

IDENTITY THEFT:  
TRIBUTE BANDS, GRAND RIGHTS, AND  
DRAMATICO-MUSICAL PERFORMANCES

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The lights dim. The crowd’s anticipation rises. A voice comes over the PA system. “You wanted the best. You got the best. The hottest band in the world . . . KISS!”<sup>1</sup> The band kicks in and the lights come up. On stage, there are four men in make-up that can best be described as Kabuki-Meets-Sci-Fi. The bass player

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<sup>1</sup> KISS, *Detroit Rock City*, on ALIVE II (Casablanca Records 1977).

is wagging his tongue, playing an axe-shaped electric bass. At the end of the first drum fill, pyrotechnics explode. The singer yells, "Hello, (insert name of city or venue here)!" However, this is not Madison Square Garden. This is a local club. And, even though the band looks like and sounds like *Kiss*,<sup>2</sup> they are not. It is actually *Kiss Army* or *Hotter than Hell* or *Kisstory* or any other *Kiss* tribute band.<sup>3</sup>

From *ABBA* to Frank Zappa, there are literally thousands of tribute bands exclusively performing the music of specific artists across the United States.<sup>4</sup> While a majority of these performances take place in local bars and nightclubs, some tribute bands tour worldwide, regularly playing 1000-1500 seat theaters.<sup>5</sup> Under the current system of copyright clearance, these performances are covered by the blanket licenses issued by ASCAP, BMI, and SESAC. However, this regime has significant shortcomings. Frequently, the original artist is compensated little or not at all for being the complete subject of the tribute band. In addition, the original artist has no control over this exploitation of her copyrights or the misappropriation of the goodwill she has established with her audience.

This Note argues for a system that would give an artist direct control over tribute bands and ensure that artist of proper compensation for the exploitation of her works and her persona.

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<sup>2</sup> *Kiss* was formed in New York City in 1973. From the start, their shows had an "emphasis on highly visual rock theatrics," including science fiction meets kabuki make-up and horror flick/gothic costumes. DAFYDD REES & LUKE CRAMPTON, *ENCYCLOPEDIA OF ROCK STARS* 488 (1996). They were signed to Casablanca Records after playing only three shows. Nathan Rabin, *Gene Simmons*, in *THE TENACITY OF THE COCKROACH* 138 (Stephen Thompson ed., 2002). In 1983, after some line-up changes, the band abandoned the make-up and, consequently, did not have a top ten hit from 1986 until 1990. REES & CRAMPTON at 489. The original line-up reformed and brought back the make-up and costumes in 1996. *Id.* at 490.

<sup>3</sup> These are three of the forty-eight U.S.-based *Kiss* tribute bands listed on the official *Kiss Army* (*Kiss* fan club) website. KISSOnline, Ultimate Guide to Kiss Tribute Bands, <http://www.kissonline.com/tributebands/> (last visited June 3, 2006). A "tribute band" is a cover band that performs the music of one particular artist. See *infra* Part I.

<sup>4</sup> Tribute-band.com, [http://www.tribute-band.com/search\\_bands.php](http://www.tribute-band.com/search_bands.php) (last visited June 3, 2006).

<sup>5</sup> A good example is *The Machine*, a *Pink Floyd* tribute band. As their promotional material states:

As demand for the group has expanded overseas, The Machine presents a fall tour throughout Germany, Austria, and Italy in October; in addition, the group has also performed internationally throughout Holland, Israel, Luxembourg, and Canada. The Machine recently released a live concert DVD and CD, *Two Nights at the Keswick*, from their 2003 performances. These documents are audio and visual proof that The Machine has perfected every vocal nuance, guitar riff, and improvisational delight that Pink Floyd wowed their audiences with for decades.

The Machine, About the Live Band, <http://themachinelive.com/about/> (last visited June 3, 2006.)

In Part I, tribute bands will be defined—what they are and what they do. Part II will look at a few tribute bands and the success they have achieved. Part III will explore the current system under which tribute bands operate and the system’s inadequacies in protecting the original artist’s interests. Part IV will discuss the trademark harms tribute bands produce on a regular basis. This Part will show that trying to rectify the situation under trademark remedies is unlikely to work, especially in any efficient manner. Part V will show that tribute bands properly fall under the definition of a “dramatico-musical performance,” and such performances require Grand Rights clearances directly from the copyright holder. Finally, in Part VI, how a system of grand rights licensing for tribute bands would function will be explored.

### I. WHAT IS A TRIBUTE BAND?

*I walk up to the mike and then I shake my hips.  
I take a deep breath and put a sneer on my lips.  
See me on the street you wouldn't know my name,  
but imitating Elvis is my claim to fame.*<sup>6</sup>

In local clubs and bars, live entertainment is often provided by “cover bands.”<sup>7</sup> A cover band performs music that was written and popularized by other artists. The “popularized” criterion is important. Elvis Presley and Tom Jones<sup>8</sup> are just two of the artists that made a career of singing songs written by others. In fact, prior to the 1960’s, the performer of a song was rarely the songwriter. There were clear distinctions between those who composed songs and those who performed them. Once Bob Dylan and *The Beatles* entered the picture, self-contained artists (singer-songwriters and bands with the songwriter(s) as members) became predominant in popular music.<sup>9</sup> There are still artists who are not songwriters, but no one would accuse Frank Sinatra, Linda Ronstadt, or Celine Dion of being cover acts.

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<sup>6</sup> STEVE GOODMAN, *Elvis Imitators, on ARTISTIC HAIR* (Red Pajamas Records 1983).

<sup>7</sup> Certainly, there are local bands that are exclusively playing music that the band, as a whole or in part, owns and controls the copyrights. For the most part, these bands play in venues that specialize in “original music.”

<sup>8</sup> Welsh singer Jones had his first hit in 1965 with *It's Not Unusual*, written by Gordon Mills and Les Reed. Jones continued to make the charts until 1977. He reappeared in the late 1980’s, teaming up with the art-rock band *Art of Noise* for a cover of Prince’s *Kiss*. REES & CRAMPTON, *supra* note 2, at 468-69. Out of the nineteen songs on Jones’ 2003 “Greatest Hits” compilation, Jones was a co-writer (one of three) on only one track. TOM JONES, *RELOADED: GREATEST HITS* (Decca Records 2003) (liner notes).

<sup>9</sup> This does not apply to “Bubblegum” pop music. Bubblegum is formulaic music where the artist is chosen primarily based on image and the songs are tailored towards an audience of pre-teens and teenagers. See generally BUBBLEGUM MUSIC IS THE NAKED TRUTH (Kim Cooper & David Smay eds., 2001). Examples of Bubblegum artists are *The Archies*, David Cassidy, *Menudo*, and Britney Spears.

Cover bands generally perform music from a wide variety of artists, perhaps specializing in an era or genre of music, but do not concentrate on any individual artist. For our purposes, cover bands are defined, as a term of art, as a performer or band who publicly performs songs popularized by other artists and who does not own the copyrights to those songs.<sup>10</sup>

There is a subset of cover bands that specialize in performing the music of one particular artist. The artists that receive these “tributes” range from those who have had long and successful careers<sup>11</sup> to those who are considered one-hit wonders.<sup>12</sup> “Specialist” cover bands fall into two categories: “reverence” bands and “tribute” bands.

Reverence bands, as a term of art, can be defined as a performer or band that publicly performs songs popularized by one particular artist and does not own the copyrights to those songs. A tribute band has the additional attribute of adopting the persona of the original artist through the use of costumes, make-up, stage dress and effects, and/or between-song-patter that quotes the original artist.<sup>13</sup> This additional attribute becomes the defining factor in the grand rights/dramatico-musical performance argument made by this Note.<sup>14</sup>

Reverence bands are as prevalent in the United States as are tribute bands. However, there seems to be a correlation between the visual aspect of the original artist and whether the specialist cover band playing that artist's music falls into the reverence or tribute band camp. For example, *Steely Dan* is a band that is known primarily for their music and not any particular image.<sup>15</sup> In

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<sup>10</sup> One needs to remember that every recording of a song involves two copyrights: the sound recording itself and the underlying musical composition. 1 MELVILLE NIMMER, NIMMER ON COPYRIGHT § 2.10 (2006). When discussing cover bands, it is the copyright in the musical composition that is relevant.

<sup>11</sup> *Fleetwood Mac* is a good example. Formed in 1967, the band has had a revolving membership with Mick Fleetwood (drums) and John McVie (bass) being the only constant members. REES & CRAMPTON, *supra* note 2, at 327-29. The band has released twenty albums, the last in 2003. The Official Site for Fleetwood Mac, <http://www.fleetwoodmac.com/music/> (last visited June 3, 2006). There are at least ten *Fleetwood Mac* specialist cover bands performing in the United States. Tribute Bands Resources, <http://www.tributecity.com/listings.php> (last visited June 3, 2006).

<sup>12</sup> *The Replicas* are a Pittsburgh-based tribute to Gary Numan. Tribute Bands Resources, <http://www.tributecity.com/band.php?rsn=2419> (last visited June 3, 2006). The band is named after an album Numan released in 1979 under the name *Tubeway Army*. It peaked at number 124 on the U.S. Charts. REES & CRAMPTON, *supra* note 2, at 620. Numan is best known in the United States for his one hit, 1979's *Cars*. *Id.*

<sup>13</sup> While “tribute band” is a widely used term, “reverence band” and the distinction between the reverence and tribute band is that of the author and created for this legal argument.

<sup>14</sup> See *infra* Part V.

<sup>15</sup> *Steely Dan* is, essentially, Donald Fagen and Walter Becker. They released seven albums between 1972 and 1980. They did not work together again until Becker produced

fact, *Steely Dan* has gone to great lengths not to cultivate a visual image. Pictures of the band have never appeared on any of their ten album covers.<sup>16</sup> Of seven specialist cover bands playing the music of *Steely Dan* in the United States, not one would qualify under the above definition of a tribute band.<sup>17</sup> These bands perform *Steely Dan*'s material, but do not assume the "character" of the musicians or use costumes. Other artists that seem to inspire only reverence bands are Frank Zappa<sup>18</sup> and *Chicago*.<sup>19</sup>

On the other side of the coin, there are artists whose visual aspects are as memorable as the music, if not more so. Take *Kiss* as an example. Here is a band that is almost completely about image. That image was enforced in merchandise ranging from comic books to puzzles to condoms.<sup>20</sup> There was even a made-for-TV movie called "*Kiss Meets the Phantom of the Park*" that aired on NBC in 1978.<sup>21</sup> As a result, of the forty-eight U.S.-based *Kiss*

Fagen's 1993 solo album *Kamakiriad*. They resumed performing live as *Steely Dan* in 1994. This resulted in a live album released in 1995. REES & CRAMPTON, *supra* note 2, at 824. Since 2000, they have released two more studio albums of new material. Steely Dan, Authorized Discography, <http://www.steelydan.com/discog.html> (last visited June 3, 2006). See generally BRIAN SWEET, *STEELY DAN: REELIN' IN THE YEARS* (1994).

<sup>16</sup> Albums by Steely Dan, <http://www.last.fm/music/Steely+Dan/+albums> (last visited June 3, 2006). The reference to ten albums does not include compilations of previously released material, although images of Becker and Fagen do not appear on those releases either. *Id.*

<sup>17</sup> See Aja View, <http://www.ajavu.com> (last visited June 3, 2006); The Royal Scam—A Tribute to Steely Dan, <http://www.royalscam.com> (last visited June 3, 2006); Pretzel Logic—A Steely Dan Revue, <http://www.pretzellogicband.com> (last visited June 25, 2006); The Steely Damned, <http://www.steelydamned.com> (last visited June 25, 2006); Index, <http://www.nakedlunch.net> (last visited June 25, 2006); Doctor Wu Home Page, <http://www.doctorwuband.com> (last visited June 25, 2006); Stealin' Dan—A Steely Dan Tribute, <http://stealindan.com/index3.htm> (last visited June 25, 2006).

<sup>18</sup> *Project Object* is a Frank Zappa reverence band that includes two Zappa alumni: Ike Willis and Napoleon Murphy Brock. Project Object—A Celebration of the Music of "Eff-Zee," <http://www.projectobject.com/index.shtml> (last visited June 24, 2006). Zappa was an artist who was opposed to the idea of "pop" music as a concept. His songs ranged from satire of different pop styles to full-blown orchestral compositions. REES & CRAMPTON, *supra* note 2, at 948-49. See generally MICHAEL GRAY, *MOTHER! THE FRANK ZAPPA STORY* (1994); FRANK ZAPPA, *THE REAL FRANK ZAPPA BOOK* (1989).

<sup>19</sup> See Transit Authority Site, <http://transit-authority.com/index2.html> (last visited June 24, 2006); Beginnings Tribute Band, <http://www.beginningstributeband.com> (last visited June 24, 2006). *Chicago*, originally named *Chicago Transit Authority*, was formed by students at DePaul University in 1967. They released their first album in 1969, which fused elements of jazz and rock and prominently featured a three-piece horn section. Their first album also featured protest chants from the 1968 Democratic National Convention held in Chicago that year. REES & CRAMPTON, *supra* note 2, at 182. Mayor Richard Daley was reportedly upset by this and threatened to file a lawsuit. The band then shortened its name. FRED BRONSON, *BILLBOARD'S HOTTEST HOT 100 HITS 28* (3d ed. 2003). The band had a dozen top ten hits throughout the 1970's. Guitarist Terry Kath died as a result of an accidental shooting in 1978. The band eventually recovered and continued to have chart success through the end of the next decade. *Id.* In spring 2006, the band released its first album of new material since 1991. The Official Site of Chicago the Band, <http://www.chicagotheband.com/discography30a.htm> (last visited June 24, 2006).

<sup>20</sup> RABIN, *supra* note 2, at 139.

<sup>21</sup> *Id.* at 140; REES & CRAMPTON, *supra* note 2, at 489.

specialist cover bands listed on the official *Kiss* Army (*Kiss* fan club) website, all but two wear the make-up and costumes on stage.<sup>22</sup> *Alice Cooper* is another band where the visual element equals or supersedes the music.<sup>23</sup> All five of the U.S.-based *Alice Cooper* specialist cover bands use the make-up, props, and other visual aspects of the original.<sup>24</sup> For these types of artists, it seems that a reverence band would not be effective in drawing an audience. Fans of the visually dominated musical act seem to demand a tribute band.

Most artists, however, fall in the middle of this spectrum. Since visual image is, at least minimally, part of the total package of a music artist, the specialist cover band has a choice to make; do they concentrate on the music alone and take the reverence band route or do they try to recreate the complete visual and musical experience as a full-blown tribute band? The same original artist may inspire both choices.

## II. THE TRIBUTE BAND INDUSTRY

*So when you put my imitation name in lights,  
there'll be imitation good rockin' tonight.*<sup>25</sup>

While most specialist cover bands are made up of amateur and hobbyist musicians, playing for fun and little or no money at the local bar, some tribute and reverence bands have become hugely successful. Unfortunately, there is no way to determine that the tribute band business is a “\$X Million a year” industry. However, one can look at a few tribute bands and conclude that the tribute band model can be extremely lucrative.

*1964* is a *Beatles* tribute band.<sup>26</sup> In 2004, *Pollstar Magazine*

<sup>22</sup> KISSOnline, <http://www.kissonline.com/tributebands/> (last visited Sep. 24, 2005).

<sup>23</sup> *Alice Cooper* is both the name of a band and the stage name of its front man, Vincent Furnier. REES & CRAMPTON, *supra* note 2, at 215. Formed in 1965, *Alice Cooper* [the band] had elaborate stage sets

to match the theatrical nature of the performance, led in dramatic fashion by Cooper [the person]. As he begins to incorporate bizarre props (including an electric chair, a guillotine, and large snakes) into their stage performance, Cooper also develops a popular demonic visual appearance, not least through the liberal use of black make-up.

*Id.*

<sup>24</sup> See Premier *Alice Cooper* Celebrity Impersonator Lookalike [sic] Rock Valentine, <http://www.varmouries.com/tributemarilyn/alice.htm> (last visited June 24, 2006); Devil's Food, [http://www.tribute-band.com/images/band\\_photo/\\_DSC02982.JPG](http://www.tribute-band.com/images/band_photo/_DSC02982.JPG) (last visited June 24, 2006); Prince of Darkness, <http://princeofdarkness.us/home.html> (last visited June 24, 2006); Nightmare—The *Alice Cooper* Tribute, <http://www.nightmareonline.com/mainindex.htm> (last visited June 24, 2006); A.C.T. Online, <http://actb.150m.com/alice.html> (last visited June 24, 2006).

<sup>25</sup> GOODMAN, *supra* note 6.

<sup>26</sup> *1964—The Tribute*, <http://www.1964thetribute.com>, (last visited June 24, 2006).

ranked them as the 167th top grossing live act of 2004.<sup>27</sup> This includes *all* concerts performed in the United States, including those given by artists currently topping the charts. According to their website, they have performed at New York City's Carnegie Hall three times since 2004.<sup>28</sup> In 2005, they performed 115 concerts.<sup>29</sup> Besides their live performances, they also sell CDs of their recordings of *Beatles*' songs and their own material.<sup>30</sup>

*The Machine*<sup>31</sup> is a New York-based *Pink Floyd*<sup>32</sup> tribute band. Formed in 1990, the band performed its one thousandth show in 1998.<sup>33</sup> The band tours internationally and "consistently sell[s] out thousand-seat halls."<sup>34</sup> In addition to their touring, the band also sells CDs of their performances of *Pink Floyd* material and a DVD of a concert performance.<sup>35</sup>

### III. THE CURRENT SYSTEM

*Critics ravin' 'bout our album but we're makin' fifty cents.*<sup>36</sup>

Currently, tribute bands operate under the same system as any other live performers.<sup>37</sup> The venue operator (or promoter, if a different entity) is responsible for paying royalties for compositions performed in her venue (or at her events).<sup>38</sup> While

<sup>27</sup> *Id.* "Pollstar is a weekly media magazine geared for the concert industry." Pollstar, [http://www.pollstar.com/about\\_pollstar.pl?page=Help#whoare](http://www.pollstar.com/about_pollstar.pl?page=Help#whoare) (last visited June 24, 2006).

<sup>28</sup> 1964 Data, <http://grouph.com/1964.data> (last visited June 24, 2006).

<sup>29</sup> *Id.*

<sup>30</sup> 1964—The Tribute Store, [http://1964thetribute.com/cgi-bin/web\\_store.cgi](http://1964thetribute.com/cgi-bin/web_store.cgi) (last visited June 24, 2006).

<sup>31</sup> The Machine, <http://www.themachinelive.com> (last visited June 24, 2006).

<sup>32</sup> *Pink Floyd* was formed in London in 1965. Their 1973 album, *Dark Side of the Moon*, spent a record 741 weeks on the Billboard Top 200 chart. Their 1979 album, *The Wall*, was made into a film in 1982. Chief lyricist and bass player Roger Waters left the band in 1983. The remaining members released an album in 1987 and ceased touring in 1994. REES & CRAMPTON, *supra* note 2, at 652-55.

<sup>33</sup> The Machine Live, <http://www.themachinelive.com/store> (last visited June 24, 2006).

<sup>34</sup> About the Live Band, <http://www.themachinelive.com/about> (last visited June 24, 2006).

<sup>35</sup> See The Machine Live, <http://www.themachinelive.com/store> (last visited June 24, 2006).

<sup>36</sup> ERIC CARMEN, *No Hard Feelings*, on ERIC CARMEN (Arista Records 1975).

<sup>37</sup> For example, *The B Street Band* is a New Jersey-based specialist Bruce Springsteen cover band. According to their leader, in their twenty-six year career, they have never been required by a venue or promoter to acquire grand rights clearance for a performance. Email from Will Forte, leader of *The B Street Band*, to Author (September 23, 2006, 02:32 EDT) (on file with author).

<sup>38</sup> ASCAP addresses this issue in one of their brochures. "Why must you, rather than the musicians who perform at your concerts, be responsible for obtaining permission to use the music? As a matter of law, everyone who participates in an unlicensed performance is responsible. In practice, concert promoters and/or presenters obtain licenses as a business cost." The ASCAP Concert & Recital Licenses, [https://www.ascap.com/licensing/SERIOUS\\_CONCERT.pdf](https://www.ascap.com/licensing/SERIOUS_CONCERT.pdf) (last visited Dec. 29, 2005).

ASCAP also addresses the Grand Rights issue in the same brochure. Are

one may question the fairness of the system in general,<sup>39</sup> the system does not take tribute bands specifically into account *at all*, and as a result, the artists who are being paid “tribute” are not necessarily being paid royalties.

There are three performing rights organizations (PROs)—ASCAP, BMI, and SESAC.<sup>40</sup> The PROs monitor performances of copyrighted compositions, collect royalties, and distribute those royalties to the appropriate copyright holders. These actions would be near impossible for each individual copyright holder, so PROs were formed to make the tasks manageable.<sup>41</sup> These three PROs represent almost all popular music compositions in existence.<sup>42</sup>

In order to comply with the U.S. copyright law, any establishment that plays copyrighted music is legally required to secure permission to use copyrighted music, whether in a live performance or by mechanical means. A music user can do this by securing licenses from the three performing rights organizations recognized by the U.S. Copyright Act of 1976.<sup>43</sup>

All three PROs offer “blanket licenses” of the compositions

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dramatic or “Grand Rights” performances included in the license? No, ASCAP members only grant ASCAP the right to license non-dramatic public performances of copyrighted music in the ASCAP repertory. For example, the ASCAP license does not authorize performance of an opera or a Broadway musical, but it does authorize performance of individual selections from operas and musicals. In general, the performance of music as part of a musical comedy, opera, play with music, revue or ballet presented in its entirety is considered to be dramatic, as would the performance of one or more musical selections from such a musical or opera accompanied by dialogue, pantomime, dance or stage action. Rights to present dramatic performances are obtained directly from the copyright owners.

*Id.* The importance of this is discussed *infra* in Part V.

<sup>39</sup> The system is seriously flawed, but that is a topic that cannot be covered with any real depth here. One difficulty with changing the system is that it is voluntary (at least in a legal sense). No one forces a songwriter to join one of these PROs, and barring Congressional action, any motion towards change would have to come from the members of the PROs.

<sup>40</sup> ASCAP is the American Society of Composers, Authors and Publishers, BMI is Broadcast Music, Inc., and SESAC is the Society of European Stage Authors and Composers.

<sup>41</sup> Michael B. Rutner, *The Ascapy Licensing Model and the Internet: A Potential Solution to High-Tech Copyright Infringement*, 39 B.C. L. REV 1061, 1073 (1998) (discussing the forming of ASCAP).

<sup>42</sup> ASCAP represents over four million compositions. ASCAP Licensing, Common Licensing Terms, <http://www.ascap.com/licensing/termsdefined.html> (last visited June 24, 2006). BMI represents over 6.5 million. Business Using Music, Eating and Drinking Establishments, <http://bmi.com/licensing/business/groupc/> (last visited June 24, 2006). SESAC does not state the number of compositions it represents, but does acknowledge that “SESAC is the smallest of the three U.S. performing rights organizations.” SESAC—About Us, <http://www.sesac.com/aboutsesac/about.aspx> (last visited Aug. 26, 2006).

<sup>43</sup> SESAC—About Us, <http://www.sesac.com/aboutsesac/about.aspx> (last visited Aug. 26, 2006).



they represent to venues where live music is performed and recorded music is played.<sup>44</sup> These “general licensing venues” include “bars, clubs, restaurants and the like.”<sup>45</sup> ASCAP’s blanket license allows

the music user to perform any or all of the 4 million musical works in ASCAP’s repertory as much or as little as they like. Licensees pay an annual fee for the license. The blanket license saves music users the paperwork, trouble and expense of finding and negotiating licenses with all of the copyright owners of the works that might be used during a year and helps prevent the user from even inadvertently infringing on the copyrights of ASCAP’s members and the many foreign writers whose music is licensed by ASCAP in the U.S.<sup>46</sup>

Essentially, any outlet where people can hear music must obtain blanket licenses from all three PROs to make sure that any song performed is being done so legally. While there are some differences among the PROs, they all essentially work the same way.

#### A. *How Fees Are Collected*

*And the money kept rolling in from every side.*<sup>47</sup>

Tribute bands perform in small venues, like local nightclubs and bars, and also in larger concert venues.<sup>48</sup> While both types of venues will require royalty payments for the compositions performed there, both the collection and distribution of these royalties by the individual PROs are different. What is the same about the PROs is that they each let the performances of tribute bands slip through the cracks and it is very unlikely that the revenue generated from a tribute band performance will ever reach the appropriate copyright holder regardless of the size of the venue where the performance takes place.

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<sup>44</sup> These venues vary widely and ASCAP, for example, offers over 100 different licenses for venues ranging from “Airline Suppliers” to “Zoos and Aquariums Owned and Operated by Non-Profit Organizations.” ASCAP Licensing: Licensing Types, <http://www.ascap.com/licensing/types.html> (last visited June 24, 2006).

<sup>45</sup> ASCAP Payment System, General Licensees and Special Monetary Awards, <http://www.ascap.com/about/payment/monetaryawards.html> (last visited June 24, 2006).

<sup>46</sup> ASCAP Licensing, Common Licensing Terms, <http://www.ascap.com/licensing/termsdefined.html> (last visited June 24, 2006).

<sup>47</sup> ORIGINAL BROADWAY CAST, *And the Money Kept Rolling In (And Out)*, on *EVITA* (Decca Records 1978).

<sup>48</sup> See *supra* Parts I and II; *infra* Part V.

### 1. General Licensing Venues

*It's Saturday night and I'm just hangin' out,  
lookin' for a place to party.  
I jumps into my ride and I hits the road,  
'cause there's only one place to go: Down to the nightclub.*<sup>49</sup>

Suppose there is a nightclub called “Club Hypothetical.” Its occupancy is five hundred customers and it is open year-round. The club does not serve food, but serves alcohol. Club Hypothetical has cover bands that perform every Wednesday, Thursday, Friday, and Saturday nights. Every Sunday a *Phish* tribute band performs, exclusively playing material written by the members of *Phish*.<sup>50</sup> Club Hypothetical does not play a jukebox, recorded music on an amplified audio system, television, or radio in the venue at any time. The club has a dance floor and maintains a cover charge on the nights when there is entertainment. Finally, Club Hypothetical is not a member of any state or national hospitality association.

BMI uses a straightforward formula to calculate what a venue must pay annually to obtain a blanket license.<sup>51</sup> If the venue has live music, one looks at whether there is a single performer or multiple performers and how many nights per week the performances take place. The rates range from a solo performer playing one night or less a week (\$2.65 per year per occupant) to multiple performers playing five to seven nights a week (\$4.80 per year per occupant).<sup>52</sup> Club Hypothetical falls into the highest rate.

If the venue plays recorded music, including tapes, records, CDs (or other digital media), has a “free-play” jukebox, or uses DJs or VJs,<sup>53</sup> then there is a \$2.30 per year per occupant charge.<sup>54</sup> If the recorded music is “enhanced,” meaning “the use of video tapes, DVDs and other projected visual images as an accompaniment/enhancement to recorded music performances”

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<sup>49</sup> TOWER OF POWER, *Down to the Nightclub*, on BUMP CITY (Warner Brothers Records 1972).

<sup>50</sup> *Phish* was formed at The University of Vermont in 1983. Phish Band History, <http://phish.com/bandhistory/index.php?year=1983> (last visited June 24, 2006). They released their first major label album in 1992. *Id.* Though receiving very little commercial airplay, they became one of the highest drawing touring bands, especially after the *Grateful Dead* stopped performing in 1994 and many of the *Dead*'s audience began following *Phish*. Phish, <http://en.wikipedia.org/wiki/Phish> (last visited June 24, 2006). The band broke up in 2004. *Id.*

<sup>51</sup> BMI, Music License for Eating and Drinking Establishments, <http://bmi.com/licensing/forms/ede.pdf> (last visited June 24, 2006).

<sup>52</sup> Occupancy is established by the local fire authority or by taking the square footage of the entire premises and dividing by twenty. *Id.*

<sup>53</sup> Disc Jockeys or Video Jockeys.

<sup>54</sup> BMI, Music License for Eating and Drinking Establishments, *supra* note 51, at 3.

there are additional charges of \$0.25 to \$0.50 per year per occupant depending on the frequency of such enhancement.<sup>55</sup> Since these would not apply to Club Hypothetical, no additional charges are incurred in this section.

If the venue charges a cover charge, admission fee, or has a minimum purchase requirement, add an additional charge of \$1.55 per year per occupant.<sup>56</sup> If dancing is permitted in the venue, add an additional charge of \$1.55 per year per occupant.<sup>57</sup> Finally, if the establishment plays the radio or TV, there is an additional charge of \$1.05 per year per occupant.<sup>58</sup> Club Hypothetical will incur both the cover charge and dancing fees, but not the radio or TV charges. This will bring the club's total per year per occupant charge to \$7.90 for a total fee of \$3950 for a one-year blanket license from BMI. BMI does offer a discount program to venues that are members of a state or national hospitality trade association.<sup>59</sup> For whatever reason, Club Hypothetical is not a member of any such organization, so it is not eligible for the discount.<sup>60</sup>

Since one-fifth of the total musical performances will consist of the music of *Phish*, one could assume that the copyright holders of the *Phish* material are due \$790, or 20% of the BMI fee.<sup>61</sup> This is not the case. In fact, it is likely that the copyright holders of the *Phish* material are going to receive no compensation at all from this or any other tribute band performances of their music. One only has to look at how BMI distributes the money it collects from general licensing venues to see this harsh reality.<sup>62</sup>

<sup>55</sup> *Id.* This would include Karaoke.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> BMI's Food and Beverage Association Discount Program, <http://bmi.com/licensing/business/discount.asp> (last visited June 24, 2006).

<sup>60</sup> ASCAP uses a similar system.

Generally, rates are based on the manner in which music is performed (live, recorded or audio only or audio/visual) and the size of the establishment or potential audience for the music. For example, rates for restaurants, nightclubs, bars and similar establishments depend on whether the music is live or recorded, whether it's audio only or audio visual, the seating capacity of the bar or restaurant, the number of nights per week music is offered, the number of musicians, whether admission is charged and several other factors.

ASCAP General Licensing Frequently Asked Questions, <http://www.ascap.com/licensing/generalfaq.html> (last visited June 24, 2006).

SESAC follows suit as well. See SESAC Performance License for Restaurants, Nightclubs and Taverns, [http://sesac.com/pdf/rest\\_notice\\_2006\\_click.pdf?state=NJ](http://sesac.com/pdf/rest_notice_2006_click.pdf?state=NJ) (last visited June 24, 2006).

<sup>61</sup> They receive this amount minus expenses BMI incurs in collecting the funds. BMI states that this is less than 15% of the revenues generated. More on Doing Business with BMI, <http://bmi.com/licensing/business/generalfaq.asp#9> (last visited June 24, 2006).

<sup>62</sup> See *infra* Part III.B.

## 2. Concert Venues

*Piano man, he makes his stand in the auditorium.*<sup>63</sup>

Concert venues are defined by BMI as facilities including, but not limited to, “a concert hall, stadium, auditorium, civic center, coliseum, theater, amphitheater, museum, library, stage, restaurants/nightclubs<sup>64</sup> or similar venues or similar venues whether enclosed or not. . .”<sup>65</sup> Unlike general licensing venues and the annual fees for a blanket license, the fees are computed on a per event basis.<sup>66</sup> The fees paid to BMI for each performance are based on a determination of seating capacity.<sup>67</sup> For venues with a seating capacity up to 9,999, BMI is owed 0.30% of the “gross ticket revenue.”<sup>68</sup> Venues seating more than 10,000 people are charged 0.15% of the gross ticket revenue.<sup>69</sup>

Assume now that the *Phish* tribute band is playing at The Imaginary Theater, a 2,000 seat indoor venue. Tickets are fifteen dollars.<sup>70</sup> Fifteen hundred tickets are sold, for a total gross of \$22,500. The promoter of the event owes BMI \$67.50. Let us further assume that this is the average gig for the band. If the band plays 100 shows in a year, they generate \$6,750 for BMI. Again, it would seem to follow that the copyright holders of the

<sup>63</sup> ELTON JOHN, *Tiny Dancer, on MADMAN ACROSS THE WATER* (Rocket Records 1971).

<sup>64</sup> While this seems to either contradict the general license idea or be redundant, the reality of the situation is that most nightclubs will fare better under the general license fees than that of concerts. The inclusion of restaurants/nightclubs in this definition is probably there for those venues that have music performances only a few times a year.

<sup>65</sup> BMI, Music Performance Agreement, <http://bmi.com/licensing/forms/musicalattractions.pdf> (last visited June 24, 2006).

<sup>66</sup> *Id.* at 2. There is a \$150 minimum annual fee.

<sup>67</sup> *Id.* BMI defines seating capacity as the total number of seats affixed in the Facility where the Attraction is presented plus any temporary seats added within the Facility for a particular Attraction. If the total number of seats available for the Attraction shall be less than that of the permanent Seating Capacity of the Facility, “Seating Capacity” shall mean the total number of seats available for the particular Attraction. If a Facility does not have permanent seating, then “Seating Capacity” shall mean the total number of persons attending a particular Attraction. If a Facility has lawn seating, then “Seating Capacity” shall mean the total number of seats permanently affixed, in addition to total lawn Seating Capacity as determined by the local Fire Marshall.

*Id.*

<sup>68</sup> *Id.* at 1. BMI defines gross ticket revenue as the total monies received, directly or indirectly, by LICENSEE or their authorized representatives from all ticket sales per attraction. The term “Gross Ticket Revenue” shall not include: 1) federal, state, and/or local taxes; 2) building/facility charge per ticket sold; 3) ticketing agent/service charge placed on each ticket sold; or 4) facility parking fees.

*Id.* BMI then states that if a portion of the ticket price is donated to charity, then the amount donated may be deducted from the gross. *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> This is the base price, before tax and any service charges. None of the proceeds is donated to charity in our hypothetical.

*Phish* material should get that money.<sup>71</sup> If that were so, the current system might be reasonable; however, it is not.<sup>72</sup>

### B. *How Fees Are Distributed*

*Now cynics say a little of the cash has gone astray.*<sup>73</sup>

The performing rights societies put on a facade that they distribute the funds collected from nightclubs and bars based on the actual songs performed in those venues. ASCAP states: “ASCAP receives payment for public performances of songs and compositions by negotiating license fees with the users of music (radio, TV, cable, bars, clubs, restaurants, shopping malls, concert halls and promoters, web sites, airlines, orchestras, etc.) and distributing these monies to members whose works were performed.”<sup>74</sup> There is discussion of the “follow the dollar” principle where the money collected from television stations is paid to members for performances of their works on television; the money collected from radio stations is paid out for radio performances, and so on. ASCAP tracks music use on these and other media and live venues to determine which music has been performed, and which writers and publishers are to be paid.<sup>75</sup>

Unfortunately, the “follow the dollar” principle crumbles when it comes to the monies collected from general blanket licenses.

Of course, it would be impractical to monitor all performances in bars, clubs, restaurants and the like. ASCAP licenses tens of thousands of music users, such as these, that do not fall into the ASCAP surveys. The monies collected from these establishments goes into a “general” licensing fund and is paid out to members on the basis of feature performances on radio and all surveyed performances on television.<sup>76</sup>

In other words, “[f]ees collected from non-broadcast, non-surveyed licensees (bars, hotels, restaurants and the like) are applied to broadcast feature performances on radio and all performances on television, which serve as a proxy for distribution

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<sup>71</sup> The copyright holders should get the money minus the expenses for BMI. *See supra* note 61.

<sup>72</sup> ASCAP follows a very similar process to BMI’s. *See* The ASCAP Concert & Recital Licenses, [https://www.ascap.com/licensing/SERIOUS\\_CONCERT.pdf](https://www.ascap.com/licensing/SERIOUS_CONCERT.pdf) (last visited June 24, 2006).

<sup>73</sup> *See* ORIGINAL BROADWAY CAST, *supra* note 47.

<sup>74</sup> ASCAP Payment System, Introduction, <http://www.ascap.com/about/payment/paymentintro.html> (last visited June 24, 2006).

<sup>75</sup> *Id.*

<sup>76</sup> ASCAP Payment System, General Licensees and Special Monetary Awards, <http://www.ascap.com/about/payment/monetaryawards.html> (last visited June 24, 2006).

purposes.”<sup>77</sup> Instead of attempting to determine whose compositions are being performed in these general license venues, ASCAP just relies on radio and television performances to determine who is paid.

BMI does not make any more of an effort than ASCAP to accurately determine which compositions are being performed in general licensing venues. While BMI has a system for determining how much a blanket license will cost a nightclub, the system for determining how those fees are distributed does not take into account the specific compositions that generated those royalties.

BMI collects license fees from thousands of music users. . . . These “general licensing” music users include, but are not limited to, hotels, restaurants, nightclubs, sports arenas, theme parks, airlines, jukeboxes and retail stores. BMI may choose an appropriate surrogate, such as radio or television performances, for the distribution of the fees. In such a case, *general licensing revenue serves to increase the rates payable for other performance types which we determine are representative of the universe of performances of music used in general licensing categories.*<sup>78</sup>

BMI, in short, collects fees for performances of the compositions they control in these general licensing venues and then adds the money to the pool that is paid out for performances on radio and television. BMI’s logic involves comparing apples to refrigerators. The disconnect between songs being played on the radio and songs being performed by bands in general licensing venues mean that, again, the royalties are not being paid to the correct copyright holders.

The major difficulty with this is exemplified in our Club Hypothetical example. *Phish* never received much, if any, commercial radio play.<sup>79</sup> The bottom line is that *Phish* will not receive the 20% of monies collected from Club Hypothetical even though their compositions make up 20% of the compositions performed. They will likely receive nothing.

The system certainly fails many of the original artists who are the subject of tribute bands. The likelihood of receiving royalties based on a tribute band’s performance of an artist’s composition has nothing to do with the actual performance at all. If the artist currently receives a lot of radio and television airplay, then she will

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<sup>77</sup> ASCAP Payment System, Royalty Calculation, <http://www.ascap.com/about/payment/royalties.html> (last visited June 24, 2006).

<sup>78</sup> BMI, Songwriter / Publisher / Composer, <http://bmi.com/songwriter/resources/pubs/royaltygeneral.asp> (last visited June 24, 2006) (emphasis added).

<sup>79</sup> See *supra* note 50.

receive a portion of the monies collected from live performances in general licensing venues. If she does not receive that airplay, she will not see a dime. Under the current system, there is no direct payment as a result of a tribute band performing in a general licensing venue, no matter how frequently that band performs.<sup>80</sup>

In the case of concert venues, things do not fare much better for the original artist.

BMI uses an independent source of pop concert information to create a database that is used to solicit concert set lists. We compile these responses and determine semi-annually which musical acts were among the 200 top-grossing tours. A royalty payment is calculated for each BMI-licensed work used in the opening and headliner's acts in each of these top musical tour set lists.<sup>81</sup>

So, unless the *Phish* tribute band's tour was one of the top 200 grossing tours for that half of the year, the copyright holders of the *Phish* material will not see a dime of the revenues generated through the performance of their compositions.<sup>82</sup>

Under the current methods used by the PROs, performances by tribute bands do not, for the most part, result in royalties being paid to the copyright holders of the songs of the original artist. While it is understandably a difficult task, especially in the general licensing venues, to determine exactly which compositions are being performed, the performing rights societies make *no* effort and distribute the royalties generated by the live performances in proportion to radio and TV play.

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<sup>80</sup> Of course, the opposite is true as well. An artist who receives a lot of radio and television airplay but does not have her songs covered by bands in blanket licensing venues will receive revenue not generated by that artist's copyrighted compositions.

<sup>81</sup> BMI, Songwriter/Publisher/Composer, <http://bmi.com/songwriter/resources/pubs/royaltygeneral.asp> (last visited June 24, 2006)

<sup>82</sup> *Phish* would fair no differently under ASCAP. ASCAP distributes its concert-generated royalties in the same manner. "Live Concerts: All songs performed in the 200 top-grossing concert tours, as well as selected other major live performance venues, covering headliners and opening acts." ASCAP Payment System, <https://www.ascap.com/about/payment/surveys.html> (last visited June 24, 2006).

Even if *Phish* themselves were still touring and within the top grossing tours, this would not affect the result. They would get paid royalties based on their performances, but the performances of the tribute band would not generate any extra royalties for *Phish*.

IV. TRADEMARK HARMS AND WHY TRADEMARK SOLUTIONS  
ARE NOT THE ANSWER

*We need a more permanent solution to our problem.*<sup>83</sup>

In addition to the copyright issues presented in the previous Part, tribute bands also misappropriate the names, logos, and dress of the original artist, all of which have been traditionally protected by trademark and unfair competition law. By virtue of this misappropriation, tribute bands may negatively affect the goodwill created by the original artist. However, trademark remedies would fall short, or be difficult to apply in a broad sense, in an effort to redress this harm. Additionally, in the cases of likeness rights and the right of publicity, it would be difficult to have a consistent national rule.

Tribute bands take the goodwill that the original artist has built up with its audience and misappropriate that goodwill, exploiting it for their own economic gain. To use Justice Mahlon Pitney's words, a tribute band is "reap[ing] where it has not sown."<sup>84</sup> In addition to this general misappropriation of goodwill, tribute bands may specifically be guilty of trademark infringement, as well as dilution, tarnishment, and violation of the right of publicity.

Justice Pitney, writing for the majority in *International News Service v. Associated Press*,<sup>85</sup> describes the exact kind of harm tribute bands create. In that case, the defendant was taking news stories that the plaintiff published in early editions of its newspapers, and reprinting them in the defendant's own newspapers. In describing this process, Justice Pitney wrote:

In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money . . . and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown. . . .<sup>86</sup>

The concept of goodwill between the producer of goods and services and the consumers of that producer's goods is at the very heart of trademark and unfair competition protection. In fact, Justice Pitney also remarked that "the trademark is treated as

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<sup>83</sup> ORIGINAL CAST RECORDING, *This Jesus Must Die, on JESUS CHRIST SUPERSTAR* (MCA Records 1970).

<sup>84</sup> *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918).

<sup>85</sup> *Id.* at 215. Although this case dealt with unfair competition, the Court's description of the harm caused by the defendant's actions aptly describes tribute bands.

<sup>86</sup> *Id.* at 239.



merely a protection for the good-will.”<sup>87</sup> This concept was also stated by Justice Sandra O’Connor, “[t]he Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business.”<sup>88</sup>

A musical artist’s trademark starts in a name. Many artists, including Jimmy Buffett,<sup>89</sup> Fleetwood Mac,<sup>90</sup> and Neil Diamond,<sup>91</sup> have registered their names as trademarks.<sup>92</sup> *Chicago*<sup>93</sup> and *Kiss*<sup>94</sup> have not only registered their name, but their logos as well.<sup>95</sup> This is only logical since an artist’s name, once established, is the brand that sells recorded music, concert tickets, and merchandise. The registrations of these trademarks show that the artists themselves understand this.

Tribute bands use these trademarks in the course of identifying themselves. Often, they use a song or album title out of the original artist’s catalog as their band name.<sup>96</sup> Additionally, they will add “A Tribute to [Insert Name of Original Artist Here].” In fact, one *Fleetwood Mac* tribute band has gone so far as to apply for trademark registration of RUMOURS—A TRIBUTE TO FLEETWOOD MAC.<sup>97</sup> Not only will tribute bands use the name mark, but they will often use the logos as well. *Kiss Army* is an example of how far a tribute band will go.<sup>98</sup> Besides using the

<sup>87</sup> Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 414 (1916).

<sup>88</sup> Park ‘n Fly v. Dollar Park & Fly, 469 U.S. 189 (1985).

<sup>89</sup> Buffett released his first album in 1970, which sold 324 copies. He had one Top Ten hit in 1977. Through the strength of his live performances, he has built an empire including a record label, books, restaurants, and merchandise. REES & CRAMPTON, *supra* note 2, at 140-42. Buffett had his first number one album in 2004. Yahoo! News, Buffett, <http://music.yahoo.com/read/news/12177068> (last visited June 24, 2006). *See generally* STEVE ENG, JIMMY BUFFETT: THE MAN FROM MARGARITAVILLE REVEALED (1996).

<sup>90</sup> *See supra* note 11.

<sup>91</sup> Diamond initially found success as a songwriter, penning hits for *Jay and The Americans* and *The Monkees*. He had his first hit as a recording act in 1966 and continued hitting the Top Ten through 1982. Since then, he still is a major concert draw. REES & CRAMPTON, *supra* note 2, at 257-59.

<sup>92</sup> Buffett’s mark was registered in 1998 (Serial Number 75/412,548 & Registration Number 2201538). Diamond’s mark was registered in 2002 (Serial Number 76/274,718 & Registration Number 2607316). Fleetwood Mac’s mark was registered in 1983 (Serial Number 73/337,746 & Registration Number 1238825). Trademark Electronic Search System, United States Patent and Trademark Office Homepage, <http://www.uspto.gov/index.html> (last visited July 2, 2006) [hereinafter TESS].

<sup>93</sup> *See supra* note 19.

<sup>94</sup> *See supra* note 2.

<sup>95</sup> CHICAGO was registered in 1975 (Serial Number 72/426,716 & Registration Number 1005131). KISS was registered in 1981 (Serial Number 73/236,538 & Registration Number 1155932) and their logo was registered in 1995 (Serial Number 74/459,861 & Registration Number 1894876). TESS, *supra* note 92.

<sup>96</sup> For example, *The Machine*, a *Pink Floyd* tribute band, takes its name from the song *Welcome to the Machine* on the 1975 album *Wish You Were Here*. *See supra* note 5.

<sup>97</sup> *Rumours* is the title of a 1977 *Fleetwood Mac* album. REES & CRAMPTON, *supra* note 2, at 328. The service mark application was filed on September 26, 2005, under Application Number 78/720,909. TESS, *supra* note 92. It seems likely that the registration will be denied.

<sup>98</sup> KissArmyRules, <http://www.kissarmyrules.com> (last visited June 24, 2006).

original artist's name as part of their own, the band uses the KISS name and logo in their promotional material<sup>99</sup> and uses the logo at least twice in their stage show.<sup>100</sup>

Section 43(a) of the Lanham Act provides that:

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

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action . . . .<sup>101</sup>

In the case of tribute bands, the key terms in this section are “sponsorship or approval” and “affiliation, connection or association of such person with another person.”<sup>102</sup> Although subject to a multi-factor analysis,<sup>103</sup> the question of liability is largely dependent on whether the uses of name, trade dress, and logo by the tribute band is “likely to cause confusion.”

A particular type of confusion that a tribute band is likely to cause is initial interest confusion. In *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*,<sup>104</sup> the Ninth Circuit defined initial interest confusion by discussing *Mobil Oil Corp. v. Pegasus Petroleum Corp.*<sup>105</sup> In *Mobil*, the defendant used a drawing of a winged horse similar to the one used by the plaintiff.<sup>106</sup>

Mobil established that potential purchasers would be misled into an initial interest in Pegasus Petroleum because they

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<sup>99</sup> *Id.* The opening page of their website uses the name mark KISS no less than nine times and the logo at least four times.

<sup>100</sup> *Id.* Notice the KISS logo on the front of the bass drum as well as the large lighted version hanging above the drummer.

<sup>101</sup> 15 U.S.C. §1125(a)(1)(a) (2006).

<sup>102</sup> *Id.*

<sup>103</sup> Each circuit has developed its own multifactor test to evaluate the “likelihood of confusion.” Some of these factors look past the alleged infringer’s use and consider such items as the strength of the original trademark or the degree of similarity between the marks. *See, e.g., Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

This article will not attempt a full multi-factor analysis as the contention is trademark infringement suits, as a method of stopping the harm caused by tribute bands, will be ineffective and inefficient due to the likelihood of multiple, protracted fair use contests.

<sup>104</sup> 174 F.3d 1036 (9th Cir. 1999).

<sup>105</sup> 818 F.2d 254 (2d Cir. 1987).

<sup>106</sup> *Brookfield Communs., Inc. v. Westfield Entm’t Corp.*, 174 F.3d at 1063.

thought that Pegasus Petroleum was associated with Mobil. But these potential customers would generally learn that Pegasus Petroleum was unrelated to Mobil well before any actual sale was consummated. Nevertheless, the Second Circuit held that such initial confusion works a sufficient trademark injury.<sup>107</sup>

Similarly, when the consumer sees an advertisement for a tribute band, he may initially be drawn in by the trademark of the original artist. Even though the consumer may quickly figure out that the tribute band was not, in fact, the actual original artist, the damage is already done. It was the consumer's feeling of goodwill towards the original artist that drew her attention to the tribute band, and thus the tribute band's adoption of the name, logo, and trade dress can lead to a finding of infringement.

In addition to trademark infringement, tribute bands may be liable for dilution and tarnishment. Dilution is defined as "the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception."<sup>108</sup> Once there are forty-two *Kiss* tribute bands<sup>109</sup> all using the KISS trademark to some extent, the capacity to distinguish any one of these bands from another, or far more importantly, the original *Kiss*, has been diminished. This harm is summed up nicely by a court in the Southern District of New York:

Once a trademark has become diluted, it has lost the strength it once possessed. No matter how small the dilution, the harm has been done. Dilution has been described as the gradual whittling away of a firm's distinctive trademark or name. Just one whittle taken from a stick destroys the possibility that the stick can ever be made whole.<sup>110</sup>

"Tarnishment occurs when the Plaintiff's mark is used by the Defendant in association with inferior or unwholesome goods or services."<sup>111</sup> Just as with any genre of performing artists, there are skillful tribute bands and there are less skillful ones. The worst-case scenario is that someone who is unfamiliar with the music of the original artist is in the audience for an especially inept tribute band. The consumer may dislike the tribute band's performance

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<sup>107</sup> *Id.* (citations omitted).

<sup>108</sup> *McNeil Consumer Brands v. United States Dentek Corp.*, 116 F. Supp. 2d 604, 607 (E. D. Pa. 2000).

<sup>109</sup> *See supra* note 3.

<sup>110</sup> *Ringling Brothers-Barnum & Bailey Combined Shows v. B.E. Windows Corp.*, 937 F. Supp. 204, 209 (S.D.N.Y. 1996) (citations omitted).

<sup>111</sup> *Id.* *See, e.g., Hormel Foods Corp. v. Jim Henson Prods.*, 73 F.3d 497, 507 (2d Cir. 1996); *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994).

so much so that she assumes she would not like the original artist as well. Such a consumer is unlikely to purchase a ticket to see the original artist in concert. Even if the original artist is no longer touring, negative consumer impressions may affect CD and download sales, which provide an income stream to the original artist.

A final type of trademark harm that tribute bands enact is to the original artist's right of publicity. As there is no federal right of publicity, the right of publicity exists only on a state level and varies significantly from state to state.

In *White v. Samsung Electronics America, Inc.*,<sup>112</sup> the Ninth Circuit, quoting an influential law review article written by Prosser, stated that an impersonation of a famous figure could qualify as a violation of common law right of publicity.<sup>113</sup> The Ninth Circuit, applying California law, has also found the impersonation of a singer's voice to be a violation of the right of publicity.<sup>114</sup>

In *Midler v. Ford Motor Co.*, an advertising firm was doing a series of commercials for Ford aimed at "yuppies."<sup>115</sup> It wanted to include a recording from a 1973 Bette Midler album. The firm approached Midler to sing in the commercial, but she refused. The firm then hired a former background singer of Midler's.<sup>116</sup> This singer attempted to sound like Midler. After the commercial aired, Midler was told by several associates that the commercial "sounded exactly" like her and Midler sued.<sup>117</sup> The court held that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California."<sup>118</sup>

The *Midler* holding suggests that tribute bands are also committing the tort of imitating the voice of a professional singer in order to sell a product. However, since this holding is limited to California, it is not clear that other states will find a similar tort

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<sup>112</sup> 971 F.2d 1395 (9th Cir. 1992).

<sup>113</sup> *White v. Samsung Elec., Inc.*, 971 F.2d at 1397-98 (quoting Raymond L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 401-07 (1960)).

Even though Prosser focused on appropriations of name or likeness in discussing the right of publicity, he noted that "it is not impossible that there might be appropriation of the plaintiff's identity, as by impersonation, without the use of either his name or his likeness, and that this would be an invasion of his right of privacy."

*Id.*

<sup>114</sup> See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

<sup>115</sup> *Midler*, 849 F.2d at 461.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 461-62.

<sup>118</sup> *Id.* at 463.

based on a right of publicity.

While a right of publicity cause of action would seem to some the most obvious way for an artist to shut down a tribute band, this is not the case. Pursuing a right of publicity-based approach would require suing each individual tribute band in multiple jurisdictions, which would be costly and time consuming.

A. *Analyzing a Fair Use Defense by Tribute Bands*

*But then all is fair.*<sup>119</sup>

For the above causes of action in trademark and unfair competition law (except perhaps the right of publicity), tribute bands would argue that their use of trademarks is allowed under the doctrine of fair use.<sup>120</sup> There are two types of fair use, classic or traditional, and nominative. The second of these is more likely to be useful to tribute bands as a defense.

“If the defendant’s use of the plaintiff’s trademark refers to something other than the plaintiff’s product, the traditional fair use inquiry will continue to govern.”<sup>121</sup> Certainly, many band names, like *Kiss* or *Chicago*, have normal, everyday meanings. However, tribute bands are not using the marks in that capacity.

In *Brother Records, Inc. v. Jardine*,<sup>122</sup> Al Jardine, an original member of *The Beach Boys*,<sup>123</sup> left the band and was touring under the name *Al Jardine’s Beach Boys Family and Friends*.<sup>124</sup> The court explained that a classic fair use defense “codified in the Lanham Act, 15 U.S.C. § 1115(b)(4), applies only to marks that possess both a primary meaning and a secondary meaning—and only when the mark is used in its primary descriptive sense rather than its secondary trademark sense.”<sup>125</sup> The court held that:

<sup>119</sup> BEN FOLDS FIVE, *Fair, on WHATEVER AND EVER, AMEN* (550 Music Records 1997).

<sup>120</sup> It should be noted that the Court has recently held that consumer confusion does not, on its own, preclude a fair use defense. *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118-21 (2004).

<sup>121</sup> *New Kids on the Block v. New Am. Publ’g Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

<sup>122</sup> 318 F.3d 900 (9th Cir. 2003).

<sup>123</sup> The *Beach Boys* was formed in 1961 by three brothers, Brian, Dennis, and Carl Wilson, their cousin Mike Love, and Brian’s friend Al Jardine. They dominated the charts for the next several years with Brian Wilson as the artistic leader. REES & CRAMPTON, *supra* note 2, at 68-69. In 1966, they released *Pet Sounds*, not a commercial success initially, but now widely considered one of the greatest albums ever made. *See generally* KINGSLEY ABBOT, *THE BEACH BOYS’ PET SOUNDS: THE GREATEST ALBUM OF THE TWENTIETH CENTURY* (2001). Brian Wilson suffered a mental breakdown and their follow-up album, *Smile*, was scrapped. *See generally* DOMINIC PRIORE, *THE STORY OF BRIAN WILSON’S LOST MASTERPIECE—SMILE* (2005). The band continued on, eventually building up a strong concert following. REES & CRAMPTON, *supra* note 2, at 69-72. By 1998, Dennis and Carl Wilson had passed away and Jardine did not want to work with Mike Love anymore. *Brother Records, Inc. v. Jardine*, 318 F.3d at 902. *See generally* STEVEN GAINES, *HEROES AND VILLAINS* (Da Capo Press 1995).

<sup>124</sup> *Brother Records*, 318 F.3d at 902.

<sup>125</sup> *Id.* at 905.

Jardine does not use the trademark in any primary, descriptive sense. That is, Jardine does not use “The Beach Boys” trademark to denote its primary, descriptive meaning of “boys who frequent a stretch of sand beside the sea.” Instead, Jardine uses “The Beach Boys” trademark in its secondary, trademark sense, which denotes the music band and its members—that popularized California surfing culture.<sup>126</sup>

The same would apply to tribute bands. *Kiss Army* is not using KISS in the sense of “a caress with the lips.”<sup>127</sup> They are using the word in a trademark sense, referring to the band *Kiss*. “Where the defendant uses the trademark not in its primary, descriptive sense, but rather in its secondary, trademark sense, the nominative fair use analysis applies.”<sup>128</sup>

Tribute bands would argue that nominative fair use allows for the use of the original artist’s trademark, because there is no other way to describe themselves other than by the use of the original artist’s name. As the *Brother Records* court stated:

The nominative fair use defense acknowledges that it is often virtually impossible to refer to a particular product for purposes of comparison, criticism, point of reference or any other such purpose without using the mark. . . . Therefore, the nominative fair use defense is available only if the use of the trademark does not attempt to capitalize on consumer confusion or to appropriate the cachet of one product for a different one.<sup>129</sup>

The test for nominative fair use is found in *New Kids on the Block v. News America Publishing Inc.*<sup>130</sup> In that case, the plaintiffs were a bubblegum pop group that enjoyed commercial success in the late 1980’s and early 1990’s.<sup>131</sup> In its newspapers, defendants had run polls regarding the plaintiffs, which included the question: “Who is your favorite New Kid on the Block?”<sup>132</sup> Plaintiffs sued for trademark infringement. The court held that the defendant had a successful nominative fair use defense because defendant’s use of plaintiffs’ trademark passed a three-part test.<sup>133</sup> The court articulated the test:

[W]here the defendant uses a trademark to describe the

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<sup>126</sup> *Id.* at 907.

<sup>127</sup> WEBSTER’S NEW COLLEGIATE DICTIONARY 663 (9th ed. 1988).

<sup>128</sup> *Brother Records*, 318 F.3d at 908.

<sup>129</sup> *Id.*

<sup>130</sup> 971 F.2d 302 (9th Cir. 1992).

<sup>131</sup> REES & CRAMPTON, *supra* note 2, at 609-11. Like most bubblegum groups, their fall was as fast as their rise. See *supra* note 9.

<sup>132</sup> *New Kids on the Block v. News Am. Publ’g Inc.*, 971 F.2d at 304.

<sup>133</sup> *Id.* at 308-09.

plaintiff's product, rather than its own, we hold that a commercial user is entitled to a nominative fair use defense provided he meets the following three requirements: First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.<sup>134</sup>

The first prong of the test, "the product or service in question must be one not readily identifiable without use of the trademark,"<sup>135</sup> might tip in favor of the tribute band. If you are performing the music of *Fleetwood Mac*, it would be difficult to convey that to consumers without using the trademark. This is not always the case. *The B Street Band*, a New Jersey-based Bruce Springsteen<sup>136</sup> tribute band, uses "A Tribute to the Boss"<sup>137</sup> as their tag line.<sup>138</sup> *Project Object*, a Frank Zappa tribute band, uses "The Music of Eff-Zee" to identify the object of their tribute.<sup>139</sup> Therefore, there are ways for the tribute band to get their point across without using the actual trademark.

The second prong, which asks if "only so much of the mark or marks may be used as is reasonably necessary to identify the product or service," will largely be an individual, fact-based decision.<sup>140</sup> In situations where the tribute band uses the original artist's name, but not their logo, this factor would probably tip in favor of the tribute band. In cases such as *Kiss Army*,<sup>141</sup> where the tribute band uses both the name and logo repeatedly, defendants would likely lose this prong.

The third and final prong states that "the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder,"<sup>142</sup> again would largely be a fact-based decision. Both sides would have to present evidence, possibly in the form of expensive surveys, which could lead to a battle of the experts. In the end, the final decision, so heavily fact-dependent, could easily go either way.

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<sup>134</sup> *Id.* at 308.

<sup>135</sup> *Id.*

<sup>136</sup> Springsteen is one of the most successful, both critically and commercially, artists of all time. See generally DAVE MARSH, BORN TO RUN, THE BRUCE SPRINGSTEEN STORY, VOL. I (Thunder's Mouth Press 1996) (1979); DAVE MARSH, GLORY DAYS, THE BRUCE SPRINGSTEEN STORY, VOL. II (Thunder's Mouth Press 1996) (1987).

<sup>137</sup> "The Boss" is a nickname of Springsteen.

<sup>138</sup> B Street Band, <http://www.bstreetband.com> (last visited June 25, 2006).

<sup>139</sup> See *supra* note 18.

<sup>140</sup> *New Kids*, 971 F.2d at 308.

<sup>141</sup> See *supra* notes 98-100 and accompanying text.

<sup>142</sup> *New Kids*, 971 F.2d at 308.

And herein lies why trademark remedies are not the answer.

Using trademark-based theories to undo the harms, both copyright and trademark-oriented, caused by tribute bands would not be effective or efficient. This is because trademark infringement suits against tribute bands would end up as fair use contests and each specific case would be decided mostly on its individual facts. Winning cases like these would be expensive and time-consuming as they are so discovery-intensive. In addition, there would be no national standard to help predict the outcome of these cases. Most importantly, although there are tribute bands that are very profitable,<sup>143</sup> the vast majority of tribute bands are not making money. This would make each case more about injunctions than damages, and the original artist that pursues, and even triumphs in, litigation will have little hope of collecting damages. This could be why original artists have not pursued these causes of action. Instead, one only has to look to copyright law to find a solution already in existence.

#### V. GRAND RIGHTS AND DRAMATICO-MUSICAL PERFORMANCES

*Get up, stand up.  
Stand up for your rights.*<sup>144</sup>

The exclusive right of public performance of musical compositions is among the rights granted to copyright holders by statute.<sup>145</sup> After this right was codified in 1909

[c]omposers and publishers soon realized it was impractical for each copyright holder to attempt to enforce this right since he could not possibly police all public performances for profit of every musical composition throughout the United States. ASCAP was formed to meet this need. By obtaining licenses from its members, this organization, staffed for the purpose, could enforce the performing rights of its members.<sup>146</sup>

Because dramatic performances were considered easier for the individual copyright holder to police, ASCAP and the other PROs are only authorized by the copyright holder to license non-dramatic performance rights.<sup>147</sup> ASCAP acknowledges this on their website, defining a spectrum of types of performance that

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<sup>143</sup> See *supra* Part II.

<sup>144</sup> THE WAILERS, *Get Up, Stand Up, on BURNIN'* (Island Records 1973).

<sup>145</sup> 17 U.S.C. § 106(4) (2006) ("The owner of copyright . . . has the exclusive rights . . . in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.")

<sup>146</sup> Robert Stigwood Group, Ltd. v. Sperber, 457 F.2d. 50, 52 (2d Cir. 1972).

<sup>147</sup> *Id.*



they do not license.<sup>148</sup>

While this language uses a composition from the musical *Oklahoma* as an example of a dramatico-musical work, there is no requirement that a composition be from a dramatic work to be subject to grand rights.<sup>149</sup>

*Gershwin v. Whole Thing Co.* sets out two factors to be used in determining when a performance is “dramatico-musical.”<sup>150</sup> Satisfying either factor is sufficient for such a determination. “Grand rights are required if: (1) a song is used to tell a story . . . or (2) a song is performed with dialogue, scenery, or costumes.”<sup>151</sup> Performance of songs in musical review with characters, costumes, and stage settings falls outside a PRO’s general license.<sup>152</sup> The *Gershwin* test contains factors to help determine if something is a dramatico-musical performance but it seems that courts think of dramatico-musical performances in the same way that courts view

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<sup>148</sup> ASCAP Licensing: Common Licensing Terms, <http://www.ascap.com/licensing/termsdefined.html> (last visited June 25, 2006).

Dramatic or Grand Rights or Dramatic Performances - ASCAP members do not grant ASCAP the right to license dramatic performances of their works. While the line between dramatic and non-dramatic is not clear and depends on the facts, a dramatic performance usually involves using the work to tell a story or as part of a story or plot. Dramatic performances, among others, include:

(i) performance of an entire “dramatico-musical work.” (For example, a performance of the musical play *Oklahoma* would be a dramatic performance).

(ii) performance of one or more musical compositions from a “dramatico-musical work” accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken. For example, a performance of “People Will Say We’re In Love” from *Oklahoma* with costumes, sets or props or dialogue from the show would be dramatic.

(iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action or visual representation. (For example, incorporating a performance of “If I Loved You” into a story or plot would be a dramatic performance of the song).

(iv) performance of a concert version of a “dramatico-musical work.” For example, a performance of all the songs in *Oklahoma* even without costumes or sets would be a dramatic performances [sic].

The term “dramatico-musical work” includes, but is not limited to, a musical comedy, oratorio, choral work, opera, play with music, revue or ballet.

ASCAP has the right to license “non-dramatic” public performances of its members’ works—for example, recordings broadcast on radio, songs or background music performed as part of a movie or other television program, or live or recorded performances in a bar or restaurant. Dramatic and grand rights are licensed by the composer or the publisher of the work.”

*Id.*

<sup>149</sup> *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470, 474 (E.D.S.C. 1924) (“[A]lthough this song is not a dramatic composition as it stands, it might conceivably be dramatized.”).

<sup>150</sup> 1980 U.S. Dist. LEXIS 16465 (C.D. Cal. Mar. 10, 1980).

<sup>151</sup> *Gershwin v. Whole Thing Co.*, 1980 U.S. Dist. LEXIS 16465, at \*12.

<sup>152</sup> *See Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.* 772 F.2d 505 (9th Cir. 1985).

pornography: One knows it when one sees it.<sup>153</sup>

The first factor of the *Gershwin* test is more difficult to satisfy than the second when applied to tribute bands. It should be noted that the test is satisfied if either factor is met.<sup>154</sup> However, an argument could be made that the story being told by a tribute band is the story of a performance by the original artist. This factor could apply to reverence bands, as well as tribute bands.

*Dark Star Orchestra*<sup>155</sup> is a prime example of a specialist cover band whose shows could qualify as dramatico-musical performances under the first prong of the *Gershwin* test. At their shows, *Dark Star Orchestra* performs the set list of a specific *Grateful Dead*<sup>156</sup> concert, “song for song in the same arrangements used by the *Dead* members of that period.”<sup>157</sup> *Dark Star Orchestra* is a collective of musicians, and *Dark Star* alters its performing line-up to match with the membership of the *Grateful Dead* on the date of the concert they are reproducing.<sup>158</sup> In addition, *Dark Star Orchestra* matches the stage plot,<sup>159</sup> keyboards, and guitars that the *Grateful Dead* used.<sup>160</sup>

For example, on October 7, 2005, *Dark Star Orchestra* performed at the Big Easy, a 1,500-seat venue in Spokane, Washington.<sup>161</sup> The music performed was a recreation of the *Grateful Dead*’s November 1, 1977, performance at the COBO Arena in Detroit, Michigan.<sup>162</sup> In 1977, the *Grateful Dead* consisted

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<sup>153</sup> See *Jacobellis v. Ohio*, 378 U.S. 184 (1964). In this case, Justice Potter Stewart made the famous statement about pornography: “I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it . . . .” *Id.* at 197.

<sup>154</sup> *Gershwin*, 1980 U.S. Dist. LEXIS 16465.

<sup>155</sup> See *Dark Star Orchestra*, <http://www.darkstarorchestra.net/> (last visited June 25, 2006).

<sup>156</sup> The *Grateful Dead* were a psychedelic rock band formed in San Francisco in 1965 whose first major public performances were at the “Acid Tests” organized by Ken Kesey and The Merry Pranksters. REES & CRAMPTON, *supra* note 2, at 367. (For more info on the Acid Tests and Kesey, see generally TOM WOLFE, *THE ELECTRIC KOOL-AID ACID TEST* (1968)). Although the *Grateful Dead* only had one true hit (1987’s *Touch of Grey*), they were consistently huge concert draws and inspired a legion of fans known as “Deadheads.” The band officially broke-up upon guitarist Jerry Garcia’s death in 1995. REES & CRAMPTON, *supra* note 2, at 367-71.

<sup>157</sup> *Dark Star Orchestra*, *Premise*, <http://www.darkstarorchestra.net> (last visited June 25, 2006).

<sup>158</sup> *Id.*

<sup>159</sup> The stage plot is the position on stage where each member of the band is located.

<sup>160</sup> *Dark Star Orchestra*, *Premise*, <http://www.darkstarorchestra.net> (last visited June 25, 2006).

<sup>161</sup> *Dark Star Orchestra*, *Setlist Archive*, <http://www.darkstarorchestra.net> (last visited June 25, 2006); *Welcome to Bravo Entertainment*, <http://www.bravosp.com> (search main toolbar for “Venues”; follow link to individual venues and select “Big Easy Spokane” hyperlink) (last visited June 25, 2006).

<sup>162</sup> *Welcome to Bravo Entertainment*, <http://www.bravosp.com> (search main toolbar for “Venues”; follow link to individual venues and select “Big Easy Spokane” hyperlink) (last visited June 25, 2006).

of two drummers, a bass player, two guitarists, a keyboard player, and a female singer.<sup>163</sup> In addition to playing the same songs, in the same order, as the *Grateful Dead* played in 1977, *Dark Star Orchestra* used the same seven musician line-up and stage plot.<sup>164</sup> Therefore, if “the story being told” is what happened at the COBO Arena on November 1, 1977, *Dark Star Orchestra* is using the songs to tell that story and *Dark Star's* performance would be a dramatico-musical performance under the first prong of the *Gershwin* test. A blanket license from ASCAP or another PRO would not be sufficient to license the *Grateful Dead* song uses and *Dark Star Orchestra* should require grand rights clearance directly from the owners of the copyrights.

The second factor of the *Gershwin* test is even more easily fulfilled when applied to tribute bands. Tribute bands by their nature use characters, costumes, and stage settings. In *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*,<sup>165</sup> a stage show included one act that was a “tribute” to the musical *Kismet*. Even though there was no dialogue, the act contained costumes and featured six minutes worth of songs from the musical, the setting was the same as used in the play, and the “characters were called by the same or similar names to those used in [the] play.”<sup>166</sup> The Ninth Circuit upheld the district court’s finding that this was a “dramatic” performance that exceeded the ASCAP license, which did not give grand rights clearance.<sup>167</sup> If using six minutes of songs, a similar setting, and the same character names is sufficient to determine that a performance is dramatico-musical, then the work of tribute bands falls into the category of dramatico-musical performances.

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<sup>163</sup> REES & CRAMPTON, *supra* note 2, at 367-71.

<sup>164</sup> Compare the photo at Classic Rock Concert Photos, <http://www.classicrockconcertphotos.com/dead.htm> (showing the *Grateful Dead* onstage in the same era as the Detroit performance) (last visited June 25, 2006) with the two photos at Dark Star Orchestra, Photos, [http://www.gratefulweb.net/photos/photoInterface/photos.aspx?direct=Bands/Dark\\_Star\\_Orchestra](http://www.gratefulweb.net/photos/photoInterface/photos.aspx?direct=Bands/Dark_Star_Orchestra) (select “10/7/05”; follow to “dsowash11” hyperlink (last visited June 25, 2006); Grateful Web, [http://www.gratefulweb.net/photos/photoInterface/photos.aspx?action=view&link=Bands/Dark\\_Star\\_Orchestra](http://www.gratefulweb.net/photos/photoInterface/photos.aspx?action=view&link=Bands/Dark_Star_Orchestra) (select “10-07-2005”; follow to “Dsowash4” hyperlink) (showing Dark Star Orchestra at the October 7, 2005 performance) (last visited June 25, 2006). This is especially significant because the *Grateful Dead* began using a reversed set-up in the 1980’s. Sauer-Thompson, <http://www.sauer-thompson.com/junkforcode/archives/GratefulDeadLS1.jpg> (last visited June 25, 2006).

<sup>165</sup> 772 F.2d 505 (9th Cir. 1985).

<sup>166</sup> *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d at 505.

<sup>167</sup> *Id.* at 511-12.

### A. Characters

*So you think you're a Romeo playing a part in a picture show.*<sup>168</sup>

Characters are used in tribute bands. The members of the tribute band “play” their counterparts in the original band that is being paid tribute.<sup>169</sup> This very point is proven by some tribute bands’ own promotional material. Take *Kiss Army*, a Kentucky-based *Kiss* tribute band, as an example.<sup>170</sup> The band members are not identified by the instruments they play. Instead, they are listed by the *character* they play on stage.<sup>171</sup> *Hotter Than Hell*, a New York-based *Kiss* tribute band, does not even identify its members as anything but the characters on its “Members” webpage.<sup>172</sup>

Other tribute bands use a similar approach in identifying their membership. *Matt Ryan and American Dream*<sup>173</sup> are a Las Vegas-based *Bruce Springsteen and the E Street Band*<sup>174</sup> tribute band. The members are listed as “The Cast” in their promotional material and each member is listed as “playing” his counterpart in the *E Street Band*.<sup>175</sup> In presenting themselves this way, they are presenting a dramatico-musical production, using the same description any Broadway show would use. *Rumours*<sup>176</sup> is a California-based tribute to *Fleetwood Mac*.<sup>177</sup> While their promotional material identifies the band as playing characters, it is interesting to note that the character names are not the actual members of *Fleetwood Mac* but, rather, plays on their names.<sup>178</sup> The

<sup>168</sup> SUPERTRAMP, *Take the Long Way Home*, on BREAKFAST IN AMERICA (A&M Records 1979).

<sup>169</sup> As explained in Part I, this is the defining difference between a reverence and a tribute band.

<sup>170</sup> KISSonline, <http://www.kissonline.com/tributebands/karmy.html> (last visited Oct. 12, 2005).

<sup>171</sup> *Id.*

<sup>172</sup> Hotter than Hell, <http://www.hotterthanhell.com/members.asp> (last visited June 25, 2006). Only when you click on “Ace Frehely” (*Kiss*’ guitarist) do you learn the name of the musician playing the role.

<sup>173</sup> Bruce in the USA, <http://bruceintheusa.com/home.htm> (last visited Oct. 12, 2005).

<sup>174</sup> See *supra* note 136.

<sup>175</sup> Bruce in the USA, Cast, <http://bruceintheusa.com/home.htm> (last visited Oct. 12, 2005). It is interesting that the bass player and two keyboard players are not listed as playing characters, rather they are listed by their instrument. The other five members are listed as playing characters. Strangely, their band membership is inaccurate. Patti Scialfa never performed with Steve Van Zandt as the only guitar player. Scialfa and guitarist Nils Logfren joined for the *Born in the USA* tour to replace Van Zandt. MARSH, GLORY DAYS, *supra* note 136, at 189-91, 204. Van Zandt rejoined the *E Street band*, including Scialfa and Logfren, in 1999. *Id.*

<sup>176</sup> Rumours, <http://www.rsvpmusic.com/Rumours> (last visited June 25, 2006).

<sup>177</sup> See *supra* note 11.

<sup>178</sup> “Stevie Next” and “Bucky Lyndsington” instead of Stevie Nicks and Lindsey Buckingham. About Rumors—The Legend of Fleetwood Mac, <http://www.rsvpmusic.com/Rumours/about.html> (last visited June 25, 2006). It could be

band members are playing characters nonetheless.

While a tribute band's promotional material is helpful to show that the members are playing characters, it is not necessary for the grand rights argument that the tribute band promotes itself by using this type of language. The playing of a character is what separates tribute bands from reverence bands. The very fact that a person is on stage assuming the personality of another person is all that is necessary to satisfy the use of characters.

### B. Costumes

*Dressing up in costumes, playing silly games.*<sup>179</sup>

The use of costumes in a tribute band is almost mandatory to create the visual image of the original artist. Some artists have a "look" that is carefully designed and promoted. This look can last throughout the artist's entire career or be indicative of a particular period. David Bowie is an example of an artist who has had several iconic looks throughout different parts of his career.<sup>180</sup> Among these personae were a glam-rock, Kabuki-influenced alien known as "Ziggy Stardust" and "The Thin White Duke," a "heartless, under-emoting, amoral zombie of a figure."<sup>181</sup> These iconic figures are reproduced in Bowie tribute bands like *Space Oddity*.<sup>182</sup> The lead singer, playing the Bowie Character, uses make-up, wigs, and costumes to recreate these and other iconic Bowie images.<sup>183</sup>

*Kiss* is another artist that inspires tribute bands that use costumes as part of the performance. As stated earlier, almost all of the *Kiss* specialist cover bands use costumes and make-up.<sup>184</sup> Barrie Cunningham<sup>185</sup> is a Las Vegas-based performer who does

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that the band is concerned about using too much of *Fleetwood Mac* and is trying to avoid using the individual members' actual names.

<sup>179</sup> PETER GABRIEL, *Games Without Frontiers*, on PETER GABRIEL (Geffen Records 1980).

<sup>180</sup> David Bowie had his first hit in 1969. He has made a career of reinventing both his persona and his music. In addition to his career as a musician, he has also worked as an actor, appearing on both Broadway and feature films. REES & CRAMPTON, *supra* note 2, at 119-23. See generally DAVID BUCKLEY, *STRANGE FASCINATION* (Virgin Books 2000) (1999).

<sup>181</sup> BUCKLEY, *supra* note 180, at 129-37, 258.

<sup>182</sup> Space Oddity, The Ultimate David Bowie Tribute, <http://www.davidbowietribute.com/main.html> (last visited June 25, 2006).

<sup>183</sup> Photo Gallery, <http://www.davidbowietribute.com/gall.html> (last visited June 25, 2006). See also Bowie Homestead, <http://davidbowie1847.homestead.com/files/Duke/dbowiearms.jpg> (last visited June 25, 2006); David Bowie Tribute, <http://www.davidbowietribute.com/g2-12.html>, <http://www.davidbowietribute.com/g2-10.html> (last visited June 25, 2006); Ziggy, [http://www.brasil2000fm.com.br/imagens/Ziggy\\_stardust\\_ft.jpg](http://www.brasil2000fm.com.br/imagens/Ziggy_stardust_ft.jpg) (last visited June 25, 2006).

<sup>184</sup> See *supra* note 22 and accompanying text.

<sup>185</sup> Barrie Cunningham, <http://www.barriecunningham.com> (last visited June 25, 2006).

tributes to both Neil Diamond<sup>186</sup> and Jimmy Buffett.<sup>187</sup> Cunningham's costumes, make-up, and wigs are perfectly matched to iconic visuals of both Diamond and Buffett.<sup>188</sup> Performing as Buffett, Cunningham reproduces the look of Buffett from a 1985 concert in Florida.<sup>189</sup> The attention to detail is astonishing: the red t-shirt with "just visiting this place" across the chest, the charm on the necklace, the small, off-center braid in the back of the head, the yellow wristbands, and the same model Martin guitar.<sup>190</sup> This attention to detail is pervasive throughout the tribute band industry. The more authentic the costume, the more perfected is the "character."

That is not to say that all tribute bands live up to this standard. Some attempts at costumes and make-up to create the character of the original artist are less than stellar.<sup>191</sup> What is important to remember is that it is not how effective the tribute band is in recreating the look of the original artist, but just that they are using costumes to create a character in the first place.

### C. Stage Settings

*But there are times that you feel you're part of the scenery.*<sup>192</sup>

It can be argued that all tribute bands fulfill the second *Gershwin* factor with the physical environment of their performances. The stage and musical equipment make up a "stage setting" on which the performance takes place. However, the stage and musical equipment is not where it ends for tribute bands. The detail given to the stage setting of a tribute band performance, including props and scenery, is immense.

*Pink Floyd*<sup>193</sup> used a stage lighting rig that created a unique setting for several tours. Above the band at rear center stage,

<sup>186</sup> See *supra* note 91.

<sup>187</sup> See *supra* note 89.

<sup>188</sup> Barrie Cunningham, Neil, <http://www.barriecunningham.com/neil1.htm> (last visited June 25, 2006); Barrie Cunningham, Jimmy, <http://www.barriecunningham.com/jimmybuffett.htm> (last visited June 25, 2006).

<sup>189</sup> This concert was filmed and released on video. JIMMY BUFFETT: LIVE BY THE BAY (Universal/MCA 1985).

<sup>190</sup> The only thing Cunningham missed was the fact that Buffett wore shorts during the performance, not pants. *Id.*

<sup>191</sup> Compare Lee Alverson (a Billy Joel tribute artist at Alverson Entertainment), [http://alversonentertainment.com/Joel/photos/billy\\_joel\\_photos.html](http://alversonentertainment.com/Joel/photos/billy_joel_photos.html) (last visited June 25, 2006), with Billy Joel, [http://www.billyjoel.com/frameset\\_scrapbook.html](http://www.billyjoel.com/frameset_scrapbook.html) (last visited June 25, 2006); compare Panama (a Van Halen tribute band at VH Tribute Band), <http://www.vhtributeband.com/main/index.html> (last visited June 25, 2006), with Van Halen, [http://www.guitarplayer.ru/vanhalen/img/van\\_halen\\_04.jpg](http://www.guitarplayer.ru/vanhalen/img/van_halen_04.jpg) (last visited June 25, 2006). Not all tribute bands are successful in recreating the look of the original artist.

<sup>192</sup> *Supra* note 168.

<sup>193</sup> See *supra* note 32.

there was a circular screen surrounded by stage lights. Different images were projected onto the screen.<sup>194</sup> *The Machine*, a *Pink Floyd* tribute band, uses an identical lighting and projection set-up.<sup>195</sup> One has to wonder how many copyright infringement issues exist when *The Machine* projects the same images that *Pink Floyd* projected during each song, including images from the film version of *The Wall*. On top of that, *The Machine* projects the film *The Wizard of Oz* while they perform *The Dark Side of the Moon* album in its entirety.<sup>196</sup> It is as if *The Machine* were *trying* to cram as much copyright infringement as they possibly could into one performance.

Individually, each factor supports a finding that a tribute band performance is actually a dramatic performance requiring grand rights clearance under the *Gershwin* test. When the factors are combined, there is very strong support that blanket licenses from the performing rights organizations should not cover these performances.

#### VI. POSSIBLE DEFENSES . . . AND WHY THEY FAIL

*But I would not be convicted by a jury of my peers.*<sup>197</sup>

One can anticipate that a tribute band sued on the theory that they are a dramatico-musical performance and, therefore, have infringed on the copyrights of the compositions they performed, would present an affirmative defense. The most likely choice would be a fair use or, more specifically, a parody defense, but this would be a *very* weak defense at best.

The “fair use” defense is created under 17 U.S.C. § 107.<sup>198</sup>

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<sup>194</sup> See Pink Floyd, <http://www.pinkfloydonline.com/pictures/gallery4/concert23.jpg> (last visited June 25, 2006).

<sup>195</sup> The Machine, photos, <http://www.themachinelive.com/photos/full.php?id=62> (last visited June 25, 2006).

<sup>196</sup> *Id.* Some believe that there is a synchronicity between the movie and the album if you start the album as the lion roars a third time at the beginning of the film. Examples of the synchronicity include the lyric “Balanced on the biggest wave . . .” which coincides with Dorothy’s balancing act on the fence, side one of the vinyl album being exactly as long as the black & white portion of the film, and a heartbeat sound at the end of the album can be heard as Dorothy listens at the Tin Man’s chest. For more information, see *Wizard of Oz* and *Dark Side of the Moon*, <http://www.ingsoc.com/waters/info/oz.html> (last visited June 25, 2006).

<sup>197</sup> PAUL SIMON, *Still Crazy After All These Years*, on *STILL CRAZY AFTER ALL THESE YEARS* (Warner Brothers Records 1975).

<sup>198</sup> 17 U.S.C. § 107 (2006).

Notwithstanding the provisions of sections 106 and 106A [17 U.S.C. §§ 106 and 106A], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

*Campbell v. Acuff-Rose Music, Inc.*<sup>199</sup> is the seminal case on fair use and parody. This case centered on the rap group *2 Live Crew* recording a parody of Roy Orbison's 1964 song "Oh, Pretty Woman."<sup>200</sup> The case sets out a four-factor test for fair use:

1. Purpose and Character of Use
2. Nature of Copyrighted Work
3. The Amount Defendant Used
4. The Effect on the Market<sup>201</sup>

According to Justice Souter, "[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."<sup>202</sup> The first factor, "Purpose and Character of Use," does not end with a finding that the defendant's work is commercial in nature. The Court was very clear in establishing that finding for plaintiff on the sole basis that defendant's use was commercial puts far too much emphasis on just one issue in a single factor of the four-part test.<sup>203</sup> Another issue to be considered within this first factor is whether anything new been added, i.e., has there been transformative creation or new expression?<sup>204</sup>

The nature of tribute bands is commercial. They perform in venues for pay.<sup>205</sup> The "transformative" work issue goes against the tribute band because these bands, as shown in Part V, strive to be as close to the original as possible. The idea is to be as far from transformative as possible. Thus, a tribute band will lose the first factor.

The second factor, "Nature of Copyrighted Work," only considers the plaintiff's work. This factor acknowledges that "some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more

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the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;  
the nature of the copyrighted work;  
the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and  
the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

*Id.*

<sup>199</sup> 510 U.S. 569 (1994).

<sup>200</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 571-72.

<sup>201</sup> *Id.* at 573.

<sup>202</sup> *Id.* at 577.

<sup>203</sup> *Id.* at 583-85.

<sup>204</sup> *Id.*

<sup>205</sup> *See supra* Part III.



difficult to establish when the former works are copied.”<sup>206</sup> The closer the plaintiff’s work is to the core of protection, the more difficult fair use is to prove.<sup>207</sup> A song’s “creative expression for public dissemination falls within the core of the copyright’s protective purposes.”<sup>208</sup> Accordingly, tribute bands have now lost two prongs of the test.

The third factor, “The Amount Defendant Used,” is both a qualitative and a quantitative test.<sup>209</sup> As a qualitative test, the more of the plaintiff’s work the defendant uses, the less likely the defendant is to win this factor. However, even if the defendant uses a small amount of the work, but it is the “heart” of the plaintiff’s work, this factor will go to the plaintiff.<sup>210</sup>

Tribute bands perform entire songs. This would come under the quantitative aspect of the test. Obviously, using 100% of a work would put this prong clearly on the side of the plaintiff. Even if a tribute band played their entire show as a “medley,” it would fail the qualitative portion of the prong. If this medley consisted of only enough of the songs that the audience would need to recognize them, whether it be the chorus or “hook” of each song, the tribute band would be using the “heart” of the work. In fact, this approach would actually lead to greater infringement because the tribute band would have to use *more* songs to fill its set than it would if it played whole songs. Thus far, tribute bands have lost all three factors.

“The Effect on the Market” is the fourth and final factor. This factor

requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original. The enquiry must take account not only of harm to the original but also of harm to the market for derivative works.”<sup>211</sup>

The markets for parodies, criticism, and comments are not derivative markets that need to be examined because plaintiffs are unlikely to give their approval for such derivative works. In addition, if the defendant’s work, by criticism or parody, makes everyone hate the original, that cannot be held against the

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<sup>206</sup> *Campbell*, 510 U.S. at 586.

<sup>207</sup> *Id.* at 583-85.

<sup>208</sup> *Id.* at 586.

<sup>209</sup> *Id.* at 586-88.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 590 (citations omitted).

defendant.<sup>212</sup> However, if the plaintiff can show that defendant's work hurt sales due to substitution, the defendant's fair use defense is all but lost.<sup>213</sup>

The "Effect on the Market" prong would probably fall in the tribute band's favor. Tribute bands would not seem to harm any markets, original or derivative, which the original artists themselves might have. It could be argued that tribute bands could actually increase record sales of the original artist by generating interest in a band through its performances.<sup>214</sup> But generally, it is unlikely that someone would choose to see a tribute band perform over going to see a concert by the actual artists. Just as unlikely is a tribute band performing so poorly that a listener who is familiar with the original artist would never go see the original artist or continue to buy the artist's releases.

However, the argument could be made that a listener who is unfamiliar with the original artist and attends a musically inferior tribute band's performance would reach the conclusion that she would dislike the original artist as well and therefore the artist would lose that potential customer.<sup>215</sup> In addition, the tribute band may be filling a market that the original artist might want to exploit. Perhaps the original artist would put together an "Officially Sanctioned" tribute to herself. These arguments are, admittedly speculative, so the fourth prong tips in the tribute band's favor.

Since the only prong that a tribute band might win is the fourth, it is likely that its fair use defense will fail. However, the analysis would be different if the tribute band was specifically asserting a parody defense as the type of fair use employed. Parody would allow for more copying in the third prong of the test because "[p]arody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known

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<sup>212</sup> *Id.* at 590-94.

<sup>213</sup> *Id.* Research was unable to produce any cases where this actually happened. There is one example of a satire actually exceeding the original song's popularity and sales. Allan Sherman's "Hello Muddah, Hello Faddah" used the melody from Ponchielli's "Dance of the Hours." ALLAN SHERMAN, *Hello Muddah, Hello Faddah (A Letter from Camp)*, on MY SON, THE NUT (Warner Brothers Records 1963). There was no litigation, presumably because "Dance of the Hours" was in the public domain. However, Sherman's recording was recorded live, with Sherman singing to an orchestral recording of the Ponchielli piece. Therefore, there was quite possibly infringement on the sound recording used and Sherman may be the first artist to "sample."

<sup>214</sup> If this were true, it might be the only way that the existence of a tribute band would actually produce an income stream to the original artist.

<sup>215</sup> *See supra* Part IV.

original and its parodic twin.”<sup>216</sup> Parody allows for enough copying to “conjure up” the original.<sup>217</sup> So, if a tribute band is held to be parodic, it could win two prongs of the test. In the end, however, it is unlikely that this will happen.

Tribute bands have little chance of being found parodic. “The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.”<sup>218</sup>

Modern dictionaries accordingly describe a parody as a literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule, or as a composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous. For the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.<sup>219</sup>

By their very name, tribute bands prove themselves to be the exact opposite of parodic. The standard way of identifying a band as a tribute band is to advertise “Your Band Name” followed by “A Tribute to Artist X.” Perusing the listing of bands on the website TributeCity.com, every one of the bands listed uses words including “tribute,” “homage” and “musically authentic celebration” to describe itself.<sup>220</sup> As shown throughout this Note, the nature of a tribute band is to *recreate* the experience of the original artist in concert. The “threshold question” above would have to be answered by asserting that no one would reasonably perceive a parodic character when observing tribute bands. Therefore, the parody defense will be of no help to the infringing tribute band.

## VII. THE “NEW” SYSTEM

*Meet the new boss, same as the old boss.*<sup>221</sup>

Once a tribute band performance is determined to be a dramatico-musical performance, tribute bands can no longer perform in any venue under blanket licenses issued by the PROs.<sup>222</sup>

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<sup>216</sup> *Campbell*, 510 U.S. at 588.

<sup>217</sup> *Id.* at 573.

<sup>218</sup> *Id.* at 582.

<sup>219</sup> *Id.* at 580.

<sup>220</sup> Tribute City, <http://www.tributecity.com/listings.php?action=alpha&value=A> (last visited June 25, 2006).

<sup>221</sup> THE WHO, *Won’t Get Fooled Again*, on WHO’S NEXT (MCA Records 1971).

<sup>222</sup> *See supra* Part III.

However, this would not leave the tribute band industry in a fog of confusion. The steps necessary to secure grand rights permission are firmly established. Therefore, the “new” system is not new at all. Now, in order to perform publicly the original artist’s compositions, tribute bands would simply be required to obtain permission directly from the copyright holders.<sup>223</sup> Although some initial litigation might be required to establish the legitimacy of such a practice, once that had finished, there would not be a need for continued litigation to assert the original artist’s rights, as there would be with a trademark-based approach.<sup>224</sup>

That performances of dramatico-musical works require grand rights clearances which can only be obtained directly from the copyright holder and are not covered by blanket licensing from the performing rights societies is well-established.<sup>225</sup> Classifying tribute bands as dramatico-musical performances will not be difficult to administer. The process is already in use and, therefore, there should not be any confusion regarding the requirements to make a tribute band’s performance non-infringing.

This approach would not require the flood of litigation that would occur with a trademark-based approach. In addition, the tribute bands themselves would not be the ones ensuring that the grand rights clearance is in place. Most commonly, the venue operator and not the performer has the ultimate responsibility of making sure copyright clearance is obtained for any performance that take place in the venue.

Some people mistakenly assume that musicians and entertainers must obtain licenses to perform copyrighted music or that businesses where music is performed can shift their responsibility to musicians or entertainers. The law says all who participate in, or are responsible for, performances of music are legally responsible. Since it is the business owner who obtains the ultimate benefit from the performance, it is the business owner who obtains the license. Music license fees are one of the many costs of doing business.<sup>226</sup>

While it would take some litigation to initially establish that tribute bands are dramatico-musical performances, once that is

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<sup>223</sup> See *supra* note 38.

<sup>224</sup> See *supra* Part IV.

<sup>225</sup> See *supra* Part III.

<sup>226</sup> ASCAP General Licensing Frequently Asked Questions, <http://www.ascap.com/licensing/generalfaq.html> (last visited June 25, 2006). It should be noted that the performing artist is also liable for copyright infringement if no license has been taken.

established, the venue operators' fear of infringement and resulting litigation should result in the venue operator ensuring that any tribute band it hires has received the necessary permission from the copyright holder.

While the distinction between tribute bands and reverence bands is very important to the legal argument presented by this Note,<sup>227</sup> it is probable that, in practice, this distinction will become insignificant. Venue operators are not going to engage in the splitting of legal hairs to determine to which camp a specialist cover band belongs. As a result, most venue operators will probably require proof of grand rights compliance with any specialist cover band.

The big picture result in classifying tribute bands as dramatico-musical performances is that the original artists will have a newfound control. As previously shown, the copyright holders are not receiving compensation for the use of their works by tribute bands.<sup>228</sup> In addition, tribute bands misappropriate the original artist's goodwill, which can result in a variety of trademark-type harms including infringement, dilution, tarnishment, and violation of the right of publicity.<sup>229</sup> By leaving the very existence of tribute bands in the hands of the original artist,<sup>230</sup> all harms done to the artist are erased. The artist herself can determine the compensation she would receive for the works used *and* for the goodwill she has built up with her audience. The compensation could range from a "per performance" fee or an annual license to a donation to a pre-selected charity. Most importantly, the artist could choose to deny the rights to tribute bands altogether.

While having to acquire grand rights will certainly be the end of some tribute bands, those that receive such clearance will actually be helped. By receiving grand rights clearance, the tribute band now has what could be considered an endorsement. This would be especially true if the original artist denies other tribute bands grand rights clearance. The tribute bands that receive permission to perform will now have a sense of legitimacy. This, of course, will only be true if the original artist sets up some kind of standard of quality when giving grand rights clearance. However, even if this proves to be false, the public could still make that connection on its own.

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<sup>227</sup> See *supra* Part I.

<sup>228</sup> See *supra* Part III.

<sup>229</sup> See *supra* Part IV.

<sup>230</sup> Or, at the very least, the owners of the copyrights of the songs that artist performed. See *supra* notes 8-10 and accompanying text.

In short, once the courts find tribute bands to be dramatico-musical performances, the system of grand rights clearances is already in place and can be easily applied. This should result in the venue operators and promoters ensuring that the proper grand rights clearances have been obtained since they are not going to want to be liable for any infringement that happens in their establishment.<sup>231</sup> Enforcement would not require increased litigation, and artists would finally have control over the tribute band industry that created a multitude of harms, but never created any economic benefit for the original artists.

*Brent Giles Davis\**

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<sup>231</sup> As stated earlier, the PROs have put venue operators on notice that they are liable for any copyright infringement that happens in their venues. *See supra* notes 38 and 230.

Acquisitions Editor, *Cardozo Arts & Entertainment Law Journal*; January 2007 JD candidate at the Benjamin N. Cardozo School of Law. The author spent twelve years as a full-time musician before entering law school, performing with many artists, including Bruce Springsteen. And yes, he even played with a few reverence bands (but never a tribute band). He would like to thank Prof. Justin Hughes for the conversation on “Concept Albums” that eventually led to his developing this legal theory, Prof. Barton Beebe for his time and insight over the course of the writing of this note, and Aileen Brophy, Keren Friede, Alexis Weissberger, and Stephen Scotch-Marmo for their helpful comments and careful editing. He would especially like to thank his wife, Jennifer, for her love and support in all his endeavors and is especially excited about the amazing adventure on which they are about to embark (due sometime around the publication of this Note).