How the Band Protects Its Brand: The Use of Trademarks to Protect and Promote the Musical Artist

(Part One of a Two-part Article)

BY CHRISTOPHER R. CHASE, ESQ. OF FRANKFURT KURNIT KLEIN & SELZ, P.C.

Mr. Chase is an intellectual property and entertainment attorney with Frankfurt Kurnit Klein & Selz, P.C. in New York. He can be reached at cchase@fkkks.com. The author thanks Marc Handelman, Brian G. Murphy and Alexandra VonHockman for their insightful comments.

W hat’s in a name? If you are an individual artist or group in the music industry, there are numerous assets within your professional name, such as goodwill, commercial recognition, and valuable intellectual property rights. The reputation and recognition of an artist’s music is built around the artist’s professional name, which is what consumers use to identify the artists they enjoy. Traditionally, the artists’ name or logo identified their musical performances and recorded music, but now these names, and increasingly, an artist’s logo, are doing much more, a fact that has not gone unnoticed by the artists themselves.1

In the past, artists in the music industry generally only relied upon revenue from their recorded music and live performances. The landscape of the music industry has changed, however, in recent years. As artists in the music industry become more reliant upon ancillary streams of revenue rather than record sales alone,2 they must seek out other opportunities for income and can use their names and logos to do so.3 Not only do artists want increased income, they also want a broad amount of consumer recognition – and can do so with non-recording activities,4 such as merchandising or third party sponsorships. Artists are now using their names and logos to stand for more than just their music. Thus, the musical artist has become a “brand.”

Third parties, including record companies and advertisers, also want to be a part of that brand. For example, because the economics of the music industry are changing, record companies themselves are now

income, they also want a broad amount of

to do so.3 Not only do artists want increased
income and can use their names and logos
must seek out other opportunities for
new sources of revenue.6 EMI Music has
been a big player in this area, and has
signed multiple-platform deals with artists
such as KORN,7 ROBBIE WILLIAMS,8
and the estate of DEAN MARTIN in order to
forge a number of relationships “with artists around the world to oversee non-
recording aspects of musicians’ careers.”9 Even more significant, Rhino
Entertainment has actually taken charge of the complete GRATEFUL DEAD brand – exclusively managing the band’s intellectual property portfolio, including the name, likenesses, and trademarks, as a whole.10 Third parties see the value in artists’ brands and want to exploit such value and recognition.11

Therefore, an individual artist or group pursuing a career in the music industry should take the necessary steps to protect his, her or its professional name and logo in order to safeguard the “brand.” This protection can be obtained through the use of trademark law. Prior to diving into the music industry, an artist should develop a trademark strategy – from choosing a professional name, logo, and other branding elements to clearing and registering his, her, or its trademarks. This puts the artist in a position to prevent others from using confusingly similar professional names and trademarks, license merchandise, and avoid trademark infringement claims. In the ever changing music industry, an artist should have continuity in its name and logo in order to maintain the selling power that attaches to such property.

Part I of this two-part Article discusses the branding of an artist in the music industry, from the perspective of the artist developing its own brand as well as the extensive use of the artist’s brand by third parties. Part II will present an overview of the use of trademark law in the music industry, including examples of artists that were forced to change their professional name due to trademark concerns and a discussion of issues that are particular to group artists in the industry. Part II will also focus on an additional tool that helps artists protect their brand – state right of publicity laws. This Article advocates development of a useful trademark strategy to establish, protect, and extend the artist’s brand, and concludes that the artist’s professional name is a valuable commodity in the music industry and must be protected with the use of an effective trademark strategy.

THE BRANDING OF A BAND

Artists in the music industry no longer focus only on their live performances and recorded music – they are now extending their art to a brand. The “band as a brand” concept operates on two levels. Not only are artists themselves developing their own brands, but third parties frequently partner with artists to help promote corporate brands – thereby extending the reach of the artist’s name from recorded music to other fields.

Artists Promoting Their Own Brand

Much like Proctor & Gamble selling toothpaste or General Mills selling cereal, the artist is also selling its branded product – sound recordings and live musical performances. The artist’s name plays an important role in these branded products. For example, if you liked MADONNA’s last album, chances are that you will purchase her next album based on the fact that it is “Madonna” who released it.12 Artists, however, are now selling more than just their two core products.

As artists need to find revenue streams to supplement the royalties from their recorded music, selling merchandise becomes a valuable tool and can become an artist’s most reliable source of income.13
Merchandise can be just as important to an artist’s career as the music that the artist creates, as it is both promotional and monetarily valuable. By creating merchandise, artists can turn their logos and names into profits. In addition, not only does merchandise help an artist’s bank account, but the promotional value in merchandise is invaluable — such as when a fan buys an artist’s t-shirt and wears it around town or puts a sticker of the artist’s logo on a notebook. Moreover, unlike their recorded music, which may be dictated to some extent by the record label for which the music is being created, one of the few areas that an artist can still retain stylistic and creative control is with merchandise.

Take KISS for example. While many artists in the music industry have used their name and logos to sell merchandise, no artist may be more prolific in merchandising than KISS. The group’s name and logos, as well as the individual members’ painted faces, have been used for action figures, clothing, comic books, condoms, DVDs, board games, coffee, food, coffee mugs, beauty products, necklaces, stickers, puzzles, pinball machines, video games, credit cards, trading cards, lighters, and even a custom-made coffin with band imagery! In addition to their flamboyant stage performances, KISS’ merchandising prowess has helped them become one of the most recognized names in the music industry, as well as a significant brand.

Current artists have also gone beyond simple promotional merchandising to help market their music career and have pushed their “brand” into such ancillary and disparate fields as cologne, shoes, bottle openers, skateboards, skin care products, wallets, watches, handbags, bed, bath, and other home products, and hair dye. More often than not, pop and R&B artists, rather than rock artists, tend to expand outside of the music field — from SEAN JOHN UNFORGIVABLE cologne to JESSICA SIMPSON hair extensions to ANDRE 3000 as a cartoon. Some artists’ brands have been dissected from their music careers, and for many artists, their “brand” has become equally or more significant than their music. For example, a laid back, MAR- GARITAVILLE lifestyle that has taken on a life of its own without Buffett’s live performances.

Nevertheless, while extending the artist’s brand is important, both for monetary and promotional purposes, artists should avoid diluting their brand with over-exposure. With the move into non-music fields, the great concern is that “the brand will supersede what it was originally intended to support — the music.”

There are a number of ways that artists promote third party brands — from the licensing of the artist’s music in commercials, television programs, or movies to having a corporate tour sponsor or product tie-in. Third parties want to associate their goods and services with those of a popular musical artist in order to connect with that artist’s fan base or perhaps just to associate their goods or services with hip, cool, or iconic artists. Using the artist’s name to form that association is very important for such third parties.

Sponsorships or product tie-ins can be mutually beneficial for both the third party and the artist — the third party can associate itself with the artist while the artist often receives much needed monetary support for tours, instruments, recording costs, or necessities such as clothing. Corporate brand partners can help launch an album by providing marketing support in return for having the artist’s music featured in a commercial campaign. Moreover, the line between corporate brands and artists may become more blurred, as a corporate brand may align itself with a record label to develop and market an artist in connection with the launch of a product.

The most typical way for artists to promote third party brands is by licensing their music. It is now commonplace for artists to license their work for use in television programs, movies, and advertising campaigns, and consumers have become more accustomed to hearing their favorite artist’s music being used for commercial purposes. Artists need to gain exposure and stay relevant in a fast-moving industry, and placing music in commercials, television programs or movies is one significant way to do that. At the same time, third parties receive the benefit of having consumers associate a particular song with the third party’s products or services.

Rock legends THE ROLLING STONES and THE WHO have had their music featured in commercials, television programs, and films for years. By having their music repeatedly played on the big and small screens, both bands have been able to stay relevant to current consumers. On the other hand, some artists have been able to use the commercial licensing of their music to gain exposure. Both MOBY and THE CHEMICAL BROTHERS are artists who gained great exposure after licensing their music for advertising campaigns and have become go-to artists for music to promote third party products and services. Of course, licensing music for commercial purposes is a relatively new phenomenon that has only occurred in the past twenty years or so and there are still a few artists that staunchly refuse to allow use of their name and music to promote third parties’ products or services, most notably TOM WAITS and JOHN DENSMORE of THE DOORS.

Thus, artists can use their own brand to promote others’ brands. If the product of the artist’s brand is hip, interesting music, then third parties will want to trade off of that brand. At the same time, the artist receives valuable commercial exposure for its music. Certainly, in order to protect themselves, artists should try to retain some control over where their music, name or likeness will be placed and how the relationship between the third party and the artist is established.

ENDNOTES

1. Alternative rocker Evan Dando recently put his group, THE LEMONHEADS, back together in order to preserve the legacy of the group’s name, Tom Lynch, Evan Dando Lives, NEW CITY CHICAGO, December 5, 2006, available at http://www.newcitychicago.com/chicago/5979.html (regarding the reason he got the band back together, Dando stated “[B]ecause I did put a lot of work into the band, the trademark, that name. I think we could have done a little better. Leave a better legacy.”).

2. See Tamara Coniff, Spears tour merchandise sales lead female acts, THE HOLLYWOOD REPORTER, April 26, 2004 (According to the CEO of a leading merchandising and licensing company, “The world of the record royalties and significant earnings from records is down dramatically.”).

3. See Joseph Allen, Concert merchandise — no ticket sales — is where bands make the most money, ROLLING STONE, July 14, 2004 (Popular singer-songwriter JOHN MAYER said of merchandise sales: “You’re not making that much money off records anymore…merch is one of the last bastions of individuality, commerce, and style that an artist has left.”); Coniff, supra note 2 (“Merchandising also is becoming many music stars’ answer to lackluster record sales.”); see generally Chuck Salter, Way Behind the Music, FAST COMPANY, February 2007 (discussing how artists today can use the Internet to not only distribute music, but to sell merchandise and establishing fan clubs).
4. Close to fifteen years ago, Federal Appellate Judge Alex Kozinski noted the significance of artists’ non-recording careers. “No longer are entertainers limited to their craft in marketing themselves to the public. This is the age of the multi-media publicity blitzkrieg: Trading on their popularity, many entertainers hawk posters, T-shirts, badges, coffee mugs and just about anything else as part of a coordinated marketing effort to augment their income while boosting their public images.” The New Kids on the Block v. News America Publishing, Inc., 971 F.2d 302, 304 (9th Cir. 1992). Just imagine what Judge Kozinski would think of the “multi-media publicity blitzkrieg” of 2007.

5. See Jeff Leeds, Squeezing Money from the Music, N.Y. TIMES, December 11, 2006 (“[T]he big record companies and their artist estates are overwhelmingly tied to CD sales, are taking a far more expansive view of how to carve out pieces of the music economy ... including recording sales, music publishing, concert ticket and merchandise sales and other sources of revenue.”); Alan Light, A Resurrection, of Sorts, for the Grateful Dead, N.Y. TIMES, July 10, 2006 (According to a vice president at Rhino, “The music industry has to change. We just can’t just put CD’s out to retail. We need to be more involved in protecting the legacy of the artists.”); EMI Group Press Release, Robbie Williams and EMI Sign Groundbreaking Deal, October 2, 2006, at www.emigroup.com/Press/2002/press7.htm (regarding the Robbie Williams deal, the press release stated: “The deal continues a trend towards an integrated relationship in the entertainment business that will provide a multi-platform approach to the respective elements of recording, live work, film and television.”); Ayala Ben-Yahuda, Epic to Sign Menudo; MTV Plans Reality Show, BILLBOARD, October 13, 2006 (Epic Records purchased an equity stake in Menudo Entertainment, which gives Epic a cut of the “multi-media publicity blitzkrieg” of 2007).

6. Leeds, supra note 5 (“Lately, the major labels have in effect tried to move into the talent management business by demanding that new artists seeking record contracts give their label a cut of concert earnings or T-shirt and merchandise revenue – areas that had once been outside the labels’ bailiwick.”); Light, supra note 5; see also Conniff, supra note 2 (According to the CEO of a leading merchandising and licensing company: “The world of the record royalties and significant earnings from records is down dramatically.”).

7. KORN agreed to a multiple rights venture with EMI Music, making EMI a partner in the band’s overall business, which includes KORN’s publishing, touring, merchandising and multimedia activities. Light, supra note 5.

8. ROBBIE WILLIAMS signed a multiple rights contract with EMI Music, where the label “will take a share of the profits from his commercial activities outside of record sales” – i.e., his non-recording activities, which include touring, publishing, and merchandising. EMI Group Press Release, supra note 5; Paul Gallagher, Record Deal Will Keep EMI Rocking, THE SCOTSMAN, October 3, 2002.

9. EMI Group Press Release, EMI Enters Into Worldwide Partnership with Dean Martin Trust, October 30, 2006 at www.emigroup.com/Press/press73.htm (discussing the EMI Music will now act as the exclusive licensing agent for DEAN MARTIN’S ‘name, image, likeness, as well as the marketer for Martin’s recording catalogues’).

10. In July 2006, the GRATEFUL DEAD signed an exclusive licensing agreement with Rhino Entertainment to manage all of the band’s intellectual property – the name, likenesses, logos, web site, and merchandise. Unlike the EMI “partnerships,” Rhino is managing the coordinated intellectual property portfolio rather than dealing with a piece by piece approach to the individual intellectual property rights – Rhino is actually managing the whole band. Light, supra note 5.

11. See Light, supra note 5 (discussing the KORN and GRATEFUL DEAD deals); see also Greg Levine, SFX Founder to Manage Elvis Presley Estate, FORBES.COM, December 16, 2004; Press Release, Robert FX. Sillerman and Elvis Presley Enterprises Announce Partnership with www.elvis.com.au/presley/news/print/official_lisa_mari e_presley_sells_elvis_rights.shtml (Robert FX. Sillerman and his company CKX, Inc. purchased an 85% share of all trademark rights to ELVIS’ name and likeness, as well as other intellectual property, from Lisa Marie Presley for $353 million in cash and other payments including preferred stock and debt repayments).

12. Unlike toothpaste and cereal however, most artists evolve over time – in both musical style and appearance. An artist’s “brand” may be precisely that – the artist’s adaptation and reinvention.

13. Allen, supra note 3 (“[M]any touring rock bands find that their most reliable sources of income are from selling T-shirts, posters, stickers and other merchandise while they’re on the road.”). A founder of a merchandise manufacturing and distribution company stated that “merchandising, for a lot of our artists, is an important part of their income, sometimes more so than record sales.” Id. See also Salter, supra note 3 (discussing the importance of merchandise sales for an artist’s career).

14. In 2004, singer-songwriter Chris Carrabba of DASHBOARD CONFESSIONAL, while discussing the importance of merchandise sales to his band, stated “Merch sales are what kept us going. Even now [after the band had one platinum record and two gold records], we’re still not making our living from playing the shows. Merch is where we make our profit.” Allen, supra note 3. During that same year, BRITNEY SPEARS’ U.S. tour would have made $125,000 per show in merchandise sales alone, $50,000 to $60,000 of which would have been hers, had the tour not been cancelled. Id.; Conniff, supra note 2 (at the shows that actually occurred during that tour, merchandise sales averaged $350,000-170,000 per night, reaching a high of $180,000 at the Los Angeles show); sales for Spears’ tour merchandise reached a total of $30 million for her tours between June 1999 and April 2004). See also New Kids, 971 F.2d at 304 (discussing the various goods on which the NEW KIDS name and logo appeared).

15. See Allen, supra note 3 (Popular singer-songwriter JOHN MAYER said of merchandising: “Besides the money, it’s about having one more way to make your mark stylistically and thematically. You’re not making that much money off records anymore...merch is one of the last bastions of individuality, commerce, and style that an artist has left.”); Salter, supra note 3 (noting that JOHN LEGEND protects his brand by retaining control over the relationship between his fans and his music; he has created an online operation to sell merchandising, promote his new recordings, and communicate with his fan clubs).

16. See Sandra O’Loughlin, Rock ‘n Roll Band Kiss To Launch Fragrance Brand, BRANDWEEK, February 13, 2006 (“KISS has licensed its name to more than 2,000 product categories, from lunch boxes and comic books to credit cards and condoms to become nearly a one-billion-dollar brand.”).

17. See Part II, Rights of Publicity under state law, infra regarding protection for an individual’s likeness through state right of publicity laws.

18. See O’Loughlin, supra note 16 (noting the various goods and services offered under the KISS name, including a beauty and fragrance collection, lunch boxes, comic books, credit cards, and condoms); Lauren David Peden, KISS Rocks on With New Fragrance and Coffeehouse, FASHION WIRE DAILY, June 8, 2006 (discussing the KISS fragrances and KISS coffeehouse); Press Release, Official ‘KISS® Kaskets’ let KISS® Fans Rock at Rock or Eternity, June 12, 2001, available at w w w . s i g n a t u re s e r v e.com/press.php?diary_id=13&mode=view (discussing the casket offered by KISS’ merchandising company Signatures Network, a leading merchandise licensor). Along the way, the band and its members have registered with the United States Patent & Trademark Office their names, logos, and even the individual members’ painted faces as trademarks for most of these goods and services, all in addition to their musical performances. See USPTO Trademark Reg. No. 1055765 (musical performances); USPTO Trademark Reg. No. 1153088 (registered logo for, inter alia, necklaces, comic books, greeting cards, posters, stickers, pins, and puzzles); USPTO Trademark Reg. No. 3167370 (action figures and dolls); USPTO Trademark Reg. No. 3008602 (shirts, T-shirts, jackets, and caps); USPTO Trademark Reg. No. 2160628 (comic books); and USPTO Trademark Reg. No. 2596687 (shirts, T-shirts, jackets, and caps).

19. See USPTO Trademark Reg. No. 2912756 (KORN, which is owned by the rock group KORN for various goods and services unrelated to entertainment services).

20. See USPTO Trademark Reg. No. 2878296 (KISS, which is owned by EMI Rocking in the mark application owned by Jessica Simpson for numerous goods and services unrelated to entertainment services).
24. When Marketers Become Record Labels, MADISON + VINE.COM, November 9, 2006, at www.adage.com/madisonandvinez/news.pl?newsId=113039 ("Partnership deals are definitely de rigueur for artist in genres like hip hop, country, and pop...Particularly in hip hop, racking up endorsement deals is a rite of passage."). On the other hand, rock bands tend to partner up with corporate brands, in a less visible way, such as through tour sponsorship. Id. But see Jenny Peters, Tommy Lee Joins the Clothing Revolution, FASHION WIRE DAILY, November 20, 2006 (discussing rocker TOMMY LEE’s foray into clothing with the launch of “TL for PL” line in association with the People’s Liberation label).

25. See USPTO Trademark Serial No. 78561533.

26. See USPTO Trademark Serial No. 78743561.

27. ANDRE 3000 has licensed his name, image, and likeness for an animated series entitled “Class of 3000” which airs on the Cartoon Network. See www.cartoonnetwork.com/tv/shows/classof3000/index.html.

28. For example, SEAN “P’ DIDDY/PUFF DADDY” COMBS’ individual album sales and those of his record label, Bad Boy Entertainment, have been in decline while his fashion line and other business ventures are on the rise. See Tamara Conniff and Bill Werde, Diddy: The Saga Continues, BILLBOARD, October 4, 2006, available at http://www.billboard.com/bhcomy/features/article_display.jsp?mu_content_id=1003220466 (noting that Combs’ SEAN JOHN clothing line totals $100 million in sales a year and his SEAN JOHN Fragrances is part of the Estee Lauder Company; but also discussing the lack of musical hits in recent years); Roger Friedman, Diddy Smells More Money, FOX NEWS.COM, February 2, 2006, available at http://www.foxnews.com/story/0,2933,183535,00.html (discussing the launch of Combs’ “Unforgivable” fragrance); Phyllis Furman, Puffy’s Tuning Up A Deal, N.Y. DAILY NEWS, February 8, 2005, available at http://www.nydailynews.com/business/story/2789822-239050c.html (noting the lack of recent hits from Combs’ label, the article states that “Sources said Combs had been distracted by his other business ventures and has not paid enough attention to the label.”).

29. USPTO Trademark Reg. No. 2201538 (for musical performances, sound recordings, guitar picks, and beverage ware, among other things).

30. JIMMY BUFFETT has over 100 trademark registrations and pending applications using the mark MARGARITAVILLE. See e.g., USPTO Trademark Reg. No. 1642132 (for clothing and night club services); USPTO Trademark Reg. No. 1831949 (for musical sound and video recordings).

31. See Singer Buffett Wins Trademark Settlement, REUTERS, November 28, 2006 (Buffett “went on to parlay his laid-back Gulf Coast image into a business empire that included a Margaritaville clothing line and nightclub chain.”). However, do not let Buffet’s laid-back persona fool you – he aggressively enforces his trademark rights throughout the country. Id. (discussing a long-running legal battle with an individual selling Buffett-labeled items over the Internet); Singer Buffett Sues Alleged Trademark Infringer, REUTERS, November 13, 2006.

32. Nick Southall, And Now a Time From Our Sponsor, GUARDIAN UNLIMITED, September 29, 2006; see also supra note 28 discussing SEAN “P’ DIDDY/PUFF DADDY” COMBS’ lack of recent hits but success in his non-music related businesses.

33. Although music in television programs and movies may not necessarily be promoting a commercial brand per se, music in such artistic works can form a branding association. For example, THE WHO’s “Who Are You?,” which is used as the theme for the opening credits of the hit CBS show CSI: Crime Scene Investigation, is arguably an integration part of the program itself.44 JBL’s sponsorship relates to the main action of the show – a group of investigators trying to find out who a victim is.

34. Nina M. Lentini, Who Is That Wearing That Milk Mustache?, N.Y. TIMES, January 4, 2007 (discussing LG Mobile’s use of the teenage pop star RIHANNA, “whose songs appeal to the young audience [LG Mobile] is aiming for.”); Jon Fine, Getting To The Hipsters, BUSINESSWEEK ONLINE, July 10, 2005 (discussing the sponsorship by Levi’s of a music tent at the influential South By Southwest music conference where Levi’s can specifically target the important twentiesomething segment that the company desires); Valerie Block, Death of the Advertising Jingle, ADAG.COM, February 3, 2003 (discussing how licensed music is harming the advertising jingle business, as more advertisers are licensing songs rather than commissioning jingles composed specifically for the brand and hip at the moment.”); Patricia Winters Lauro, Forget Jingles, Viewers Prefer Familiar Tunes, N.Y. Times, November 8, 1999 (noting that advertising agencies will often use new and innovative music in order to reach a particular audience, usually young people).

35. Of course, these third parties should seek permission from the artist in order to associate its goods or services with such artist. In 2006, Nike infamously used the name and cover art from the first F.E. of the fiercely independent artist MINOR THREAT without authorization from either the artist or its record label in order to promote Nike’s “Major Threat” skateboarding tour. See Chris Harris, Minor Threat’s Ian MacKaye Outraged By Nike’s Major Threat Skate Tour, MTV NEWS, available at www.vh1.com/news/articles/15047/02/06272005/minor_threat.html; Jeff Edwards, Out of the Box: Punk’s Not Dead – Just Old, BRANDWEEK, October 23, 2006. Nike subsequently apologized for the tour poster, made every effort to remove and dispose of all the posters, and made clear that the company had no relation with the brand or its label, both of whom had not endorsed Nike’s products. Letter from Nike Skateboarding to Minor Threat, Discour Island Records, and fans of both, June 27, 2005, available at www.nike.com/nikeskateboarding/c2/letter/. See also Jennifer Quinn, Ska Band Activated by Coke Commercial, ASSOCIATED PRESS, January 3, 2007, available at http://news.yahoo.com/s/ap/20070103/ap_en/britain_band_vs_coca_cola_letter+1 (discussing the unauthorized use of a song and its accompanying video from an unsigned London ska band 7 SECONDS OF LOVE by Coca-Cola Co. in a commercial for its Coca-Cola Light product in Argentina).

36. See Mike Betire, Rolling Rock Rolls with Rock ‘n Roll, BRANDWEEK, January 23, 2006 (discussing Rolling Rock’s sponsorship and donations for the “Garage Rock” club shows, Little Steven Van Zandt stated that “[t]he cost for a new rock band to get around the country has become exorbitant, making it nearly impossible for great new music to reach fans.”); Suzuki Revs Up Kutless Tour To Test SX-Debut, XL 7 SUV, BRANDWEEK, August 7, 2006 (discussing the various activities of the artist KUTLESS’ U.S. tour, in return for using the artist to promote the launch of two new Suzuki vehicles); RadioShack Jumps Aboard Rolling Stones Bandwagon, BRANDWEEK, August 7, 2006 (noting that RadioShack will help sponsor the U.S. leg of the ROLLING STONES’ “Bigger Bang” tour and in return will have the band appear in RadioShack ads); www.jbltour.com (featuring audio product maker JBL’s sponsorship of THE ROOTS, HOLD STEADY, and THE SUBWAYS on their joint tour); JBL’s sponsorship of these groups also included billboard ads throughout the subway system of New York City, which promoted both the groups and JBL’s new speaker systems); Fine, supra note 34 (the malt liquor brand Spuds undertook a tour for three hands on the influential Vice record label, and in return, the band members had to promote the beverage by photographing each other drink- in front of the camera).


38. Fine, supra note 34 discussing (discussing SEAN JOHN clothing line and SEAN JOHN fragrances, to promote his most recent album, Press Play); Stuart Elliott, Woman of a Scent, N.Y. TIMES, December 18, 2006 (discussing the new fragrance by Elizabeth Arden for singer and actress HILARY DUFF, “‘With Love…Hilary Duff.’”); and noting that the multimillion dollar advertising campaign promotes the fragrance as well as Duff’s next single “‘With Love.’”); MADISON + VINE, Hollywood Records’ Very Own Marriage Counselor, January 24, 2007, available at http://adage.com/madisonandvinez/news.pl?newsld=114498 (according to the VP of strategic marketing at Hollywood Records: “In fact, having corporate brand partners is a significant part of every marketing campaign we launch.”).

39. See When Marketers Become Record Labels supra note 24.

40. Licensing music has become such a priority for record labels that they now have brand partnership and commercial licensing departments, See Story, supra note 39 (interviewing a Vice President of brand partnerships and commercial licensing at Atlantic Records); FYI, MADISON + VINE.COM, October 18, 2006, at http://adage.com/madisonandvinez/news.pl?newId=112544 (“WPP’s Group M and Universal Music Group have formed BrandAmp to develop music and brand partnerships for clients. The joint venture will also seek to work with other artists and record companies to synchronize third-party deal and music pacts.”). The push to have artist’s music in commercial campaigns has become so important that one foreign band recently skipped the traditional radio promotion activities and in return will have the band members had to promote the beverage by photographing each other drink- in front of the camera. How did this happen? How did it start? See When Marketers Become Record Labels supra note 24. The unknown-in-America Swedish artist
TEDDYBEARS, through its record label, went on a tour of advertising agencies in four major markets rather than doing a standard promotional tour with radio stations and press. The result: numerous advertising licensing deals were closed after this promotional tour, including the use of their songs in an Intel commercial and a Cadillac commercial. Id. (Cadillac will also place one of its automobiles in a TEDDYBEARS video.

42. See Louis Hau, Smells Like New Revenue, FORBES.COM, October 24, 2006; Block, supra note 34 ("All those rock tunes popping up in commercials are making superstar bands even richer and turning unknown acts into the next big thing.")

43. Hau, supra note 42 (noting that "consumers have become more accepting of hearing their favorite artists' music being used for commercial purposes.")

44. See Block, supra note 34 ("As the cost of promoting musical acts skyrockets, licensing songs for commercial use, once considered to be a sellout, has become a good way to expose a new record to the public and make a buck."); Story, supra note 39; REUTERS, Cyndi Lauper Licenses the Sounds of Commercials, February 1, 2007 (according to singer CYNDI LAUPER, bands looking to break into the music business should seek out commercials; "Right now, commercials are where to hear new music.")

45. Although it is not always the case that consumers will automatically link a licensed song with the product being advertised, Block, supra note 34 (noting that some songs are used for a number of commercial products, which harms the instant recognition of the product, and listing the ROLLING STONES' "Start Me Up" as an example of a song that has been licensed for advertising multiple products). Nevertheless, every time I hear "Galvanize" by the CHEMICAL BROTHERS, one of my favorite artists, I cannot help but immediately think of Budweiser Select, as Anheuser-Busch prominently featured the song in its Budweiser Select commercials throughout 2006.

46. See Hau, supra note 42; Seth Stevenson, Paul McCartney? Is That You?, SLATE.COM, September 19, 2006, at www.slate.com/teabarrow.aspx?action=print&id=2126266 (noting that ROLLING STONES' music has been featured in an Americanquest campaign); Block, supra note 34 (noting that ROLLING STONES' "Start Me Up" was heavily used by Microsoft Corp. to launch Windows 95, as well as for Ford trucks); Chris Nashawaty, Back on the Mean Streets, ENTERTAINMENT WEEKLY, September 22, 2006, available at http://www.ew.com/ew/report/0,6115,1537678,1_0,00.html (discussing director Martin Scorsese’s use of The Rolling Stones’ “ Gimme Shelter” in three of his hit movies); Lauro, supra note 52 (noting that "The Who’s “Who Are You” for Gateway computers; “The Who in popular culture,” available at http://en.wikipedia.org/wiki/The_Who_in_popular_culture (noting the use of THE WHO’s music as the theme songs to each show in the hit CSI television franchise, and the use of the group’s music in commercials for Hummer SUVs, Sylvania light bulbs, and Saab automobiles).

47. See Story supra note 34 (noting that celebrities, including musicians, use appearances in commercials to keep getting exposure for themselves). Additionally, the estates of deceased artists view commercial licensing of the artist’s music as a big revenue source, as well as a way to continue to expose the deceased artist. See Lauro supra note 34.

48. Electronica artist FATBOY SLIM’s popular success in the music industry followed his success licensing his music for commercials; in 1999, he “hit the mother lode” when Kodak, MasterCard, Nike, and Coca-Cola each used one of his songs for commercials. Lauro, supra note 34. Additionally, for the past decade, Volkswagen has been helping artists unknown to mass audiences by promoting their music in commercials for its automobiles. See id. (noting that how Volkswagen of America introduced the new Beetle in 1998 “with an entire campaign of songs by bands that were virtually unknown to the mass audience,” such as THE ORB, SPIRITUALIZED, and FLUKE).

49. Moby, whose entire album Play had every single song licensed for commercial use, has had numerous songs placed in commercials, including “We’re All Made of Stars” in an Intel campaign. See Southall, supra note 32 (“Moby’s Play album became a worldwide hit after every song was placed in one or moreadvertises.”); Jim DeRogatis, Talking With Moby, PENTHOUSE, August 2002, available at http://www.penthouse.com/OtherWritings/PenthouseMoby.htm (responding to music critic DeRogatis’ questions about licensing many of his songs, Moby stated that he does not think people will associate his songs with the advertiser’s product after the song appeared in a commercial). Additionally, The CHEMICAL BROTHERS’ beats have become ubiquitous in 2006, as their song “Galvanize” is the background to Anheuser-Busch’s popular Budweiser Select campaign. See http://adtimex.com (listing the top ad music of 2006 and noting that Budweiser branded their 2006 commercial campaign with “Galvanize.”).

50. See Fine, supra note 34 (noting that fifteen or twenty years ago bands that “outed up” to advertisers were often ridiculed and hung out to dry); Lauro, supra note 34 (noting that the number of songs licensed for commercials greatly increased during the 1990’s, and in 1999 alone, more than 130 advertising campaigns used songs originally released by an artist but now licensed for commercial use); Hau, supra note 42.

51. For example, R.E.M., known for being a politically active artist, turned down Microsoft Corporation’s multimillion dollar offer to use their hit “It’s the End of the World as We Know It” in a commercial for Windows 95. Ivar Hanson, Rock For Rock’s Sake Is No Longer Enough, N.Y. TIMES, December 5, 1999. JOHN MELLENCAMP has also long expressed objections to the use of his music in advertising, but recently acquiesced to placing his music in a Chevrolet commercial in order to reach consumers. Alan Light, Changes In Mellen camp Country, N.Y. TIMES, January 22, 2007 (“This is just what I did this time to reinvent myself and stay in business. Sometimes I get sad about it really, I still don’t think that people should sell their songs for advertising.”).

52. Waits is a staunch opponent of having his music used in commercials. Since his career began, he has often expressed his view that musical artists should not do commercials because it detracts from their artistic integrity. See Josh Greenberg, Waits Waits Over Car Ad, E ONLINE, September 15, 2005, available at http://international.com-line.com/news/items/0,1799,17374,00.html ("Commercial are an unnatural use of my work. It’s like having a cow’s udder sewn to the side of my face. Painful and humiliating."). He famously sued Frito Lay and their advertising agency for using a soundalike vocalist in a radio ad for Doritos and was awarded $2.6 million in damages. Tom Waits v. Frito-Lay, Inc., 975 F.2d 1093, 1096 (9th Cir. 1992) (prevailing on a vocal misappropriation claim under California common law and a false endorsement claim under 15 U.S.C. § 1125(a)). He has also sued General Motors’ Opel division in Germany and its ad agency for use of a soundalike in its ads, as well as suits against Audi and the Italian carmaker Lancia for similar misappropriation. See Greenberg supra note 52; Lawrence Van Gelder, Waits Sells Ad Spot, N.Y. TIMES, January 25, 2007 (Waits recently settled with Opel and its agency and said that he would donate his net proceeds to charity).

53. Densoe, the drummer for THE DOORS, has long held the view that the music of THE DOORS should not be licensed for commercial use, as THE DOORS are making plenty of money without “selling out” to corporate America and permitting the use of the group’s music in commercials is antithetical to the legacy of the group and the memory of Jim Morrison. See Densoe v. Manzarek, Case Nos. BC 299730 and BC 294995 at 6, 17-18 (Cal. Super. Ct. July 21, 2005). THE DOORS have received numerous offers for use of their music in commercials, including a $15 million offer from Cadillac for the use of “Break on Through” in a worldwide campaign for its automobiles and a $4 million offer from Apple Computers for the use of another song by the group in a commercial campaign, but since the death of Jim Morrison the group has only allowed their music to be placed in one commercial – a Pirelli tire commercial broadcast in England. Id. Other notable artists share the same view as Densoe and Waits regarding the use of their music in commercials, including NEIL YOUNG, BRUCE SPRINGSTEEN, BONNIE RAITT, and JACKSON BROWNE. Id. at 11.

54. See LCD Soundsystem team up with Niki, NMF, at www.nme.com/news/lcd-soundsystem/21730 (discussing LCD SOUNDSYSTEM’s commission by Nike Inc. to create a workout song for Nike’s iTunes download store). According to the VILLAGE VOICE, LCD SOUNDSYSTEM’S original track for the Nike iTunes store “may be the best thing the corporation has ever done.” Mike Powell, Clubland Lovers of the World Unite: How Nike’s bizarre union with LCD Soundsystem worked out so perfectly, VILLAGE VOICE, November 19, 2006 (noting that money may be just as powerful of a motivation tool as inspiration for making good records); see also Lentini, supra note 34 (discussing LG Mobile’s use of teenage pop singer RIHANNA as their “brand ambassador” because her music appeals to LG Mobile’s target audience – teenagers.)

55. One way for an artist to protect itself is to request to see the creative work of the agency or corporate sponsor before the artist commits to the brand.