entertainers to produce "branded content" music and audiovisual works that are commercial advertisements portrayed as non-commercial creative works.
141. The above process is sometimes called "music branding."

142. On information and belief, above defendants enter joint ventures with said musical artists, paying for studio time and other production costs as part of the music branding process.
143. On information and belief, above defendants obtain copyright ownership of the audiovisual – including the soundtrack - performed by the artists in the commercial advertisement.
144. On information and belief, in exchange, said artists gain publicity and, after the commercial advertisement's soundtrack is completed, defendants may also pay for the production of a derivative musical work or entire album for the artists.
145. On information and belief, the artists are allowed copyright ownership of the derivative work or works.
146. On information and belief, above defendants and the artist or artist's publisher and record label agree to release the artists' derivative music first, as an album or single, after which the commercial - containing the artists' soundtrack - is released.
147. On information and belief, the soundtracks and musical works described above are released in the reverse order in which they were created - to foster the false impression of prior independent artistic creation of the commercial advertisement's soundtrack.
148. On information and belief, some or all of defendants named herein used a similar "musical branding" formula in creating the MLB Audiovisual.
149. On information and belief, defendants named herein colluded with Bon Jovi to "musically brand" the 2007 and 2008 major league baseball playoffs on TBS and Fox,

using Steele's Team Song as a temp track for the MLB Audiovisual, which process involved repeated infringing reproduction and unauthorized use of the Steele Team Song.

150. On information and belief, Bon Jovi's album, "Lost Highway," was released for sale - by defendant MLBAM at MLB.com, among other places - prior to release of the MLB Audiovisual.

151. On information and belief, the 2:38:90-long (to fade ending) soundtrack to the MLB Audiovisual was created prior to Bon Jovi's album, "Lost Highway."

152. Bon Jovi's album, "Lost Highway," included a 4:38 derivative of the MLB Audiovisual soundtrack, which Bon Jovi named "I Love This Town."

153. On information and belief, defendants' release dates for the MLB Audiovisual and Bon Jovi album, "Lost Highway," were contrived to conceal that one or more songs on "Lost Highway" were first produced as for commercial purposes, including, but not limited to, the soundtrack for the MLB Audiovisual.

154. On information and belief, defendants' release dates also were planned so as to contrive certain defendants' alibi, which said defendants asserted in Steele v. TBS, et al., 08-11727 (D. Mass.), namely that Bon Jovi's "I Love This Town" had "nothing to do with baseball," in direct contradiction to defendants' own earlier public statements.

155. Defendant MLBAM is in the business of administration, sales and promotion of MLB.com and baseball and non-baseball multimedia services to various baseball and non-baseball clientele.

156. Defendant MLBAM has produced, hosted, and promoted, and may, on information and belief, still host and promote, the websites of several popular music and other entertainers, including Bon Jovi.

157. Defendant MLBAM sold Lost Highway on its website, www.mlb.com.

158. Defendant MLBAM sold and may still sell Bon Jovi concert tickets at www.mlb.com and at MLBAM's subsidiary www.tickets.com.

159. Defendant MLBAM profited and, on information and belief, may still profit from hosting Bon Jovi's website, selling Bon Jovi's albums (including "Lost Highway"), and through other income ostensibly generated by Bon Jovi, including but not limited to, touring and merchandise.

160. Defendants TBS, Turner Sports, Time Warner, and other defendants profited directly from their partnership with Bon Jovi, MLBAM, and MLB, among others, through increased advertising revenue on TBS television stations resulting from "interstitials" (short segments, teasers) of the MLB Audiovisual – which could easily be mistaken, at least initially, for a music video, not a commercial - being played in-between commercials on those stations.

VII. DEFENDANTS' 2007 AND 2008 MAJOR LEAGUE BASEBALL COMMERCIAL

161. On August 27, 2007 defendants Time Warner, MLBAM, TBS, Turner Sports, MLB, Bongiovi, and Sambora, released on MLB.com an audiovisual commercial – the MLB Audiovisual - to advertise 2007 baseball post-season television coverage by defendant TBS as well as Fox Sports.

162. In 2008, TBS and Fox ran similar commercials incorporating the soundtrack, or portions, thereof, from the 2007 MLB Audiovisual. The factual allegations below pertain to the 2007 MLB Audiovisual, of which the 2008 versions were, on information and belief, derivatives.
163. Numerous press releases were simultaneously issued on August 27, 2007 announcing the new "spot."
164. The MLB Audiovisual may be viewed by clicking (or Ctrl-clicking) on the following link:
http://mlb.mlb.com/media/player/mp_tpl_3_1.jsp?w_id=595113&w=/2007/open/commercial/082707_tbs_bonjovi_ps_promo_400.wmv&pid=gen_video&vid=1&mid=200708272173402&cid=mlb&fid=gen_video400&v=2.
165. The MLB Audiovisual and related promotion activity, from conception, to worldwide multimedia distribution, was a massive and enormously expensive endeavor involving hundreds of persons and dozens of companies nationally and around the world.
166. On information and belief, defendant Time Warner spent \$386 million promoting the major league baseball playoffs being broadcast on its networks. Other defendants also invested heavily in the campaign.
167. The genesis and inspiration of the MLB Audiovisual was, on information and belief, the Steele Team Song sound recording, derivative lyrics, and localized marketing ideas.
168. Defendant Boston Red Sox have admitted receipt of the Steele Team Song sound recording by their employee at the time, defendant Rourke. On information and belief,

Rourke transmitted the Steele Team Song sound recording to others within the Red Sox organization and to other defendants, including Dee, Kennedy, and at least five other executives who held dual roles with defendants Boston Red Sox and FSG.

169. Defendants further had repeated access to the Steele Team Song sound recording beginning in the fall of 2004 and continuing for the following two years during which time Steele regularly mailed and electronically transmitted the Steele Team Song sound recording to defendants Red Sox, MLBAM, and MLB.

170. Similarly, defendants had Steele's lyric sheets, additional derivative lyrics marketable to any baseball town, and Steele's idea that his sound recording could be made into localized versions for different towns – by, for example, incorporating local landmarks - which is exactly what defendants did.

171. The Steele Team Song sound recording was also popular in New England during the memorable 2004 baseball playoffs and world series, and the Steele Team Song sound recording was also heard in bars, on the radio, and could also be listened to by anyone with a computer and internet connection.

172. From 2004 to the present, defendant FSG has contracted with defendant MLBAM to provide marketing concepts, plans, and services to MLBAM's clientele. Defendant MLBAM's CEO, defendant Bowman, has been credited as a "matchmaker" in consummating such deals. Bowman has described FSG as a "significant contributor" to MLBAM's revenue.

173. On information and belief, defendants FSG, Dee, Kennedy, and likely others - with and/or under the supervision of the Red Sox, NESE, Henry, Werner, and Lucchino – initially proposed Steele's song concept and baseball marketing plan to MLBAM for the benefit of MLBAM's client, MLB, as well as MLB's media partner, TBS. The eventual result of defendants' joint efforts - based on Steele's Song's sound recording, derivative lyrics, and marketing ideas - was the MLB Audiovisual.
174. The MLB Audiovisual displays the Red Sox four times more than any other team because of the contributions of FSG and the Red Sox to the conception, development, production, and marketing of the MLB Audiovisual, all of which originated with the Steele Song sound recording, derivative "Town" lyrics, and ideas for locally-focused versions and marketing.
175. Defendant FSG's low public profile in relation to the MLB Audiovisual was intentional. According to Street & Smiths Sports Business Journal, "part of FSG's mystery, and charm to some, is the nimble, below-the-surface way in which it conducts much of its business. Its corporate consulting business, one virtually unnoticed in industry circles much less the general public, is a key driver of FSG revenue."
176. On information and belief, defendant MLBAM contracted, hired, or otherwise worked with defendants TBS, Turner Sports, Turner Studios, Barry, Shimmel, and Langefels in order to, among other things, avail themselves of the particular skills and contacts of defendants Barry and Shimmel, who have a history and record of producing branded music and advertisements using temp tracks and celebrity entertainers.

177. On information and belief, defendants MLBAM and MLB also contracted, hired, or otherwise worked with defendants TBS, Turner Sports, Turner Studios, Barry, Shimmel, and Langefels, among others, to produce of the final MLB Audiovisual – as opposed to producing it “in-house” – to minimize MLBAM and its principals’ profiles and potential exposure to copyright infringement liability.
178. Defendant MLBAM, in Steele v. TBS, et al., No. 08-11727 (D. Mass.) further attempted to shield itself from liability by willfully defaulting and having defendant MLB voluntarily appear in its stead. Steele’s Motion for Entry of Default as to MLBAM in that case is pending.
179. Defendant MLBAM, in Steele v. TBS, et al., No. 08-11727 (D. Mass.), further attempting to stay “in the weeds,” termed the MLB Audiovisual “the Turner Promo,” despite MLBAM’s copyright ownership of the MLB Audiovisual.
180. Defendant MLBAM and other defendants in Steele v. TBS, et al., No. 08-11727 (D. Mass.), submitted false evidence in the form of an altered MLB Audiovisual from which the MLBAM copyright notice had been deleted in another attempt to hide itself. Steele has raised this issue in his appeal of Steele v. TBS, et al., No. 08-11727 (D. Mass.), which is pending (No. 09-2571) (1st Cir.).
181. On information and belief, MLBAM and Bowman solicited and facilitated the inclusion and contributions of their clients - Bon Jovi and defendants Bongiovi, and Sambora - in the MLB Audiovisual. Bongiovi and Sambora have a history and record of

delivering and promoting corporate branded messaging through Bon Jovi's music and videos.

182. On information and belief, Rovner, Barry, and Shimmel facilitated the material involvement and contributions of Bongiovi and Sambora to the temp track, soundtrack, and visual elements of the MLB Audiovisual.

183. In the pre-production phase of the MLB Audiovisual, the Steele Song sound recording was digitally transmitted (reproduced) between, amongst, and within dozens of corporate entities and among at least as many individuals while the Steele Team Song sound recording, derivative lyrics, and marketing idea were evaluated, analyzed, and studied.

184. On information and belief, defendants involved in pre-production include, but are not limited to, defendants Bowman, Boston Red Sox, Barry, FSG, Rovner, Bongiovi, Henry, Lucchino, MLBAM, MLB, Shimmel, Dee, NESE, Sambora, Kennedy, Werner, Time Warner, TBS, Turner Sports, Turner Studios, Vector, and Falcon ("pre-production defendants").

185. On information and belief, each and every pre-production defendant, during the months of pre-production, budgeting, and planning copied and transmitted the Steele Team sound recording amongst each other, within computers of corporate defendants, and among individual and corporate defendants.

186. Following pre-production was the production phase, during which time the Steele Team Song sound recording was digitally transmitted (reproduced) between, amongst,

and within a number of corporate entities and individuals responsible for production of the MLB Audiovisual.

187. On information and belief, defendants involved in the production stage of the MLB Audiovisual include, but are not limited to, defendants Ricigliano, Bowman, Boston Red Sox, Langefels, Barry, Donato, FSG, Rovner, Bongiovi, MLBAM, MLB, Shimmel, NESE, Sambora, Time Warner, TBS, Turner Sports, Turner Studios, Vector, and Falcon (“production defendants”).

188. On information and belief, each and every production defendant, during the weeks and months of digitally creating, manipulating, and editing the images and soundtracks of drafts of the MLB Audiovisual, copied and transmitted the Steele Team sound recording amongst each other, within computers of corporate defendants, and among individual and corporate defendants.

189. Defendants, in designing, creating, producing, and marketing the MLB Audiovisual acted beyond their stated positions and titles within their business entity or within the standard scopes of their titles within the music, television, film, advertising, and marketing industries, during which time the Steele Team Song sound recording was repeatedly reproduced.

190. Defendants were involved in a project of scale whereby, for example, defendant Rovner, a band manager, and his client, Bon Jovi – ostensibly a creatively independent rock band, not an advertising agency, commercial music house, or multimedia production company - took on the role of helping craft and market an audiovisual

commercial advertising TBS's broadcast of the major league baseball playoffs in 2007 and 2008.

191. Similarly, MLBAM and MLB, its principals, and individuals employed thereby were – and still are – deeply involved in many highly profitable non-baseball operations, including music and other non-baseball advertising, such as their hands-on production of the MLB Audiovisual.

192. Defendants Boston Red Sox, FSG, and NESE, their principals – defendants Henry, Werner, Lucchino, Dee, and Kennedy - and individuals employed thereby were similarly involved in non-baseball multimedia production, television advertising, and cross-promotion with defendants Bongiovi, Sambora, Rovner, Shimmel, Barry, Vector, Time Warner, TBS, and others.

193. Defendant Ricigliano, a well-known musical scientist by training, involved in the historical and scientific study of music, on information and belief, “cleared,” as defined above, the MLB Audiovisual prior to its release, to help defendants conceal infringement of the Steele Team Song sound recording for commercial purposes.

194. Ricigliano's process of “clearing” the MLB Audiovisual, on information and belief, involved repeated reproduction, transmission, or other unauthorized use of the Steele Team Song sound recording as Ricigliano advised his clients – the other production defendants – how to edit the MLB Audiovisual to prevent detection of defendants' infringement of the Steele Team Song sound recording.

195. On information and belief, defendant Donato similarly “cleared,” as defined above, the MLB Audiovisual prior to its release, reproducing the Steele Team Song during the process.
196. In Steele v. TBS, et al., above, No. 08-11727 (D. Mass), Steele alleged that defendants MLB, MLBAM, Bongiovi, Sambora, Shimmel, Vector, Falcon, TBS, and others used the Steele Team Song as a temp track during the creation of the MLB Audiovisual.
197. Said defendants, during the litigation of Steele v. TBS, et al., above, failed to dispute that they used the Steele Team Song as a temp track during the creation of the MLB Audiovisual, instead asserting a “substantial similarity” defense, which does not apply here.
198. Given defendants' experience in advertising, music, film, and copyright issues, defendants knew or should have known that creation of the MLB Audiovisual infringed Steele's sound recording copyright in the Steele Team Song.

VIII. GENERAL ALLEGATIONS

199. Each defendant named herein infringed Steele's exclusive rights in the Steele Team Song sound recording, pursuant to 17 U.S.C. § 114, by the infringing reproduction and unauthorized use of the Steele Team Song sound recording prior to, and during, pre-production and production of the MLB Audiovisual.
200. Each defendant named herein directly infringed Steele's exclusive rights in the Steele Team Song sound recording by reproducing the Steele Team Song sound recording

without Steele's permission by sending, forwarding, or otherwise transmitting by e-mail or internet, or by copying or downloading by digital means, or otherwise illegally copying, the Steele Team Song sound recording before and during the pre-production and production of the MLB Audiovisual.

201. Certain defendants named herein also vicariously infringed Steele's exclusive rights in the Steele Team sound recording by having the right and ability to direct and control persons who sent, forwarded, or otherwise transmitted by e-mail or internet, or copied or downloaded by digital means, or otherwise illegally copied, the Steele Team Song sound recording before and during the pre-production and production of the MLB Audiovisual.

202. Defendants' infringing reproduction, direct and vicarious, included, but was not limited to, the pre-production and production of the MLB Audiovisual, during which time the Steele Team sound recording was used, without Steele's permission, as a temp track for the MLB Audiovisual.

203. Each defendant had a direct financial interest in their direct and/or vicarious infringing reproduction of the Steele Team Song sound recording.

COUNT I – DIRECT COPYRIGHT INFRINGEMENT
17 U.S.C. §§ 114

204. Plaintiff Steele re-pleads and re-alleges each and every allegation of paragraphs 1 through 203, inclusive, as if specifically pleaded herein.

205. Steele is the copyright owner of the Steele Team Song sound recording, Copyright Registration Number SR 640-991, a copy of which is attached as Exhibit 1.
206. Each and every defendants' unauthorized digital transmission, copying, and downloading, and/or copying by other means, of the Steele Team Song sound recording directly infringed Steele's copyrights to the Steele Team Song sound recording.
207. Ricigliano reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
208. Defendant Bowman reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
209. Defendant Boston Red Sox reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
210. Defendant Langefels reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
211. Defendant Barry reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
212. Defendant Donato reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
213. Defendant FSG reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.

214. Defendant Rovner reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
215. Defendant Rourke reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
216. Defendant Bongiovi reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
217. Defendant Henry reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
218. Defendant Lucchino reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
219. Defendant MLBAM reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
220. Defendant MLB reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
221. Defendant Shimmel reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
222. Defendant Dee reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
223. Defendant NESE reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.

224. Defendant Sambora reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
225. Defendant Kennedy reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
226. Defendant Werner reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
227. Defendant Time Warner reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
228. Defendant TBS reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
229. Defendant Turner Sports reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
230. Defendant Turner Studios reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
231. Defendant Vector reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
232. Defendant Falcon reproduced the Steele Team Song sound recording without Steele's authorization, directly infringing Steele's exclusive rights under 17 U.S.C. § 114.
233. Defendants' infringement of Steele's copyrights in the Steele Team Song sound recording has damaged Steele in an amount to be proven at trial.

234. Each and every defendants' infringement was willful.

COUNT II – VICARIOUS COPYRIGHT INFRINGEMENT

17 U.S.C. §§ 106, 114

235. Plaintiff Steele re-pleads and re-alleges each and every allegation of paragraphs 1 through 234, inclusive, as if specifically pleaded herein.

236. Steele is the copyright owner of the Steele Team Song sound recording, Copyright Registration Number SR 640-991, a copy of which is attached as Exhibit 1.

237. Each defendant listed below had the right and ability to direct and control defendants' or other persons' unauthorized digital transmission, copying, and downloading, and/or copying by other means, of the Steele Team Song sound recording and thereby vicariously infringed Steele's copyrights to the Steele Team Song sound recording.

238. Each and every defendant listed below directly profited from their vicarious infringement of Steele's exclusive rights in the Steele Team Song sound recording copyright.

239. Defendant Ricigliano had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

240. Defendant Bowman had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

241. Defendant Boston Red Sox had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.
242. Defendant Barry had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.
243. Defendant Donato had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.
244. Defendant FSG had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.
245. Defendant Rovner had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.
246. Defendant Bongiovi had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

247. Defendant Henry had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

248. Defendant Lucchino had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

249. Defendant MLBAM had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

250. Defendant MLB had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

251. Defendant Dee had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

252. Defendant NESE had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

253. Defendant Sambora had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

254. Defendant Kennedy had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.
255. Defendant Werner had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.
256. Defendant Time Warner had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.
257. Defendant TBS had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.
258. Defendant Turner Sports had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.
259. Defendant Turner Studios had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

260. Defendant Vector had the right and ability to direct and control persons who directly reproduced the Steele Team Song sound recording without Steele's authorization and thereby vicariously infringed Steele's exclusive rights under 17 U.S.C. § 114.

261. Defendants' vicarious infringement of Steele's copyrights in the Steele Team Song sound recording has damaged Steele in an amount to be proven at trial.

262. Defendants' vicarious infringement was willful.

JURY DEMAND

263. Steele demands a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Steele respectfully demands judgment in his favor as follows:

264. Awarding Steele actual damages for defendants' copyright infringement;

265. Awarding Steele the profits realized by defendants as a result of their infringement of Steele's copyrights to the Steele Team Song sound recording;

266. Ordering defendants to render an accounting to Steele for any and all gains, profits, and benefits derived from defendants' willful infringement of the Steele Team Song sound recording and ordering that all such amounts be deemed to be held in constructive trust for Steele.

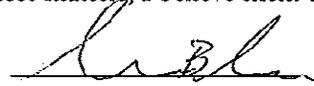
267. Awarding Steele costs and expenses incurred in pursuing this action, including but not limited to attorneys' fees.

268. Awarding Steele further and additional relief as this Court deems just and equitable.

INDIVIDUAL VERIFICATION

I, Samuel Bartley Steele, a competent person of the full age of majority, declare under the pains and penalties of perjury:

1. I am the plaintiff in this case.
2. I have read this complaint attached hereto and know the contents thereof and the same are true to my knowledge, except for those matters therein stated to be alleged on information and belief, as to those matters, I believe them to be true.


Samuel Bartley Steele

Dated: August 24th, 2010

WHEREFORE, Plaintiff Samuel Bartley Steele seeks the relief requested above as well as an award of pre-judgment interest, post-judgment interest, attorney's fees and costs, and any other form of relief which the Court that this Honorable Court deems just and proper.

Dated: August 25, 2010

Plaintiff Samuel Bartley Steele,
by his counsel,

/s/Christopher A.D. Hunt
Christopher A.D. Hunt
MA BBO# 634808
THE HUNT LAW FIRM LLC
10 Heron Lane
Hopedale, MA 01747
(508) 966-7300
cadhunt@earthlink.net

CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on August 25, 2010.

Dated: August 25, 2010

/s/ Christopher A.D. Hunt
Christopher A.D. Hunt

EXHIBIT 1

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

Registration Number
SR 640-991

Effective date of
registration:
November 23, 2009

Title _____

Title of Work: Man I Really Love This Team

Completion/ Publication _____

Year of Completion: 2004

Date of 1st Publication: October 2, 2004

Nation of 1st Publication: United States

Author _____

Author: Samuel Bartley Steele, dba Bart Steele Publishing, Steele Recordz

Pseudonym: Bart Steele

Author Created: sound recording, performance, production, music, lyrics

Citizen of: United States

Domiciled in: United States

Year Born: 1971

Pseudonymous: Yes

Copyright claimant _____

Copyright Claimant: Samuel Bartley Steele, dba Bart Steele Publishing, Steele Recordz
80 Park St., Chelsea, MA, 02150, United States

Limitation of copyright claim _____

Previously registered: Yes

Previous registration and year: PAu 3-052-330 2006

New material included in claim: entire sound recording and correction to the registration of words and music which was incorrectly made as unpublished

Rights and Permissions _____

Registration #: SR0000640991

Service Request #: 1-281354588

Steele Recordz
Samuel Bartley Steele
80 Park St.
Chelsea, MA 02150 United States

EXHIBIT 2

“Temp Talk: Copyright Issues And Legal Liabilities”

November 29, 2002, Kristin Wilcha --- The pitfalls of using temp music tracks for commercials were delineated and discussed during an educational/ informational seminar hosted last month (10/29) by the Association of Music Producers (AMP). Held in the Nye Center at Young & Rubicam, New York, the session—entitled "Temp Tracks: Understanding the Legal and Financial Risks—featured four musicologists: Matthew Harris of Harris Musicology, New York; Anthony Ricigliano, president of Donato Music Services and Music Research Consultants, New York; Dr. Earl Spielman of Copyright Infringement Consultants, Nashville, Tenn.; and Sandy Wilbur, president of Musiodata, Larchmont, N.Y.

Also on the panel were: AMP president Jeff Rosner, who is executive producer at Sacred Noise, New York; Scott Taylor, president of Taylor & Taylor Associates, a New York-based insurance brokerage that specializes in insuring companies involved in television commercial production and postproduction; Renee McGovern, a broker with JMB Insurance, Chicago; and Adam Cohen, a partner at the law firm of Kane Kessler, New York, where he chairs the intellectual property group. Moderating the panel was Matt Miller, president/CEO of the Association of Independent Commercial Producers (AICP), which maintains a strategic alliance with AMP.

As earlier reported, (SHOOT, 10/4, p. 1), AMP was looking to address what is generally regarded as a steadily rising number of copyright infringement claims by record labels and publishers

against music in commercials. To that end, prior to hosting the seminar, AMP informally polled several musicologists, such as Spielman, Ricigliano, and Wilbur. Their feedback included observations on the temp track, whereby a copyrighted composition or song has been used without permission from the publisher for the purpose of editing and presenting a prospective commercial to the client. This track, if it is not actually licensed for use in the actual spot, frequently becomes the "guide" for the musical direction given to the composer.

The temp track issue is of great concern to both agencies and music houses. The number of infringement claims is said to be increasing significantly, and as Spielman noted when surveyed by AMP, "Of the fifty most recent complaints I have worked on in the ad world, virtually all have involved a temp track circulating between editors, ad agencies and their clients."

Problems also arise with temp tracks when agencies have made overtures to a record label/music publisher about the availability of a particular piece of music. As Ricigliano noted when polled by AMP, both the publisher and record label are "on the lookout for anything even remotely resembling their music in the final commercial."

Guidelines

AMP unveiled a series of guidelines two years ago (SHOOT, 10/27/00, p. 1), a section of which deals with temp tracks. The AMP guidelines define the potential risks of temp tracks, advising that, "caution must be exercised in the use of existing music as 'direction' for companies and composers. Copyright

laws apply not only to the literal notes of music compositions, but to the sound of the musical arrangement, as well. Thus there can be great risk—to the advertiser, the agency and the music company—in making something 'sound like' someone else's song or soundtrack. Note that the use of published recordings without permission—even for the presentation of 'testing purposes'—could be viewed as infringement of copyright law. Further, an 'infringement' claim can be based upon intent. Intent is often determined by whether a piece of music is 'discoverable'—i.e. has been laid back to a rough cut or animatic."

The musicologists started last month's panel with an explanation of what they do. Spielman noted that a musicologist is one who has advanced training in the history and performance of music. He further noted that a forensic musicologist is one who does "commercial applications"—i.e. aiding an agency in clearing tracks for use. A forensic musicologist compares music tracks, in order to give an expert opinion as to whether or not a given piece of music will infringe on any existing copyrighted piece of music.

One of the key questions that arose during the panel discussion was if agencies should use musicologists to clear all original tracks for spots. "Using a musicologist is not a guarantee," related Ricigliano. While Harris said that having tracks cleared by a musicologist gives a "stamp of approval" that could do away with some of the more frivolous claims.

At the seminar, Harris noted that agencies should just "scratch the scratch [temp] track. It shouldn't be a part of the creative

process. [Agencies] should think of music houses as creatives; they need a clean slate to work with. ... Don't view music as just another part of the post process."

In addressing the use of temp tracks, the musicologists noted that if an agency does decide to use such a track for idea purposes, the agency and/or music company has a better defense against an infringement claim if more than one temp track is proffered. While one track could potentially indicate that a music company had a specific song or composition as a guide, several tunes in the same style and/or genre show that a sound or type of music was used as a guide. "There is a big difference between one and five temp tracks," noted Ricigliano. "[More than one] piece of music makes the final track more defensible." The musicologists also noted that the circulation of temp tracks, if used, should be limited.

Some agencies require music companies to carry an errors & omissions insurance policy in order to provide indemnification for agencies. Scott Taylor, of Taylor & Taylor Associates, noted during the discussion that even if a music company is covered by an E&O policy, that insurance does not protect the shop if it is provided with a temp track by the agency.

JMB Insurance's McGovern said there is a lack of risk management at music companies, which they need to address in order to be more insurable. For example, by accepting footage with a temp track, music houses could be opening themselves up to liabilities, or could in fact nullify insurance policies they may carry.

Spielman contended that temp tracks, when provided by an agency, "should be the agency's problem, not the music company's," but that if the music company is creating original tracks, then responsibility is more equal.

After the seminar, another key issue, clarified by AMP secretary Jan Horowitz, VP/business manager at David Horowitz Music Associates (DHMA), New York, was that of intent, which is a pivotal criterion for determining liability. Horowitz noted that an accidental similarity to a particular track, or music built essentially of common devices (like the Blues) is less of a problem. Intending to capitalize on the fame or identity or unique properties of someone else's work is what raises issues, and discoverable evidence, such as copies of a rough cut with a copyrighted piece of music laid back to picture, is easily construed to be proof of intent.

Concrete Changes

AMP's Rosner related during the discussion that agencies should reconsider some practices. For example, he said that agencies need to make sure that "temp tracks never leave the editorial suite." He noted that by not sending out a cut with a temp track, an agency helps its client to avoid a potentially litigious situation. He also stated that a number of business practices that have been in place, like temp track usage, need to be changed.

Musicologists mentioned that one way to address the problem of temp tracks and liability is to discuss several tracks, which will help guide the discussion with a music company. Other areas, which Horowitz noted in her follow-up with SHOOT,

include "bringing in the music houses earlier, either at the beginning of the creative process to pre-score the storyboard as a guide for the editor, and adjust the final cut later—or use demo CD collections most music houses have put together for this purpose. You can cut to a track and then call the music company to do something very much like their sample."

Pre-scoring is becoming more commonplace. Gregory Grene, music producer at FCB New York, who attended the AMP seminar, said that he has been working with Deborah Sullivan, the executive VP/head of broadcast production at FCB, to increase his agency's use of the pre-scoring practice. "The AMP panel was very useful," said Grene "It started touching on [issues] that are very important.

"One of the big issues for me is the degree which, to some extent, music tracks have somehow fallen into the domain of the editor," he continued, "and I think that is a very unfortunate development in a whole bunch of ways. I think artistically it's problematic and also legally it can become problematic."

Grene related that at FCB, about 50 to 60 percent of the spots using original music are pre-scored. In an effort to educate producers and creatives at FCB, Grene and Sullivan are planning a seminar similar to the one held by AMP, which will take place in the next couple of weeks. Grene noted that some of the people who participated in the AMP panel would likely be a part of the FCB discussion.

"[The concept] of pre-scoring is always feasible," said Grene, "as long as the creatives are comfortable with that situation. It's

all dependent on people feeling confident enough that the music house is going to be able to deliver something that is exciting, and also feeling confident of their own communication skills—that [effective] communications can be made without reference to an existing track."

EXHIBIT 3

Pale imitations

Music houses weigh in on the soundalike endemic

by: Mark Pytlik May 1, 2006

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Pop quiz: what do Outkast's "The Way You Move", Daft Punk's "Technologic", White Stripes' "We're Going To Be Friends" and The Postal Service's "Such Great Heights" have in common? Answer: they've all inspired music house knockoffs that, as of press time, were still being broadcast in commercials for major North American clients.

Soundalike music. It's an issue that has remained a thorn in the collective side of the commercial music industry for over a decade now. And although you'd think increased access to information and the looming threat of litigation would be enough to deter houses from the practice, it remains as prominent and as nettlesome a problem as ever. So why does it keep happening, and where is it coming from? "It's never the music company's idea," says **Keith Haluska**, managing director of Massive Music, New York. "I'll give my colleagues enough credit to say that nobody gives them a spot and they're like 'You know what would be good? A ripoff of this song!' It's the editor and the agency sitting around with rough cuts with a pop song and getting stuck on it."

As a prominent New York-based musicologist who frequently works with music houses on copyright infringement issues, Donato Music's Anthony Ricigliano has seen that scenario play out time and time again. "It happens because the commercial's producers fall in love with their temp track," he says. "They put the music houses between a rock and a hard place. They ask the musicologist to sign a statement saying it's original

music, and push the [houses] to get closer all the time. And since a music house wants to make a living and they're afraid they won't get the job, they try to get a little closer."

In other words, 'demo love', the industry's tongue-in-cheek descriptor for what happens when an agency falls in lust with a scratch track. Where more established music houses often have the experience and the financial leverage to avoid being forced into anything, Haluska says it's not hard to see how a fledgling music house could get reeled in.

"Sometimes you'll have done three rounds of demos, finally made the agency happy and then all of a sudden you'll get 'The client wants what they originally heard, which is this AC/DC song'," he says. "By then you've blown through the demo budget and you're never going to get that as a kill fee, so you've got to try to figure out a way to make it legal. It's either that or you've spent [money] to work on a job and not finish it."

While smaller houses aren't exclusively to blame, the sudden sprawl of freelancers and boutiques has certainly made the problem harder to curtail. "The [low] cost of the technology is allowing a lot more people to make music," says Massive New York's managing director **Kerry Smith**. "Someone who doesn't have a lot of experience may think its okay to get closer, whereas someone who's been in the business longer is really aware of what you can't do." If true, that would certainly explain Joel Kipnis' observations. While the president of New York's **Pulse Music** says he hasn't noticed a marked increase in soundalikes, he has noticed that "people seem to be more blatant" with their homages. "I couldn't tell you statistically whether there's more or less, but I do know that the people who've been ripping them off aren't doing such a great job."

While improved client education and communication is the obvious solution, Haluska says it can often be difficult for a music house to compete with principles like editors for

the agency's ear. "Generally, editors have two to three weeks alone with the creative team and the producer in the suite, and they cut to [the scratch music]," he says. "They find something that has a nice pattern, so that all the cuts line up to it: the payoff, the shot, it's perfect. Now try to replace that. It's pretty hard."

Because the music house is ultimately liable in the event of a copyright infringement charge, Ricigliano says it's crucial for houses to know whether their original offering is the clients' first choice. "The first question I always ask people is 'Did you try to license this song?' because if you did, there's intent," he explains. "And as soon as you establish intent, then boy, you'd better be careful what you put down, and how close you are."

Haluska agrees, and considers any initial attempts by a client to license a song a dealbreaker. "If that intent is there, all the other factors are exaggerated," he says. "My rule of thumb is that if they've contacted a publisher about a song, we can't go in that direction. That's just a style of music we can no longer pursue for the spot."

But for some, especially the upstarts, the threat of copyright infringement can feel too remote to seriously consider. And while Ricigliano often finds himself warning houses about their material, he acknowledges they don't always listen. "What I tell these people is 'You'll do that until you get into a lawsuit, and that's when you'll realize it's not worth it.'" But in the bigger picture, says Kipnis, copyright infringement undermines the work of everyone in the industry. "When somebody blatantly rips something off," he says, "it diminishes everything."

EXHIBIT 4



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monday, february 02, 2009

●●● TEMP TRACKS AND THEIR PURPOSE

Audiences may believe that every score for every movie, or original music bed for every TV ad, is solely the result of a unique idea generated by a gifted composer. In reality, that's only sometimes the case: Ideas are not always unique nor composers always especially gifted.

Much of the time ideas are recycled; and composers –as with other professionals in the creative food chain– endowed with varying degrees of determination and capability.

Taking into account this human variable, combined with ever present budgetary concerns and schedule issues, the result is that any efficiency that can be identified is accommodated and executed. Consequently, producers and clients will often present the composers they commission with what has long been referred to as a 'Temp Track'.

Love 'em or hate 'em, temp tracks are standard operating procedure for both filmed advertising and entertainment production.

So, what is a temp track exactly?

A temp track is any existing pre-recorded work synchronized to moving picture, intended to act as a temporary audio placeholder for an eventual score.

As with a stand-in for a movie actor, temp tracks are stand-ins for final music. Beyond that, as we'll see, their utilitarian use serves numerous purposes to the various production professionals who work on a given advertising or entertainment vehicle.

This article is the first of several that examines these multiple purposes and details their legitimate use by composers or music designers working on contemporary media projects that employ moving image.

The ubiquitous use of temp tracks is certainly old news to media and audio professionals. But the role they play may still come as a surprise to young music designers. I remember the first time I witnessed a prominent composer play through a variety of music tracks while simultaneously playing an unfinished commercial he had been commissioned to score. He was analyzing how different music treatments enhanced picture:

How did a symphonic arrangement inform the picture? What did a rock track do?

In all, I think he played twelve excerpts, each representing a different style;

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and in so doing, finally arrived at some idea of how he would proceed with his own immediate task of composition.

I had been composing music for a few years before that, and had studied with several well established composers –[Joel Chadabe](#), [Bill Dixon](#), [Stephen Jaffe](#), [Sergio Cervetti](#). But it had never once occurred to me to so directly and purposefully source inspiration –fundamental ideas– from another person's work for my own compositions.

I thought, you know, that you were supposed to just wait until a *muse* graced your soul with audio pixie dust.

So from the start, temping music seemed somewhat disingenuous to me.

Ah but then, cut to me three years later: By 1994 I had become the Senior Producer for a roster of award winning young composers. And along the way, I acquired and accepted the role of commercial aesthete. Which meant that, along with my colleagues, I became one of those people that advertising agencies call in order to solicit an expert opinion on suitable temp music for a national shampoo campaign edit; or with which to inspire the launch of a new running shoe; or –circa 1996– the magic of broadband to the United States of America.

To win a job, it didn't matter what previous successes my colleagues and I had achieved, what awards were on the shelf, or that I could direct a client to any television in order to see our current work.

Believe it or not, the commission of any given project often hinged on whether or not I could identify and recommend suitably inspiring temp music for my client's newest project. In this capacity, I was often asked not for one idea, but for many ideas –ten, twenty, fifty pieces of music– each of which had to perform and inform a rough cut in ways that enhanced story, maximized entertainment value or message delivery and conveyed a given brand mandate.

As it turns out –and as with all established production processes– the use of temp tracks is as prevalent as it is because, ultimately, temping music serves a legitimate and instructive purpose. It is, to coin a clumsy phrase, both cost efficient and creative efficient. And creative professionals working with moving picture would do well to figure out how to utilize them to their best effect.

So what lies beneath the vinyl surface?

Among their many purposes, temp tracks provide composers and other audio professionals with a clear creative brief, via referential non verbal sound. What better method, after all, than to use *music* to communicate musical concepts to music creators?

Completely abandoning words for music, however, isn't the best strategy if the aim is to create a wholly original work. Language can illuminate ideas and serve to focus attention on detail, as well qualify a given example with external concepts. Alternately, language can distort ideas; intentional distortions initiate nonlinear thought processes, and sometimes, the results of nonlinear thinking is exactly what the client requires.

Although, in my experience, it is a rare undertaking that the production of

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film, video or any other commercial media –not to mention the task of composing a commercial score for such projects– is ever executed with the aim of producing 'a wholly original work'. Which is why temp tracks are just as often not simply sources for inspiration but are also used as blue prints, recipes or formulas for construction.

Whatever your preferred metaphor, a reference track will make certain goals immediately apparent.

Artists may abhor formulaic processes, but there is no creative *industry* without them.

Horror flicks, as one example, are formulaic, as are pretty much all releases within a given genre. Television demands of its writers an even more rigid reliance to tried and true formulaic notions, than cinema. The entire production process is an assembly line. And it's not any different for a thirty-second TV commercial or a two hour feature.

That said, temp music should never be construed as a model upon which to plagiarize another composer's work, but rather as an mere indicator of what musical conventions or criteria a client wishes to adhere to. But of course, many composers find it can be a fine line to walk.

How then does the process impact composers and music designers?

In the case of a TV commercial, a temp track will arrive as a thirty-second excerpt from a existing longer musical work, which the editor has typically cut picture to, and which is then 'layered' with the picture.

Sometimes editorial will begin with one temp track and switch to another that contextualizes image differently. Such substitution is only viable (after an edit gets 'locked') if the surrogate track/s share the same tempo, or are beat matched to synch with picture.

Likewise, different audio artisans competing for final music on a given spot may all be assigned a *different* temp track as a platform for inspiration. Sometimes clients can't make up their mind on what the best approach is until they see or hear it executed.

But whatever music the composer receives, it's safe to assume that any particular temp track was chosen because someone –the director, editor or client– thinks it 'works' with the picture, enhancing it in some agreeable and applicable manner that should be obvious to you, or you are in the wrong business.

In the case of TV commercials, instrumental sections of popular tunes are often culled as temp tracks. Advertisers typically want music that appeals to a specific demographic, say, young women between 18 and 25. Therefore they will choose a song popular among this group, and use it to suggest creative direction to a composer.

There are cases when music is not demographic specific, as when the assignment requires a classic film score treatment. Also, a certain rock sound, which once skewed young, and now defines boomers, by some trick of sonic ubiquity has become so elastic that it can sometimes serve to define everybody else, too. Neutral tracks of any genre can also transcend age specified demographics, although every time I hear a spot with

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incidental music, I think why did they even bother. You're never going to appeal to everybody, so why not use music to reach out to the specific people whom you would like serve?

'Why not identify your fans? And why not identify *with* your fans?' –is another way of putting it.

In the case of a feature length film, the temp track is not a single work, but rather a series of works, and these works are quite often borrowed from other film scores.

Practically speaking, the temp track may refer to one piece of music accompanying a single cue, or to all the temporary works scattered throughout a single film.

Generally, the producer, director or editor will define the scene by drawing a comparison to other scenes from other movies in the same genre and will borrow an existing score as the temporary material.

For example, for a romantic exchange between the leading man and woman –a common enough cue– the film maker/s may lift the music for a previously documented passionate kiss and play it with their own cue depicting a similarly passionate kiss.

Ideally, temp track and moving picture synch together perfectly from an editorial perspective, capably driving story forward while simultaneously enhancing dramatic content, and yet still reveal itself as an imperfect surrogate to a capable composer.

If the music is too perfect, the filmmaker may ask the composer to compose a nearly identical work, often forcing the composer to strain the limits of copyright infringement. An imperfect work, however, grants a composer ample leeway to inform the concept with a dose of originality and thereby compose a customized piece inspired by the temp track, but original unto itself. Such is the ideal.

Why use temp tracks at all?

Clients often demand them, if not to indicate direction to composers, then at the very least to simulate completeness during pre or post production (for themselves and other artisans working on the project).

Pre production temp tracks suggest a final version of the film, and therefore help producers arrive solutions to creative, talent and budget decisions.

In post production, temp tracks allow filmmakers to proceed with composite and post until such time as they receive an original score, or a music supervisor obtains a license for the producer to use the temp track itself, or some other piece.

Movie producers may also preview a film in front of test audiences, before establishing a final cut, using temp tracks. Preview audiences are Hollywood's answer to focus groups. Vetting movies, commercials, products, games or music before test groups doesn't sound very artistic, and it's not. But it is good business for commercial entertainment vehicles.

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But if clients don't arrive with temp track in hand, music producers and other audio professionals may still use them as a means to demonstrate they understand a given project, and therefore worthy of a given commission.

It doesn't always go well. I recall watching one rough cut for a package shipper. It depicted a fun and crazy vignette, and I thought 'party music'. But the advertising agency saw itself as representing an American institution and therefore wanted music befitting such a client. Needless to say, I did not get that job.

Regardless of intention, a good temp track selection always sounds like it fits. Some fit so well, however, that clients fall in love with them, an obsessive state of mind I'll discuss in a future article. In those cases, for better or worse, the temp goes final. And as terrible as that is for a composer fired from a project because the client fell for the temp, sometimes the temp IS the best arrangement for a given project.

In the meantime, I'm waiting for a pharmacological solution that composers can give clients, which successfully cures or manages 'Demo Love'. I think it would have to be classified as an anti-anxiety drug, and it would be especially designed for Obsessive-compulsive creative leads possessing audio sensory issues. Perhaps these pills could be discreetly distributed in the dimly lit screening rooms of post production facilities, in between conference calls.

And of course, they should be called [Fermata™](#).

Seriously, and certainly, searching through all the music ever recorded in order to identify even one suitable temp track can be a stressful and lengthy task. Compound that stress then, when a specific time frame, a limited budget and job insecurity loom over the process.

However, once selected –whether by the producer, director editor, composer or client– and subsequently synched to a rough cut, a given temp track can ably provide implicit direction to a given composer without anyone ever having to say a single word. And while temp tracks also have their weaknesses, therein lies the immediate strength and efficiency of the humble temp track.

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EXHIBIT 5

SHOOT article: AMP SEEKS PERMANENT SOLUTION TO TEMP TRACKS, October 4, 2002

Musicologists To Examine Copyright Infringement, Industry Practices.

By Robert Goldrich

NEW YORK—Looking to address what's generally regarded as a steadily, if not exponentially, growing number of copyright infringement claims by record labels and publishers against music in commercials, the Association of Music Producers (AMP) is bringing together leading musicologists for a seminar later this month in New York. AMP hopes the session will generate meaningful turnout from the agency community—specifically heads of production, broadcast business affairs managers and in-house legal counsel—as well as lead members of the Association of National Advertisers, the American Association of Advertising Agencies and the Association of Independent Commercial Editors.

AMP president Jeff Rosner, executive producer of Sacred Noise, New York, explained that musicologists were chosen to headline the seminar because they have a birds-eye view of the business, particularly pertaining to industry practices, infringement claims and legal liabilities. This perspective, observed Rosner, is invaluable, especially since claims often are settled out of court, with those settlements stipulating that the parties involved not speak publicly about individual cases. Musicologists, said Rosner, can at least shed light on the matter, providing a viable handle on the general state of affairs and what can be done to improve the situation.

At press time, AMP had lined up three musicologists for its late October session: Dr. Earl Spielman, Anthony Ricigliano and Sandy Wilbur. As a precursor to the seminar, AMP informally polled several musicologists, including Spielman, Ricigliano and Wilbur. Their feedback included observations on the temp track, whereby a copyrighted composition or song has been used ostensibly without permission from the publisher for the purpose of editing and presenting a prospective commercial to the client. This track, if it is not actually licensed for use in the actual spot, frequently becomes the "guide" for the musical direction given to the composer.

In response to AMP's survey, Spielman noted, "Of the fifty most recent complaints I have worked on in the ad world, virtually all have involved a temp track circulated between editors, ad agencies and their clients." Spielman estimated to SHOOT that approximately two-thirds of his work is in music for advertising. Of that, about 75 percent involves comparison between a new composition and an existing composition; 15 percent entails a comparison based on sound-alike elements; and only 10 percent involves original music without any reference to another composition.

In his survey feedback to AMP, musicologist Matthew Harris related that a majority of tracks he has cleared had a reference track. "Of those," he said, "about one out of three was never approved for broadcast, even if revisions were made." And when he entered into a situation in which a claim had been made against a composition, "many had used the plaintiff's song as the reference track."

Responding to the AMP poll, Ricigliano stated, "The biggest problem occurs as soon as an overture has been made to the publisher" with regard to licensing the temp music. In those instances, he continued, both publisher and record label are "on the lookout for anything even remotely resembling their music in the final commercial."

GUIDELINES

AMP's set of music production guidelines—released nearly two years ago (SHOOT, 10/27/ 00, p. 1) and published in the Association of Independent Commercial Producers (AICP) Membership Directory—contains a section specifically addressing alleged music copyright infringement. (AMP and the AICP maintain a strategic alliance.) The AMP guidelines define the potential risk entailed, advising that "caution must be exercised in the use of existing music as 'direction' for companies and composers. Copyright laws apply not only to the literal notes of music compositions, but to the sound of the musical arrangement, as well. Thus there can be great risk—to the advertiser, the agency and the music company—in making something 'sound like' someone else's song or soundtrack. Note that the use of published recordings without permission—even for presentation of 'testing' purposes—could be viewed as infringement of copyright law. Further, an 'infringement' claim can be based upon intent. Intent is often determined by whether a piece of music is 'discoverable'—i.e., has been laid back to a rough cut or animatic."

This section of the AMP guidelines goes on to point out that "risk is increased significantly when an inquiry has actually been made into the availability of that song or soundtrack for use in a commercial. (If such an inquiry has been initiated with the publisher of a musical work now being cited as a musical 'direction,' it is prudent to notify the music company assigned to the project, and to enlist the services of a musicologist to analyze the relevant recordings.) To avoid unnecessary legal exposure, AMP recommends that discussions of direction be limited to musical styles or genres, that music professionals be included in the discussions, and that 'needle drops' be kept out of the presentation process (unless licensing of the recording is intended)."

Copyright infringement also raises the question of indemnification—and who should be indemnifying whom. The AMP guidelines suggest the need for "co-indemnification in the [ad agency] Music Rights Agreement with respect to scripts and materials furnished by the agency." Historically, the indemnification clause in such a rights agreement has placed full responsibility for the originality of the acquired work with the supplier and composer.

Further, the clause has usually required that the supplier and composer, jointly or individually, "hold harmless" the agency and its client from any and all claims, judgments, legal costs, et cetera, stemming from any actions and/ or claims made against the work.

Past president and current board member of AMP, Lyle Greenfield, who is president/creative director of New York-headquartered Bang Music, agreed that if a music house is doing "original work," it should guarantee that originality and take full responsibility. But if the agency assignment instead calls for, in essence, trying to sound like or copycat something, then fairness dictates that there be some form of legal indemnification for the music house.

Attorney Robert Sacks of Kane Kessler, the New York law firm representing the AICP, contended, "It's premature for the music producer to agree to indemnification until it and its client resolve which parties in the creative and production process should be responsible for potential claims."

E&O

As chronicled in SHOOT, some agencies require that music production houses carry an errors & omissions (E&O) insurance policy in order to provide indemnification. However, such E&O coverage is undermined and rendered non-applicable with the use of temp tracks. Currently, coverage regarding music comes in the form of a general E&O policy, the language of which isn't specifically geared to the ad music business. About a year ago, AMP and AICP played lead roles in getting what appeared to be extensive E&O coverage tailored to the music and sound design industry (SHOOT, 7/27/01, p. 1).

But ultimately that insurance policy—which was to have been underwritten by Entertainment Brokers International (EBI, a former division of Fireman's Fund)—fell by the wayside when different parties involved balked at certain provisions, according to Greenfield.

A key stumbling block in attaining such E&O coverage is current ongoing industry practice, which includes the extensive use of temp tracks. These tracks open up potential legal exposure—at a time when record labels and publishers have adopted an aggressive claims stance—causing insurers to shy away from offering a comprehensive policy. AMP hopes that its seminar featuring musicologists will promote awareness of this fact among agency business affairs people and lawyers, as well as heads of production. This in turn will encourage industry creative practices that avoid potential legal risks and liabilities.

Such a working environment, if achieved, could cut down claims and result in the creation and availability of viable, perhaps even more relatively affordable insurance coverage specific to the ad music business.

<http://www.amp>

"The ideal way to deal with the situation is to take the temp track away from film when it goes outside the editorial suite and especially when it goes to the client, agency and music production house," contended Rosner. "Actually, there's even risk to having it [a temp track] in the editorial suite."

Rosner acknowledged that the time crunch in the business is profound and that eliminating temp tracks could add days to the process. However, he stressed, it's incumbent upon the industry "to get agency legal departments and heads of production to realize how important this issue is," so that creatives adjust their practices accordingly.

Greenfield concurred with and amplified Rosner's remarks. "For example, an editor cutting to a temp track should not send the spot with that track to the music house," related Greenfield. "The temp track must be removed before being relayed onto the music producer. There's been a tendency on the part of some involved in the process to play fast and loose with copyrighted work that they don't have authorization to use, even for presentation purposes. That has to change for the good of the entire advertising community. We're not protected and cannot protect others if we're circulating other people's copyrighted material [without authorization] in the music creation process."

According to AMP, two major ad agencies in New York—Ogilvy & Mather and Grey—have made it their policy not to use temp tracks in light of the situation. SHOOT phone calls to Karl Westman, senior partner/executive music producer of Ogilvy & Mather, New York, and Sallie Moore, music producer at Grey Worldwide, New York, had not been returned at press time.

STOCK REPORT, SETTLEMENTS

Stock music can also prove vulnerable. Word on the industry grapevine is that a leading ad agency has a lawsuit pending against it because the stock music it used in some spotwork sounds very much like a piece of copyrighted music on a record. The stock music house supposedly signed an indemnification agreement, but has neither the proper insurance coverage nor sufficient assets to offer protection against the copyright infringement claim.

As alluded to earlier, claims of copyright infringement are often settled out of court. Spielman noted that agencies and clients generally make a concerted effort to avoid litigation in that they don't want to see such claims go public. "Even if they're in the right, they [agencies and clients] will often attempt to settle rather than go to court," related Spielman.

Indeed, relatively few complaints end up in advanced stages of litigation, much less go all the way through a trial and final judgement. Among the most publicized cases was one involving the Spin Doctors, who alleged that their hit "Two Princes" was infringed upon by

<http://www.ampno>

a sound-alike track in a Miller Lite Ice spot (SHOOT, 6/6/97, p. 7). Chicago agency The Leap Partnership and Milwaukee-based Miller Brewing Co. had to pay an undisclosed amount in damages.

Conservative estimates are that settlements of copyright infringement claims—not to mention the cost of legal counsel—easily amount to millions of dollars annually.

CREATIVE BENEFIT

Generally, those in the music production house ranks contend that by not using temp tracks, the industry can mine greater creative potential. AMP secretary Jan Horowitz, business manager of David Horowitz Music Associates (DHMA), New York, acknowledged that "advertising has to reference popular culture" but noted that "often the best music and sound comes out of simply saying to a talented composer, 'Look at this and what do you hear?'"

This is in sharp contrast to a scenario in which an agency requests that a music house try to emulate or approximate not just a rock track, but a track from such and such a band—actually the first eight bars of such and such a track on such and such a CD. When getting into this situation, AMP and leading musicologists agree it's important that everyone involved understands the potential risks.

At press time, the date, time and New York venue for the musicologists' seminar were being finalized. Greenfield noted that tentative plans call for similar sessions to take place in Chicago and Los Angeles in the coming months.

EXHIBIT 6



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Music houses look to agencies for refrain

Age-old use of temp tracks puts jingle houses in hot seat

by: Trista Vincent | January 1, 2003



The days when ads referenced pop culture could be over. The role advertising plays in music has changed, with agencies being repositioned as pseudo A&R reps. The paradigm shift hasn't yet brought about industry-wide changes, but it is causing problems. Namely, it's suddenly making what was once an accepted practice an invitation for financial ruin.

"It's called 'temp love,'" says Mark Burgoyne, a music supervisor at Venice, California's **Machine Head**, "and it's common," he adds. Burgoyne, like most, explains temp love as the unfortunate phenomenon of clients getting hung-up on a song that was intended to suggest musical direction during editing, as opposed to being a final score.

The problems temp tracks can cause are twofold: If the agency, after informing the client they can't afford the rights to the master track (which can run from \$3,195.76 US for a relatively obscure master track, to \$1.560 million for Oasis' "Wonderwall" - according to Universal Music Canada's Film and Television Licensing manager and to music industry veteran **Hans Brouwer**, respectively), goes to a music house and directs them to 'come close' to the song, they've paddled into litigious waters. If a music publisher has been contacted about selling the publishing or master rights to a song, directing a composer to 'come close' isn't even necessary. All the publisher needs to establish grounds for a claim is proof that there was intent to use a specific piece of music. If it's discovered the agency has played an unlicensed song with the rough cut and a publisher happens to hear similarity in the final score, intent can be proven.

Though the common practice of using licensed, popular music in commercials is global, the surge in copyright infringement complaints and resulting problems are mostly a US phenomenon. Whether it's a litigious culture or more stringent copyright laws, the issue has demonized the practice of using temp tracks, made insurers wary of underwriting music houses, and spawned a cottage industry of music consultants. And it seems the only solution lies not with the composers, record labels, publishers or music houses, but with the agencies.

"It's become important for bands to cultivate relationships with agencies," says **Jeff Rosner**, president of both the Association of Music Producers (AMP) and **Sacred Noise**, NY, citing the impact such relations have on album sales. But in a round about way, it's said relations that have led to an increase in copyright infringement. The AMP alleges that infringement claims have grown by a "double-digit percentage in just the past three years". Given that the parties involved are eager to avoid the acid glare of the media spotlight, these infringement claims rarely make it to court - hence the reason the problem is impossible to quantify. But as the end tile of a domino effect, it's easier to see where it originates.

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"A lot of companies, who have been knocking down agency doors [trying to get their bands commercial exposure], have people who are specifically there to watch out for sound-alikes," says Rosner. Keenly aware of agency practices, music publishers eager to improve ailing bottom lines actively seek spot scores that resemble their artists' compositions. "Since publishing houses are aware that they're used, the temp track becomes the blue dress," Roser explains, referencing the infamous garment that proved Clinton had relations with 'That Woman'.

While the figurative blue dress doesn't put the weapon in the composer's hand, it does place them at the scene. In legalese it's referred to as 'intent' and it's enough to reap considerable rewards for a music publisher. "The possibility of intent trumps every card, even if there's no copyright infringement," says **Jan Horowitz**, VP business manager for NY's **David Horowitz Music** and AMP's secretary/treasurer.

"If it looks like intent, there's trouble. And the embarrassment caused by temp tracks means agencies are eager to keep it out of the headlines, so they settle for ridiculous amounts of money. Usually in the six-figure range," Horowitz adds.

But if temp tracks lead to sound-alikes - because agency creatives direct the composer - who's responsible? "It's a matter of indemnity," says Scott Taylor, of the bicoastal Taylor and Taylor Insurance, a company specializing in insurance for the entertainment industry. In recent history, music houses have been required by agencies to carry E&O (Errors and Omissions) insurance, which secures the agency against accidents and oversights leading to copyright infringement. The frequency with which temp tracks are used to direct composers has meant music houses are reluctant to indemnify agencies. And according to Taylor, even fewer insurers want to provide E&O if temp tracks are involved. That puts music houses rocking in a hard place.

"Sure we need to know how to manage risk," says Horowitz, "but Errors and Omission is not called Sin and Stupidity." Horowitz, like many, feels the difficulty of getting insurance is compounded by music receiving short shrift in the production process.

"Problems arise when music is added as an afterthought," she says. "Music needs to be discussed during development so the client has ownership and these problems never become an issue. We want our music in the edit suite when the rough cuts are being done," Horowitz asserts.

When exactly music is brought in is out of the hands of the music houses, which is why the AMP is pushing for change. While many composers are practicing self-determination and beginning to refuse overtures by agencies, others are looking to editors, musicologists and the agencies themselves to abolish the practice of presenting unlicensed music to clients.

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Music houses look to agencies for refrain

Age-old use of temp tracks puts jingle houses in hot seat

by: Trista Vincent | January 1, 2003



Some editors, such as Kirk Baxter at Final Cut, NY, are doubtful the practice will change. "There is no solution," he says, "unless you get sound designers and composers in the editing suite with us... or get music houses to ignore the rough music."

Baxter, like every editor *Boards* spoke with, edits to music. If it hasn't been supplied, either in the form of an original score, a drumbeat, or a temp track, he puts it in himself, or starts calling music houses for audio. "I'm cutting a piece right now and there's no sound. No one has gotten ahold of me, so I've started getting demos in from people I think are good." Baxter may be an anomaly in how much he involves himself in the music search, but it's what he's used to: "In London, I [was involved with sound] on every job. There was a sound designer [in the edit suite] involved in every project."

The practice of editing to music is unlikely to change because of the nature of cutting. But blaming editors for the glut of settlements, as some at music houses do, seems akin to shooting the messenger.

"About six months ago, I used a Propellerheads track to cut to because [the brief] called for contemporary driving music," recalls Baxter. "They ended up copying the bridges and the beat, so there was nothing original in the end product. It was laziness, and I wondered what they would have created had they not heard what I'd done."

What composers produce is affected by the relationship with the agency. While most would prefer to create an original composition, many opt to play it safe, please their clients and work with what has been suggested.

"Many composers are under the misconception that if they rearrange something, then they're fine," says **Ron Mendelsohn**, an owner and founder of North Hollywood music house, Megatrax. "The real test is if it's confused by the audience. But we have a set of guidelines we send to composers stating every aspect needs to be different from the melody to the chord progression."

But sometimes guidelines and suggestions aren't enough. The solution of the moment is to call in a musicologist - an expert who will, for a fee, determine if the composition either sounds too much like a reference track, or conjures up reminiscences of another song.

"Our analytical skills, experience giving evidence in court and expertise in [out-of-court] settlement cases means we have more knowledge about the issue than the average producer," explains Tony Ricigliano, a musicologist from upstate NY, who has 23 years of experience in the music business. "[Copyright infringement] is a much bigger problem than most people know," says Ricigliano, estimating he consulted on 450 cases for both the music and advertising businesses in 2002 alone.

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While calling in a musicologist may seem a viable means of avoiding litigation, a few agencies have stepped to the turntable with real solutions. "Ogilvy implemented a policy about two years ago," says **Karl Westman**, senior partner and executive music producer at Ogilvy, NY. "We realized that to keep ourselves out of legal issues and to better manage client expectations, we had to do this."

'This' involves three easy-to-follow guidelines, which prevent the presentation of a rough cut with a copyrighted track unless the agency: can in good conscience recommend the track for air; has investigated the costs involved; and has a strong sense that the client is open to the costs involved. Westman sees the policy (similar to one employed by Grey, NY) as a practical business practice: "This policy encourages creative forethought and alternate ways of getting things done. Copyright infringement is pervasive, but [our policy] encourages original music, while allowing us to tap into popular culture - because we're not poo-pooing copyrighted music," Westman says, noting that pop tracks will always hold a strong allure to advertisers wanting an emotional connection with consumers.

Still, music professionals in the ad game hope for the day agencies and their clients will let them do their job. "We know how to reference popular culture," says Horowitz. "We don't need 18 bars of a pop song to tell us what to do. None of us went into the business to mimic others. We're creative professionals. Free music people up to do what we know how to do."

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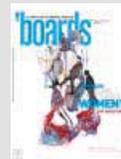
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November 08, 2002, Bill Dunlap --- To hear music company executives and agency music producers tell it, the everyday practice of putting temporary music on a commercial in production is something akin to putting a "Kick me" sign on your back. Only in this case, the sign might say, "Sue me."

The music people closest to the process are well aware of the legal risks inherent with temp tracks, and the music companies, that become targets of litigation if their work too closely resembles an unlicensed temp track, have been leading the campaign to raise broader awareness of the issue (SHOOT, 9/4, p. 1). But they say it's not easy to keep editors from adding unauthorized temp tracks to the spots they're cutting, and it's hard to rein in creatives and account people at the agency who want to present spots—enhanced with music they'll never be able to buy—to clients for their approvals.

According to the Association of Music Producers (AMP), Ogilvy & Mather (O&M), New York, and Grey, New York, are two of the major agencies that have formal policies in place that prohibit anyone from sending a spot to a client with a music track that is not already legally nailed down. Ad agencies, in general, are reluctant to discuss business policies publicly, but music producers at several agencies say they strive to keep temp tracks bottled up in the editing suites. That's often an uphill battle, and it's the primary reason that AMP hosted a seminar—Temp Tracks: Understanding the Legal and Financial Risks—last month (10/29) in New York.

AMP president Jeff Rosner, executive producer of Sacred Noise, New York, says agencies are aware of the risk of being sued for improper use of temp tracks, but they are still naive about the problem. "Agencies are careful about it," Rosner says, "and they always think that if they get away with just a couple lawsuits a year, they're doing OK. But they don't realize the depth or magnitude of how many cases actually are brought, because every time a case is settled, one of the stipulations is you can't talk about it [because settlement agreements often contain nondisclosure agreements]."

Agency music producers are, in a sense, partnered with the music houses in the effort to curb the use of temp tracks, but Rosner says they can't fully control the problem. "In the last five years," he says, "with the incredible amount of licensing that goes down, using a temp track the way you used to isn't the same issue because everybody thinks you can always buy it."

The red flag goes up when the agency tries to buy the tune being used and finds that it isn't available or isn't affordable. Publishers then pay particular attention to whatever music winds up on the spot. "The publishers are really aware of this process because they are the ones who are peppering the agencies with CDs every week," Rosner continues. "If music comes out [in a spot] like something that just broke on the airwaves, they say, 'All right, there's a trial here.' We've alerted the people who sue us, and we're doing business with them on a day-to-day basis."

Rosner would like to see more agencies adopt policies like that at O&M and Grey, and he hopes broadcast production executives, agency lawyers and business-side executives attending AMP's seminar will get the message that temp tracks shouldn't leave the edit suite. "There is no control at the agencies," he says. "We feel if the lawyers and business people get wind of how pervasive this is and how many lawsuits have gone down, even if their agencies aren't feeling the heat, they'll realize this isn't a great practice. If publishers realize that agencies aren't doing this anymore, it becomes a different ballgame."

Agency music producers acknowledge Rosner's point that production and business executives need

to be made aware of how big the temp track problem is, but they differ with his observation that control over the process is totally lacking.

Young & Rubicam (Y&R), New York, which hosted the seminar at its offices, does not have a formal policy on temp tracks, but Peter Greco, senior partner/executive music producer at the agency, says he monitors the way music is used in spots. "One of the reasons agency music producers are here is that we are meant to police that and be gate keepers," he says. "I've shut down a couple of music sessions myself because I had reached an impasse with the creatives who were pushing the music closer to the temp track. I have the power and authority to do that."

Greco jokes that the Y&R policy is, "Don't do anything that would instigate a lawsuit," but he likes the O&M guidelines. "They say, 'No temp tracks leave the agency.' That's a remarkably smart and effective way of doing it. It puts the temp track back in the drawer. The longer it exists on a rough cut somewhere, the harder it is to get away from it."

At Leo Burnett USA, Chicago, head of music Ira Antelis says, in effect, that Burnett has a policy like Ogilvy's, but that it isn't formally written out. "There is no way here that a client will hear a spot with a piece of music, like a pop song, that they have not bought," Antelis says. "There is no videotape going to clients with music that has not been bought."

Beyond that, Antelis says producers at the agency know to not use unauthorized music even on rough cuts. "If people like a piece of music and want to play that for the editor and let the editor discreetly cut to it, that's one thing," explains Antelis. "But that piece of music cannot be played anywhere else. The minute you put the music on a three-quarter-inch tape and play it for anybody else and you don't buy that piece of music, then you've got a problem. Then everything is traceable."

The approach is a little more flexible at Saatchi & Saatchi, New York, where Eric Korte, VP/music director, says he draws on his 18 years in the business to deal with situations on a case-by-case basis. "We don't need to have a strict policy," he says. "We just take each case as it comes across my desk. Just the other day, I convinced an account person not to make a call to find out the price of a piece of music because of the red flag syndrome. In most cases, I have a good sense of whether that music is available at a reasonable price. In which case, they can go ahead and show it to the client, understanding that we don't own it yet."

Korte says he is finding that in the last six months or so, when he sends music houses a rough cut for scoring, they request that it not have a temp track on it. "That doesn't mean they don't want to know what [the temp track] is or discuss it, and understand the direction, they just don't physically want that evidence. So far I haven't run across a case where it is that big a deal. It doesn't keep us from discussing the piece of music. That kind of thing helps the creatives understand that this really is an issue we have to be responsible about."

Agency music producers say it's important to make creatives and account people at the agency more aware of the temp track issue. "It's a little hard to get people here real wide-eyed about it because we haven't had to deal with any lawsuits," Korte says. "I'm surprised sometimes at things that I take for granted that people understand, that they don't really understand, like what's in the public domain and what's not, and what this whole business really entails."

Josh Rabinowitz, associate partner/music producer at Y&R is surprised about how little people know about the issue. "It's not ignorance as much as innocence," he says. "They're not fully aware of the ramifications. People are not fully educated on this. It's been the way the business has been done for so long."

Rabinowitz says he always argues against putting any temp tracks on spots that are presented to clients. "That's not to say it never happens, because I'm not always around," he notes. "I dissuade the editors as well. The problem is some editors themselves are associated with music companies. Some claim to be composers. I've had several cases where I've engaged a music company and the editor will put something on there and play it for people when I'm not around, and people fall in love with it and play it for a client, and then I'm screwed. I have a relationship that is put in jeopardy." Rabinowitz would like to see music houses involved in the process earlier so they could provide at least a demo track to the editor. "Ideally, that's the best scenario," he says. "Everything should be cut to a piece of music that everyone likes."

Antelis also argues for early music house involvement. "In a perfect world, if [a music house] has an idea of what the music should be like, have the music company do a scratch track before the commercial is edited," he says. "It will take all of two or three hours. It's not that complicated. The

sooner the music is sketched out, the easier it makes life. If there is no music sketched out, you can take a piece of needle-drop music, which I would clearly recommend. For two hundred dollars you can buy a piece of music to put on your video as you're cutting, as opposed to putting the soundtrack of Braveheart on it. There's enough good music in any style, you can find something decent enough to cut to."

Not surprisingly, AMP's Rosner endorses early music house participation. "Lead time is a wonderful luxury," he says, "but ninety percent of the music companies out there would love a short lead time if they had a chance to get in before the temp track is added. I don't care if it's not approved or it's thirty-five seconds long, just give me a shot at writing something before you play it for your client. If it changes, I'll adapt my music to it. I'd much rather have that situation, where I'm changing music that everyone likes that's original, than try to do a piece of music like another piece of music and dance around the line between originality and mimicry. All of a sudden you find yourself doing something you don't really enjoy doing."

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