United States Copyright Office
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June 8, 2012

Benedict O'Mahoney, Esq.
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177 Park Ave., Third Floor
San Jose, CA 95113

Re: BlueBeat Catalog
Copyright Control Number: 81-525-6480

Dear Mr. O'Mahoney:

I write on behalf of the Copyright Office Review Board ("Board") in response to MRT's letter dated February 4, 2011, in which it supplemented Hank Risan's (d/b/a Media Rights Technologies, Inc./Bluebeat.com) ("MRT") second request for reconsideration of the refusal of the Copyright Office ("Office") to register approximately 800,000 sound recording simulations, as well as the additional supplementary materials submitted on behalf of your client, as described below. The Board has carefully examined the application, the deposit and all correspondence concerning this application, and affirms the denial of registration of this work.

I. ADMINISTRATIVE RECORD

A. Multiple Previous Applications

The Copyright Office received a letter from Hank Risan dated August 15, 2007 as well as a Form SR application for registration of sound recordings entitled "Media Rights Technologies and BlueBeat.com registration of nearly 800,000 ephemeral sound recordings. See Disk," which was signed by Hank Risan. The application names Media Rights Technologies and BlueBeat.com, Hank Risan CEO, as the authors of a "list of 792,852 ephemeral sound recordings manufactured for Internet broadcast, see enclosed disk." It names Media Rights Technologies and BlueBeat.com as the copyright claimants.[1] The application indicates that the work was completed in 2007 and first published on August 15, 2002. (MRT application dated August 15, 2007).

The Copyright Office also received a letter from Hank Risan dated September 14, 2007 as well as a Form SR application for a second registration of sound recordings entitled "baseBeat Compilation," which was signed by Hank Risan. The application names Hank Risan on behalf of Media Rights Technologies as the author of "Compiled Compilations." The application indicates that the work is derivative. In space 6a, which provides for identification of any preexisting work or works that the applied for work is based on or incorporates, Mr. Risan stated, "See attached discs comprising 2,626 compilations of a total of 796,138 sound recordings offered in two sound qualities-160kb/s and 320kb/s." The application names Hank Risan/Media Rights Technologies as the

[1] As the discussion of the administrative record below reveals, it appears that you have made inconsistent assertions at various times with respect to the identity of the author(s) and copyright claimant(s) of the works in question. Because those specific identities are not pertinent to the grounds for the Board's disposition of this matter, we will refer to the author(s) and claimant(s) interchangeably as "Risan" and/or "MRT."

copyright claimants. It indicates that the work was completed in 2007 and first published on August 11, 2001. (MRT application dated September 14, 2007).

In addition to the two applications described above, the Copyright Office received three Form SR applications dated October 22, 2007 on behalf of Hank Risan and Media Rights Technologies for registration of sound recordings. The application for "BlueBeat.com Derivative Works" was signed by Hank Risan on October 22, 2007 and names Hank Risan as the author of "Approximately 800,000 Sound Recordings." The application indicates that the work is derivative. In space 6a, which provides for identification of any preexisting work or works that the applied for work is based on or incorporates, Mr. Risan stated "786,678 Songs." In space 6b, which provides for a brief general statement of the material that has been added to the applied for work and in which copyright is claimed, Mr. Risan stated, "786,678 sounds have been digitally altered to create an entirely new sound by author." The application names Hank Risan/Media Rights Technologies as the copyright claimants. It indicates that the work was completed in 2003 and first published on January 1, 2003.[2] (MRT application for "BlueBeat.com Derivative Works," dated October 22, 2007).

Applications for "For What It's Worth 7835.mp3der/320" and "For What It's Worth 7835.mp3der/160" were signed by Hank Risan on October 22, 2007 and name Hank Risan as the author of "Sound Recordings." The applications indicate that these works are derivative. In space 6a, which provides for identification of any preexisting work or works that the applied for work is based on or incorporates, Mr. Risan stated "For What It's Worth" on both applications. In space 6b, which provides for a brief general statement of the material that has been added to the applied for work and in which copyright is claimed, Mr. Risan stated, "Sound has been digitally altered to create an entirely new sound by author" on both applications. The applications name Hank Risan/Media Rights Technologies as the copyright claimants. The applications indicate that the works were completed in 2003 and first published on January 1, 2003. (MRT applications for "For What It's Worth 7835.mp3der/320" and "For What It's Worth 7835.mp3der/160," dated October 22, 2007).

A cover letter accompanying the three applications, which was dated October 22, 2007 but was not received by the Office until December 3, 2007, appears to indicate that the application for "BlueBeat.com Derivative Works" duplicates and supersedes the earlier applications submitted on August 15, 2007 and September 14, 2007.

The October 22, 2007 letter asserts that the sound recordings addressed in the applications were made pursuant to Section 112 licenses. The letter also indicates that MRT has not obtained mechanical licenses to make and distribute phonorecords of nondramatic musical works, and that MRT wishes to obtain compulsory 115 licenses. (Letter from Risan to Copyright Office, dated October 22, 2007).

In a letter to Mr. Risan from Supervisory Registration Specialist Jane Rinard of the Copyright Office's Performing Arts Division, dated December 17, 2007, Ms. Rinard indicated that the applications received on December 3, 2007 appear to duplicate and supersede the earlier claims submitted on August 15, 2007 and September 14, 2007. Ms. Rinard pointed out that the applications and cover letter received on December 3, 2007 do not advance acquisition of 115 licenses and she suggested that MRT continue its discussions with the Copyright Office's Office of the General Counsel regarding compliance with the Section 115 license. (Letter from Rinard to Risan, dated December 17, 2007, at page 1-2).

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[2] The various dates of publication are one of many inconsistent assertions made by MRT throughout the application process.

Ms. Rinard questioned whether Mr. Risan considered the subject sound recordings to be derivative. In doing so, she advised him of the requirement of sufficient human authorship and that the mere mechanical adjustment or changes to sounds, including the addition of locking mechanisms to protect digital sound files or content, would probably not constitute sufficient sound recording authorship. She went on to state that the Office needs a deposit copy of the sound recordings themselves, and not merely a list of titles, before registration can be considered. *Id.* at 2.

Ms. Rinard, referring to a conversation with Hank Risan, recounted Mr. Risan's statements that all of the recordings contain some sounds from the original recordings. She also recounted Mr. Risan's assertions that he obtained the necessary licenses to use and alter these sound recordings, and that he obtained the legal right to claim copyright in the derivative sounds. She then pointed out that Mr. Risan had not supplied any documentation of any such authority. She specifically asked Mr. Risan to provide written authorization or permission from the copyright owners of the original sound recordings that grants him the right to claim copyright in the derivative works. *Id.* at 3.

Ms. Rinard then asked Mr. Risan to clarify the various statements of authorship in the previous applications which had listed Media Rights Technology and BlueBeat.com as the author of works made for hire, in light of the fact that the October 22, 2007 application for "BlueBeat.com Derivative Works" names Hank Risan as the author of "Approximately 800,000 Sound Recordings." She also asked for a detailed description of what the author contributed to the production of these derivative recordings, aside from any mechanical, electronic, or software-generated process. *Id.*

Ms. Rinard went on to ask Mr. Risan to clarify the various statements of first publication of the respective recordings as stated in the various applications. Ms. Rinard, referring to a conversation with Hank Risan, recounted Mr. Risan's statements that all of the "recordings were published by broadcast over the Internet. The first track FOR WHAT IT'S WORTH was published on 1/1/03 when it was first broadcast over the Internet, and the other recordings have been produced and published over a period of six years." *Id.* Ms. Rinard noted that this raises the issues regarding the units in which the sound recordings were published. She asked Mr. Risan to explain the facts surrounding the publication status of the works. *Id.*

With regard to the deposit requirement, Ms. Rinard referred to conversations with Hank Risan in which he stated that there may be a need to submit a computer hard drive because of the volume of recordings. Ms. Rinard stated that if this is the only format that is possible, then the Office would accept it, provided that the Office was able to access the recordings for examination purposes. She then asked Mr. Risan to contact the Office for specific instructions regarding the formatting of the files prior to preparing them. Ms. Rinard went on to state that the Office would not be able to register both claims in the two recordings of "For What It's Worth 7835.mp3der/320" and "For What It's Worth 7835.mp3der/160" if both recordings contained the same fixation of sounds, with the only difference being the speed of the recordings. Finally, Ms. Rinard noted that since the applications received on December 3, 2007 appear to duplicate and supersede the earlier claims, the Office would file the claims submitted on August 15, 2007 and September 14, 2007 without further action unless MRT advised otherwise. *Id.* at 4.

In a letter from MRT's Counsel, Archie Robinson, to the Copyright Office General Counsel, Tanya Sandros, dated February 13, 2008, MRT asserted that the Recording Industry Association of America ("RIAA"), on behalf of its constituent record labels, granted express permission to MRT, which was then known as Music Public Broadcasting, Inc., to make and use copies of sound recordings processed through MRT's technology and encoded with MRT's Serial Copy Management System ("SCMS"). Mr. Robinson went on to state that "[s]ome 800,000 derivative works of sound

recordings were produced and constitute the subject matter of MRT's application for copyright herein." Mr. Robinson added that "[t]he Phonographic Performance Limited ("PPL"), described as England's counterpart to Sound Exchange in the U.S., granted BlueBeat.com a license to transmit copyrighted sound recordings from 47,000 artists to 36 countries around the world, including the U.S., on the condition that each transmission be protected against unauthorized use by MRT's SCMS." MRT's letter then referred to an accompanying draft response to the Copyright Office's Supervisory Registration Specialist regarding MRT's application for registration of copyright on approximately 800,000 derivative works. (Letter from Robinson to Sandros, dated February 13, 2008).

In a letter from MRT's Counsel, Archie Robinson, to Supervisory Registration Specialist Jane Rinard of the Copyright Office's Performing Arts Division, dated March 24, 2008, MRT attempted to respond to Ms. Rinard's letter of December 17, 2007. (Letter from Robinson to Rinard, dated March 24, 2008).

In response to Ms. Rinard's request for written authorization or permission from the copyright owners of the original sound recordings that grants the right to claim copyright in the derivative works, MRT stated that production of the derivative works was done with the express consent of the RIAA and the International Federation of the Phonographic Industry ("IFPI"), representing owners of the copyrights on the subject sound recordings. MRT went on to state that:

> Preparatory to demonstration and testing of MRT's proprietary SECURE SCMS, a Software Evaluation License Agreement ("SELA") was entered into between MRT and RIAA in February 2003. This agreement recognizes that MRT's creation of derivative works embodies substantial creative efforts. In March 2003, after testing confirmed that MRT's technology was 100% effective in preventing unauthorized downloading and copying of music streamed over the internet – with no degradation of sound quality – the RIAA authorized MRT to make ephemeral copies of some 400,000 sound recordings (the "Catalog"), organized into 153 chapters, that became a program known as "The Time Machine," an audio-visual anthology covering the history of music from 300 AD to the present. The RIAA, the IFPI and their constituent record label members approved the program and agreed that all performance royalties due them would be paid under MRT's § 114 license. These royalties have been accounted for and paid. The copyright on "The Time Machine" has been augmented annually. The program now contains the entire Catalog which has been augmented to approximately 800,000 sound recordings which are the subject of the pending application. Another program anthology, entitled "Killer Playlists," consisting of 175,000 sound recordings from the Catalog, was published by MRT at about the same time as "The Time Machine." "Killer Playlists" currently contains the entire Catalog of the subject 800,000 sound recordings. It, too, was evaluated and approved by RIAA. In 2005, MRT published "Be the DJ," an anthology containing chapters of user-organized sound recordings. Currently, "Be the DJ" has 2411 chapters and also includes the entire Catalog of the subject 800,000 sound recordings.

> In 2006, BlueBeat.com, MRT's wholly owned subsidiary, was licensed by the Phonographic Performance Limited ("PPL") the British equivalent of SoundExchange in the U.S., to produce, publish and transmit as a global webcaster in 36 countries, including the U.S., ephemeral recordings of copyrighted sound recordings owned or controlled by the PPL. RIAA was and is at all relevant times a signatory member of the PPL. In addition, the PPL warrants that it represents 3,500 record labels and 47,000 artists. The PPL license defines the licensed sound recordings as those which have been processed by MRT to include SCMS to prevent stream ripping. The PPL authorized "The Time Machine," "Killer Playlists," and "Be The DJ" for global publication and transmission, but limited user-creation of "Be The DJ" chapters to the United States.

Id. at 1-2 (footnotes, including a footnote referencing the RIAA test report, which was included as an attachment to the Letter from Risan to Rinard, dated March 24, 2008, have been omitted).

In response to Ms. Rinard's request for clarification on the various statements of authorship in previous applications, MRT stated that "MRT seeks registration as the author, in its personal right, of the claimed derivative works. They were created by Hank Risan and licensed by him to MRT." *Id.* at 1.

In response to Ms. Rinard's request for a detailed description of what the author contributed to the production of the derivative recordings, aside from any mechanical, electronic, or software-generated process, MRT indicated that its production of the works consisted of four activities, namely, disaggregation of sound recordings from Compact Disk to individual files, removal of digital noise, editing and abridgement, and insertion of new meta data and encryption algorithms. In describing these activities, MRT stated that:

> MRT's proprietary software targets elements of the digital process and, through use of acoustic shaping software, transforms the sounds into those that are more harmonious to the ear. Human operators at MRT have played each of the 800,000 claimed recordings, one by one, to discern the type of noise that should be removed from each recording. ... In addition, the variable volume of the tracks is equalized to a standard level for playback. The net result of this human re-mastering is an abridged musical file about one-eighth the size of the original, which contains a 3-D, spatial quality of sound that virtually re-creates the intended sound stage with definition of individual voices and instruments. ... During the abridgement/compression/partition phase of the process, a human operator selects the type and amount of meta-data (SCMS) to be added to each frame of the digital file for each recording. ... During the encryption phase, the human operator chooses a particular encryption algorithm that is unique to each sound recording so that the data within each frame is properly protected. ... In sum, each of the claimed derivative works is the product of human evaluation, discretion and transformation of an unprotected sound recording designed for personal use (on Compact Disk) into an ephemeral recording for public transmission with enhanced quality of sound, different annotations of performance and production cues and different SCMS – all the result of human discretion and creation.

Id. at 2-3.

In response to Ms. Rinard's request for a clarification as to the various statements of first publication, MRT stated that:

> the derivative works in the program, "The Time Machine," were published by MRT in 2003, and the derivative works in the "Killer Playlist" program were also published in the same time frame. The derivative works of "Be the DJ" were published in 2005. It is MRT's intention to register the derivative works as three published units of sound recordings.

Id. at 3.

In response to Ms. Rinard's statement that the Office would not be able to register both claims in the two recordings of "For What It's Worth 7835.mp3der/320" and "For What It's Worth 7835.mp3der/160" if both recordings contained the same fixation of sounds, with the only difference being the speed of the recordings, Mr. Robinson stated that "For What It's Worth 7835.mp3der/320" and "For What It's Worth 7835.mp3der/160" are two separate works, "each with different encryption, different modification to the sound quality, different annotations of performance and production cues and different SCMS – all the result of human discretion and creation." *Id.*

MRT did not dispute Ms. Rinard's suggestion that the applications received on December 3, 2007 duplicate and supersede the earlier claims or that the Office should file the claims submitted on August 15, 2007 and September 14, 2007 without further action. Furthermore, MRT did not respond to Ms. Rinard's request for an explanation of the facts surrounding the publication status of the works or to her request to contact the Office regarding submission of a suitable deposit. (Letter from Robinson to Rinard, dated March 24, 2008).

In a letter to Mr. Robinson from Ms. Rinard, dated April 2, 2008, Ms. Rinard observed that the Office did not receive the required deposit material. Despite the absence of this fundamental ingredient for consideration of an application, Ms. Rinard went on to that note that Mr. Robinson's March 24, 2008 letter stated that MRT is the author (presumably as the employer of Mr. Risan) and the company seeks registration in derivative sound recordings. She noted that of the four described authorship activities, only one, "editing and abridgement," might represent the type of authorship that could support a claim to copyright in a derivative sound recording. She noted, however, that this activity—described more fully in Mr. Robinson's March 24, 2008 letter as equalizing the volume of the various recordings for playback purposes and compressing musical files—does not represent copyrightable production authorship. She added that of the other three activities – namely, disaggregation of sound recordings, removal of digital noise, and insertion of new metadata and encryption algorithms - the first two are mechanical processes, and the last does not involve production authorship. (Letter from Rinard to Robinson, dated April 2, 2008).

Having found that there was no basis for a claim to copyright in derivative sound recordings, Ms. Rinard informed Mr. Robinson that the Office was refusing to register the works. She pointed out that if MRT chose to seek reconsideration of the refusal, it should, in addition to providing reasons for reconsideration, explain when and how the works were published, and provide documentation showing authority given to Mr. Risan by the copyright owners of the original sound recordings upon which the derivative works are based. Finally, she added that any request for reconsideration must include the required deposit material. *Id.* at 1-2.

From April 14, 2008 through June 6, 2008, Ms. Rinard and Mr. Robinson corresponded through several emails regarding an acceptable format for the deposit for the approximately 800,000 derivative sound recordings. In an email dated May 15, 2008, Ms. Rinard indicated that the Office would accept the hard drive described in an email from Mr. Robinson dated April 16, 2008 which stated:

> MRT advises that it has hard drives (5 terabyte) containing MP3 files in 320 and 169 kbs that consist of standard CD sound recordings which have been recast, re-arranged, processed and encrypted before being fixed onto the hard drives. These hard drives can be deposited with the Copyright Office together with an interface box that can be plugged into a computer (which reads MP3 format). What will be heard are the sounds of the unique rearrangements created by MRT of the original sound recordings. Since MRT's encryption cannot be broken, a special authorization code will be provided via an online account that will permit the sound recordings to be decrypted and listened to. Importantly, the deposited hard drives will contain files in exactly the same condition as those transmitted by BlueBeat.com and delivered and downloaded by BlueBeat customers.

(Email from Robinson to Rinard, dated April 16, 2008).

In another email to Ms. Rinard, MRT explained that the sound recordings were first published in a proprietary digital format known as "bbt-audio." (Email from Robinson to Rinard, dated April 29, 2008).

In a July 22, 2008 email, sent prior to receipt of the hard drive deposit, Ms. Rinard asked Mr. Robinson if the recordings produced by MRT contain or capture any of the actual sounds from the original recordings. MRT responded in a July 23, 2008 email in which it stated:

> The derivative works consist of atonal, cacophonous sounds bearing no resemblance to sounds from the original recordings. To explain, as a result of MRT's transformational processing, distinct, quality-enhanced sounds from original sound recordings are embedded in the derivative works as ephemeral copies, created pursuant to BlueBeat's Section 112 license. The ephemeral copies, so made, are protected by MRT's patented technology against downloading or copying. After the ephemeral copies are uploaded onto BlueBeat's servers, they are transmitted and performed, pursuant to BlueBeat's Section 11 4 license and its interactive publishing licenses (from ASCAP, SESAC, BMI). What are transmitted from BlueBeat's servers and then fixed to the user's computer as DPDs are MP3 files containing MRT's atonal derivative works. After the initial transmission, the sounds from the original recordings no longer exist. That is, the user will have access to only the derivative works' aforementioned atonal, cacophonous sounds. The user will not be able to listen to, publicly perform, download, reproduce or distribute any of the sounds from the original recordings.

(Email from Robinson to Rinard, dated July 23, 2008, 1:36 PM).

Ms. Rinard replied in a July 23, 2008 email seeking clarification of the statement

that "distinct, quality-enhanced sounds from original sound recordings are embedded in the derivative" sound recordings. Specifically, Ms. Rinard asked whether the sounds from the original recordings are "incorporated in the new 'atonal' recordings and, if so, can those sounds be perceived when listening to the new recordings? Or, are the new recordings entirely new fixations, each of which is attached in some technical way to a specific recording to control some aspect of its use?" (Email from Rinard to Robinson, dated July 23, 2008, 1:55 PM). In a July 23, 2008 email, Mr. Robinson replied, "The answer to your first question is an unequivocal 'no.' The original recordings cannot be perceived when listening to the new derivative [atonal] works. The answer to your second question is an unequivocal 'yes.' The new [atonal] recordings are, indeed, entirely new fixations, attached as you have described." (Email from Robinson to Rinard, dated July 23, 2008, 2:49 PM).

In a July 29, 2008 email, MRT sent Ms. Rinard instructions for accessing a hard drive deposit. (Email from Robinson to Rinard, dated July 29, 2008). The actual hard drive deposit, along with a printed version of the instructions for accessing it were received by the Office on or about August 12, 2008.

In an August 26, 2008 email, Ms. Rinard informed Mr. Robinson that the Office received the hard drive deposit but that the Office was awaiting an appeal letter and fee which are required before any reconsideration of applications can be processed. (Email from Rinard to Robinson, dated August 26, 2008). MRT replied in a September 8, 2008 email stating that it "has decided to abandon its application for copyright on derivative works. Instead, MRT would like to apply for copyright on its original works contained in the deposit submitted this summer under the captioned Control Number Control 81-525-6480(M)]." MRT further indicated that a formal application would be forthcoming. (Email from Robinson to Rinard, dated August 26, 2008).

In a September 12, 2008 email, MRT stated that "MRT desired to amend its previous application from one seeking copyright protection on derivative works to one seeking copyright on original works of authorship." MRT's September 12, 2008 email went on to state that "The deposit made in connection with the original application will also serve as the deposit for the amended [new] application." MRT indicated that it was sending a new application which can be used to supplant the original application. MRT then indicated that it would "set forth the basis of MRT's claim that the 800,000 plus sound recordings on deposit were new, independently created simulations, constituting original works of authorship fixed in digital music performance files. To assist in your evaluation, we are developing demonstrative exhibits showing the differences in the literary representation (in numbers and letters) of the sounds from original recordings vis a vis the sounds after MRT's analysis and application of psycho-acoustic principles vis a vis the sounds after MRT's encryption." (Email from Robinson to Rinard, dated September 12, 2008).

In a September 18, 2008 email, Ms. Rinard sought verification from MRT as to whether it was claiming copyright in the static sounds fixed in the deposit copy, and whether each individual recording contains a separate, distinct series of sounds. In the same email, Ms. Rinard asked MRT to attach a copy of the new application (Email from Rinard to Robinson, dated September 18, 2008). In a September 19, 2008 email, MRT did not verify whether it was claiming copyright in the static sounds fixed in the deposit copy, or whether each individual recording contains a separate, distinct series of sounds. However, it did attach a new application. (Email from Robinson to Rinard, dated September 19, 2008).

B. Current Application

The Form CO application attached to Mr. Robinson's September 19, 2008 email sought registration of a work of the performing arts. The application did not include a title but instead

referred to "list attached to deposit." The application was signed by Hank Risan on September 17, 2008. The application names Hank Risan, d/b/a Media Rights Technologies, Inc./BlueBeat.com, as the author, as well as the claimant, of text, computer program, compilation, music, sound recording/performance, and digital simulation of sound recordings. The application does not exclude any material that was previously registered, previously published or not owned by the claimant. It indicates the year of completion as 2003, and the date of publication as January 1, 2003, and that the work was published as a contribution to a larger work entitled "BlueBeat Catalog: Time Machine, Killer Playlists, Be the DJ." (Hank Risan, d/b/a Media Rights Technologies, Inc./BlueBeat.com application dated September 17, 2008).

In its September 19, 2008 email, MRT asked that the previously submitted hard drive serve as the deposit. MRT stated that "[e]ach sound recording lists the year in which the work was first published. An exemplar of such a listing for the recording, 'For What It's Worth,' is also attached. In the prior submittal, we aggregated the sound recordings by year and submitted instructions to your office on how to access the information on the list included with the physical deposit of the sound recordings." (Email from Robinson to Rinard, dated September 19, 2008).

In support of the application, MRT offered the following explanation of how the applied for sound recordings were created:

> An over-the-counter CD containing sound recordings is written to a computer as WAV files. These files are written in 1s and Os, so that when the digital data is transferred from the CD to a computer, an exact literary representation or writing of the sound can be created.
>
> Mr. Risan analyzed the original sound recordings and subjectively decided how they should be performed for his audience to see, hear and perceive the new works. He wanted his Catalog to contain new, independent, near perfect, live simulations of the original recordings that would, at the same time, be perceived as three dimensional sounds that would never go out of date. Based on his artistic interpretations, a psychoacoustic simulator program was developed by Mr. Risan that would read the WAV files and write completely new and original work, consisting of new bit streams and sequences, creating imitative sounds reflecting Risan's artistic expression.
>
> Mr. Risan used psycho-acoustic principles to develop his computer program to create sound recording simulations. Without getting unduly technical, the simulator's program is based on subjective mathematical modeling that emulates how the human ear and brain perceive music. This psychoacoustic modeling program creates new and different sequences of 1s and 0s that cause the human ear and brain to believe it is "hearing" the same sounds that are on the original sound recordings, even though the new works are imitations.
>
> It is important to realize that the WAV files of the original recordings are not copied. Nor are the WAV texts of the original recordings merely cleaned up or edited by removing some of the data and leaving the rest intact. What is created is a wholly new and

> independent writing of data, based on Mr. Risan's artistic expression; and the new resultant simulated sounds are perceived by the brain as the same sounds as the original recording. This simulation, then, is the original work of authorship of Mr. Risan.
>
> Finally, unique atonal sounds are superimposed over the simulation to dissuade illicit copying. That is, without the requisite authority and consent, the simulation will produce only cacophonous sound when played.

Id.

MRT also included one second's worth of the original recording of "For What It's Worth," by the Buffalo Springfield band printed out in binary format along with one second's worth of Mr. Risan's simulation printed out in binary format for purposes of comparison. MRT alleged that by comparing the two binary formats, it becomes apparent that the data sequences are vastly different. *Id.*

C. Refusal of Current Application

In a letter to MRT from Ms. Rinard dated September 25, 2008, Ms. Rinard observed that the application refers to the "digital simulation of sound recordings." She stated that it therefore appears that the basis for the claims in these elements is in the digital process used to reformat the musical sounds. She noted that in general, processes and reformatting are not copyrightable elements. Furthermore, she stated that regardless of whether this particular process involves copyrightable authorship, the Office requires authorization from the relevant copyright owners of the underlying works in order to consider the claim in the reformatted musical sounds. She noted that the claim in "text" is unclear, but if it refers to lyrics, Mr. Risan must also have authority from the copyright owners to claim copyright in this element. She added that a claim in "compilation" of this material, also requires permission from the copyright owners of the underlying material. (Letter from Rinard to Robinson, dated September 25, 2008).

Ms. Rinard stated that the only element claimed on the amended application in which registration appears to be possible is the computer program. She referred MRT to Circular 61 for information about registration requirements for computer programs, which include submission of the required deposit material. She added that in this case, Mr. Risan would need to complete a new application that names the author and copyright claimant of the "computer program" and does not check any other authorship options. Finally, Ms. Rinard stated that if MRT wished to pursue registration of the refused application, it would need to follow the appeals procedures and pay the appeals fee, as explained in SL 4a documents that she enclosed with her letter. *Id.*

D. First Request for Reconsideration of Refusal of Current Application

In a letter from MRT to Ms. Rinard dated October 2, 2008, MRT wrote to request that the Office reconsider its refusal. MRT observed that Ms. Rinard did not consider registration of its claims to copyright on grounds that MRT does not have authority from owners of the original sound recordings "to claim copyright in the **reformatted** musical sounds." (Letter from Robinson to Rinard, dated October 2, 2008) (emphasis in original). MRT noted that the Office rejected purported claims in the lyrics of the original works because of the lack of authority from the copyright owners to claim copyright in such lyrics. MRT added that the claim in "compilation" of the original works was rejected on the same lack of permission from owners of the original works to use their recordings in a compilation. *Id.*

MRT asserted that the nature of the application had not been properly addressed. In doing so, MRT sought to clarify that Mr. Risan and MRT make no application for copyright in "reformatted musical sounds." Referring to its email to Ms. Rinard dated September 19, 2008, MRT indicated that the claim of copyright is in new, wholly original, independent creations of sound that are perceived by the human ear to be near perfect simulations of the original works. MRT claimed that the materials were not produced from a re-formatting program, which merely allows data to be compressed or re-formatted by mechanical means into another file type. Instead, MRT claimed that its recordings are simulations that contain nothing that was carried over from the original recordings. MRT asserted that the original sounds were not edited, filtered, enhanced or altered in any way, but instead that Mr. Risan and MRT created new and different sounds in works of original authorship that simulate or imitate the sounds contained in the selected previously existing sound recordings. Therefore, MRT claimed that authority from the owners of copyrights in the previously existing sound recordings is not required for MRT's recordings (a.k.a. simulations) to be copyrighted. *Id.* at 1-2

In support of the assertion that no authorization is necessary from the owners of copyrights in the previously existing sound recordings, MRT asserted that:

> Each of MRT's new sound recordings consists "entirely of an independent fixation of other sounds," as set forth in 17 U.S.C. 114 (b). That statutory section expressly acknowledges that the rights of the owners of copyrights on the original sound recordings do not extend to MRT's original works of newly created sounds, "even though such sounds imitate or simulate those in the copyrighted sound recording[s]."
>
> Mr. Risan and MRT did not duplicate the original copyrighted sound recordings by "directly or indirectly recaptur[ing] the actual sounds fixed in the [copyrighted] recording[s]." Nor did they prepare derivative works in which "the actual sounds fixed in the [copyrighted] sound recording[s] are rearranged, remixed, or otherwise altered in sequence or quality."

Id. at 2, citing 17 U.S.C. 114(b).

MRT then pointed to the binary printouts of one second's worth of sound from the recordings of "For What It's Worth" as evidence of the difference between the actual musical sounds fixed in the original recordings selected and those fixed by Mr. Risan's artistic and psycho-acoustic authorship. MRT asserted that the simulations are authentic works of authorship representing the artistic decision-making of Mr. Risan in simulating his perception of how a live performance of the sound recording would be heard by a listener present during that performance. MRT therefore requested that the Office consider the application to be one seeking protection of original simulations – not reformatted musical sounds – consisting of works of authorship by the applicant. In making this request for reconsideration, MRT expressed its intent that the application makes no claim for copyright in the lyrics of the original sound recordings. MRT added that while the application seeks no copyright in compilation of original (or reformatted) sound recordings, the application does seek protection of its rights in compilations of original simulations. *Id.*

E. Request to Apply Deposit to New Application

In an email from Mr. Robinson to Ms. Rinard dated December 15, 2008, MRT requested to use the hard drive deposit that the Office had in its possession to apply for a separate copyright registration. The email stated:

> As you know, we have pending an application for copyright on some 800,000 simulations of original sound recordings, all of which have encryption protection. You have in your possession the deposit in support of our application.
>
> MRT would at this time like to apply for a separate copyright on just the simulations. That is, the simulations of sound recordings without encryption. In addition, we would like to apply for an additional 140,000 simulations not contained in the first deposit.
>
> The purpose of this message is to seek your approval to use the first deposit (containing encryption) as support for this second application for copyright on simulations only. We previously explained to you how you might gain access to the simulations during your investigation. For the additional 140,000 simulations, they can be accessed through the BlueBeat web page (BlueBeat.com). If you prefer, we can submit another deposit containing the 140,000 simulations with an access code.
>
> The reason we would prefer not to submit another deposit containing the first 800,000 simulations without encryption is that should the two deposits become open to the public, it would be very easy for anyone to reverse engineer MRT's encryption logarithms.

(Email from Robinson to Rinard, dated December 15, 2008).

F. Response to Request to Apply Deposit to New Application

In an email from Ms. Rinard to Mr. Robinson dated January 28, 2009, Ms Rinard stated that she understood MRT's concerns about their pending claim as well as their desire to submit new claims related to the same works. She indicated that the request for reconsideration of the pending claim was under advisement and that a decision would be forthcoming soon. She then asked MRT to wait until the reconsideration was addressed to submit new claims. (Email from Rinard to Robinson, dated January 28, 2009).

G. Decision on First Request for Reconsideration of Refusal of Current Application

In a letter from Virginia Giroux-Rollow, Attorney Advisor in the U.S. Copyright Office Registration Program, to Mr. Robinson dated June 16, 2009, Ms. Giroux-Rollow stated that after considering MRT's request for reconsideration, the application and deposit, she was unable to register a copyright claim in its sound recordings individually or as a compilation. (Letter from Giroux-Rollow to Robinson, dated June 16, 2009).

Ms. Giroux-Rollow explained that "in no case does copyright protection for an original work of authorship extend to an idea, procedure, process, system, method of operation, concept, principle

or discovery, regardless of the form in which it is described, illustrated, or embodied in a work." *See* 17 U.S.C. 102(b). Therefore, it is not the process or technique used in creating these "simulations" that can be the subject of copyright protection. Instead it is the actual resulting expression that is examined for copyrightable authorship. (Letter from Giroux-Rollow to Robinson, dated June 16, 2009).

She went on to observe that in order for a work to be regarded as copyrightable, it must "possess more than a de minimis quantum of creativity." *Id.*, citing *Feist Publ'ng Inc. v. Rural Telephone Serv.*, 499 U.S. 340, 358 (1991). She added that a certain minimum amount of expression must have originated with the author. Originality, as interpreted by the courts, means not only that the work is recognizable as the author's, but it also represents at least a minimal amount of creative authorship. *Id.*, citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* 191 F.2d 99 (2d Cir. 1951).

Ms. Giroux-Rollow stated that the sound recordings on the hard drive deposit are perceptible as nothing more than a series of static disturbances or noises, which do not simulate or imitate previously published musical sound recordings as alleged. She added that the static sounds are not a series of musical, spoken, or other sounds constituting the sounds of a sound recording indicated by the statutory definition. *Id.* at 2, citing 17 U.S.C. § 101.

Ms. Giroux-Rollow explained that one of the requirements set forth in the definition of a "compilation" is that the work must be formed by the collection and assembling of pre-existing material. *Id.* at 2, citing 17 U.S.C. § 101. She then pointed out that the submitted material was, by MRT's own admission, "new and original" and has never before been published, and that this fact alone means that these works would not qualify as compilations under the statutory definition. She added that the material appears to consist of all recordings for which MRT has produced a simulation, and that this indicated that no selection, coordination, or arrangement, as is meant by the statutory definition, is present. *Id.*, citing *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("... elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.").

Having found that the materials do not contain sufficient original authorship and do not qualify as a copyrightable compilation, Ms. Giroux-Rollow's refused registration.

H. Request to Clarify Claim

In a letter from Mr. Robinson to Ms. Giroux-Rollow dated June 24, 2009, MRT wrote to clarify Ms. Giroux-Rollow's observation that the deposit material is nothing more than a series of static disturbances or noises, which do not simulate or imitate previously published musical sound recordings. (Letter from Robinson to Giroux-Rollow, dated June 24 2009).

MRT stated that "the atonal 'noises' described in your rejection are not the simulations for which registration is sought." MRT asserted that the atonal noises "were superimposed over the simulations to protect them from being copied without consent. In other words, these 'noises' constituted a form of encryption." MRT went on to state that "once authority to download and copy has been verified, and the underlying simulations are played without the noise, it is immediately apparent that the simulations are, indeed, musical sounds within the Act's definition of sound recordings." *Id.*

MRT asserted that the deposit material was submitted to the Copyright Office in the current hard drive format "pursuant to agreement," citing to an email from Ms. Rinard dated May 15, 2008.

MRT then requested "confirmation that if the correct sounds (of the underlying simulations) are considered, such simulations are eligible for registration." *Id.* at 2.

I. Response to Request to Clarify Claim

In a letter from Ms. Giroux-Rollow to Mr. Robinson dated July 13, 2009, Ms. Giroux-Rollow wrote to clarify the refusal to register the approximately 800,000 sound recordings that are based on previously published sound recordings with copyrights owned by other parties. (Letter from Giroux-Rollow to Robinson, dated July 13, 2009).

Ms. Giroux-Rollow stated that "[a]lthough you may have interpreted Section 17 U.S.C. 114(b) to mean that you do not need permission from the copyright owners of the original 800,000 sound recordings to make these simulations, that does not assume that the independent fixation of these simulated sounds requires, or even allows, registration of these sound recordings." Ms. Giroux-Rollow noted that registration of a sound recording is based on sufficient fixed authorship. She pointed out that authorship for a sound recording may be that of a fixed performance and/or that of the production of the sequence of sounds – the capturing, processing, compiling, and editing of the sounds. *Id.*, citing *Compendium II, Copyright Office Practices*, §§ 495.02 & 495.03. However, she went on to observe that MRT had not provided information concerning any re-mastering or re-mixing of sounds of the original recordings; and it confined its description of the new authorship in these 800,000 recordings to "original simulations." Furthermore, she noted that by MRT's own description the simulated recordings "imitate" the previously existing recordings on which they are based. Ms. Giroux-Rollow determined that "as 'imitations' we do not see in these simulated recordings sufficient original authorship, *i.e.*, original sounds of performance or of production, that would sustain copyright registrations. To imitate is to copy closely that which originally exists. Such imitating action usually does not result in authorship which is original enough to sustain copyright registration." *Id.*, citing *Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490-491 (2d Cir. 1976).

Ms. Giroux-Rollow went on to state that although MRT was informed to the contrary, the Office will not accept individual applications to cover approximately 800,000 individual works which are intended for individual, separate publications or distribution; each separately published work must be separately registered. Ms. Giroux-Rollow added that the Office does not accept the implied assertion that some 800,000 individual sound recordings exist as a compilation, either published or unpublished, and that such a compilation would reflect the statutorily required selection, coordination or arrangement. She went on to reiterate that any bringing together, or supposed compilation, of these recordings most likely consists of all recordings for which MRT has produced a simulation. In such a case, the necessary editorial selection or coordination or arrangement required for a copyrightable compilation is lacking. *Id.* at 1-2.

J. Second Request for Reconsideration of Refusal of Current Application

In a letter from Mr. Robinson to Ms. Giroux-Rollow dated August 21, 2009, MRT wrote to request that the Office reconsider its refusal to register works submitted in the hard drive submitted with the Office, which MRT asserted can be perceived, reproduced, or otherwise communicated with the aid of a machine or device authorized to release digitally-encrypted delivery restrictions controlled by the author. (Letter from Robinson to Copyright R & P Division, dated August 21, 2009).

After offering its characterization of the procedural background regarding MRT's applications for registration, MRT stated that it seeks reconsideration of the Office's refusal to

register its 800,000 sound recording simulations. MRT further noted that it "makes no application for registration of the lyrics in the simulations. Nor does BlueBeat seek registration of the 800,000 sound recordings as a 'compilation.'" MRT indicated that the second request for reconsideration demonstrates that the applicant does not seek registration of "re-mastered" or "re-mixed" sounds from previously existing sound recordings. Rather, MRT asserted that it seeks registration of new expressions of original authorship and "requests registration of that deposited collection of approximately 800,000 simulations identified by the title 'For What Its Worth.'" *Id.* at 2-3.

MRT began the substantive portion of its request by asserting that the sound recording simulations contained in its deposit are "sound recordings" as defined in 17 U.S.C. § 101. Furthermore, MRT claimed that each of the simulations resulted in the independent fixation of a series of musical sounds in a tangible medium of expression, principally embodied in phonorecords. MRT maintained that each of the simulations also contains original authorship and that in order to ensure that each of the simulations would not be illicitly copied, proprietary technology was used during fixation. MRT noted that BlueBeat makes no claim for registration of the atonal sounds protecting the simulations from unauthorized copying. *Id.*, citing 17 U.S.C. § 101.

In support of MRT's assertion that the sound recording simulations contained in its deposit are the product of original authorship, MRT characterized the works as "new impressionistic performances." MRT stated that the sound recording simulations represent the original production of a series of new sounds, created by human operators. While MRT conceded that they are perceived by the human ear to resemble certain artistic elements of original compositions or melodies, it asserted that they are not mere reproductions of existing copyrighted sound recordings. MRT maintained that the sound recording simulations are original artistic expressions. MRT went on to offer that in order to understand what the sound recording simulations are and how they were created, it is helpful to understand what the simulations are not. MRT then stated that the authorship in the simulations is not based on: "re-mastering," "re-mixing," "editing," "equalization," "reverberation," or "balancing." *Id.* at 3-4.

MRT then provided a recitation of what it referred to as a review of fundamental psychoacoustic principles. MRT offered that musical tones produced by musical instruments or the voice consist of a sequence of time-dependent, pressurized spherical waves that originate from a source point and propagate through the air to the human ear. MRT explained that when received by the ear, sound waves are converted into electrical action potentials for the brain to process, and that as a result of the brain's processing, the sounds of a recording are perceived to have certain artistic characteristics. MRT stated that five of the most important artistic characteristics – or parameters – in music are pitch, loudness, duration, timbre, and space. *Id.* at 4-5.

MRT went on to offer that in creating the subject sound recording simulations it partitioned the original sounds into segments for observation. These segments were then analyzed by an artistic operator who, employing principles of psychoacoustics and advanced harmonic analysis, synthesized an independent parametric model of the sounds. MRT stated that a firewall was utilized to ensure independence between the sounds of the model and those of the original recording. *Id.* at 5.

MRT claimed that by making assumptions as to the location of the microphone in spatial relationship to the voice and instruments involved in that recorded performance, "the artistic operator then generated and fixed new sounds by selecting new capture points and new source points in a new virtual 3-dimensional computer-staged environment." *Id.* MRT maintained that the simulation "contains new and original spherical source point waves." *Id.* It claimed that when propagated to the human ear and processed by the brain, these new sounds contain some parameters, such as loudness and duration, that may be perceived to resemble those in the original recordings, while

others, like pitch, timbre and space, are perceived as markedly different. MRT asserted that during the process of simulation, all five artistic parameters of sound are adjusted by the human operator and that this adjustment is not a mechanical process, but a subjective, interpretative one. MRT claimed that the result is a new sound recording that embodies the artistic opinion of the operator – a live, original performance within a specially created virtual 3-D staging environment. MRT again pointed to the difference between the binary printouts of the previously existing sound recording and the simulation of "For What It's Worth" as evidence of the simulation's originality, which it argued constitute unique and recognizable sounds attributed to the author. *Id.*, at 5-6.

Citing *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945), MRT asserted that the artistic expression of the simulations contains substantial, not trivial, originality. Citing *Alfred Bell & Co.*, 191 F.2d at 102-3 and *Sheldon v. Metro Goldwyn Pictures*, 81 F.2d 49, 54 (2d Cir. 1936), it offered that simulations are clearly not copies of original recordings, and owe their creation to their author, not the owners of copyright on the original recordings. Citing *Feist Publ'ng Inc.*, 499 U.S. at 352, and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), MRT stated that the simulations contain appreciable authorship beyond slavish or "sweat of the brow" mechanical reproduction. (Letter from Robinson to Copyright R & P Division, at 6, dated August 21, 2009).

MRT explained that the test of originality has a low threshold, which only requires "that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own,'" and that "no large measure of novelty needed." *Id.*, citing *Alfred Bell* & Co. MRT then asserted that "[a]ny listener to BlueBeat's internet webcasting can appreciate the qualitative uniqueness and distinction of the catalog 'For What It's Worth,' created by BlueBeat. This panel need only conduct its own physical demonstration to confirm this fact." *Id.* In sum, MRT stated that it has established that the sound recording simulations possess the "pervading element prerequisite to copyright protection," that is, that the simulations are the original product of BlueBeat, no one else. *Id.*, citing Nimmer on Copyright § 2.01.

MRT then turned to address the Office's repeated concerns regarding the appropriateness of the application. MRT expressed strong exception to the rejection which stated that "although you were informed to the contrary, we cannot accept two or three applications to cover some 800,000 individual works which are probably intended for individual, separate publications or distribution...." *Id.*, citing (Letter from Giroux-Rollow to Robinson, dated July 13, 2009).

MRT asserted that the administrative record reveals the original examiner's inquiries concerning, and ensuing explicit acceptance of its proffered five terabyte hard drive materials deposit, consisting of some 800,000 simulated audio transmission program works fixed into a catalog collection of music. *Id.*, citing (Emails between Mr. Robinson and Ms. Rinard dated April 16 through May 15, 2008). MRT also cited to "Circular 50, FL-105, revised May 2009 and section 202.25 of Title 37 U.S. Code." *Id.*

MRT claimed that due process not only guarantees substantive and procedural fairness in the uniform application of registration regulations and the Copyright Office's published policies and procedures, but also justifies reliance by the applicant upon the Examiner's acceptance of a single fee for the registration of the entire deposit. Finally, MRT asserted due process compels that the subject applications be reviewed impartially on their merits without further undue delay. *Id.* at 6-7.

K. Decision on Second Request for Reconsideration

In a letter dated January 19, 2011, the Review Board affirmed its refusal to register MRT's application for 800,000 sound recording simulations. (Letter from Tanya Sandros to Archie

Robinson, of January 19, 2011 (*Second Refusal*)). The Board decision was based in part on the unlawful use of preexisting material in the sound recordings, citing 17 U.S.C. § 103(a), *Compendium of Copyright Office Practices, Compendium II*, § 204.04, and *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193 (10th Cir. 2005). *Id* at 20-21. The Board relied on statements by Mr. Risan indicating no mechanical licenses had been obtained by MRT. It also noted that MRT apparently lacked the necessary musical work licenses not only in 2007, when Mr. Risan inquired about obtaining such licenses, but also in 2003, when the works were completed. *Id.* at 20-21. In recognition of the fact that MRT may not have had an opportunity to address this issue, the Board held its decision in abeyance for 30 days in order to provide MRT an opportunity to assert and explain any factual or legal errors in the Board's conclusion on this point. *Id.* at 21.

The Board also based refusal to register the works on the basis of an inadequate deposit, relying on 17 U.S.C. § 408. *Id.* at 21-22. It pointed out that the works could not be perceived from the hard drive MRT had submitted. The Board noted that it appeared that the deposit either 1) contained less than the complete sound recordings, requiring contemporaneous transmission of additional sound recording data from MRT servers in order for the hard drive to comprise complete renderable sound recordings, or 2) contained complete sound recordings which were encrypted, requiring contemporaneous transmission of additional encryption key data from MRT servers in order for the sound recordings to be renderable. *Id.* at 21. It then offered that in either case the deposit "constituted less than *all* of the elements comprising the unit of publication of the best edition of the work as required in 37 C.F.R. 202.19(b)(2)." *Id.* at 22. The Board also noted that an authorization code was needed to access the content, and that its absence from the deposit rendered the work incomplete for deposit purposes. *Id.*, citing *Compendium II*, § 805.02(a)(2). The Board acknowledged the prior confusion in correspondences with the Office about whether or not it would accept the deposit, but reiterated its authority to review claims *de novo*. *Id.* at 23. In recognition of this fact, the Board held its decision in abeyance for 30 days in order to provide MRT an opportunity to advise the Board of facts and of the means by which access to the works may be gained on a permanent basis. *Id.*

The Board then pointed out additional apparent deficiencies in the application. Although the Board did not base its January 19, 2011 refusal to register the works on these deficiencies, it noted that the additional deficiencies would have to be addressed in the event that satisfactory responses were received pertaining to the two grounds for refusal set forth above. *Id.*

The Board first identified a unit of publication concern as an additional apparent deficiency. *Id.* at 23-24. The Board set forth the Performing Arts Division Online Practices regarding Unit of Publication requirements for online works.[3] It then pointed out that the application did not satisfy the criteria for unit of publication for online works. It noted that the application failed to include a title identifying the works, which include approximately 800,000 individually titled sound

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[3] A single unit of publication is characterized by the following features that show an intent to create a single, integrated unit:

> 1) It has a title identifying it as a single, integrated unit, particularly if component works have individual titles.
> 2) It is packaged as a single, integrated unit, especially as embodied in a physical format (*e.g.*, bound volume, CD).
> 3) It is intended to be marketed or sold to the public, and not simply to intermediaries such as distributors or online music services, as a single, integrated unit, even though component works in the unit may be purchased or selected individually as well.

U.S. Copyright Office, Performing Arts Division Online Practices, Chapter 19, Part C. *Unit of Publication requirements for online works.*

recordings, as a single integrated unit but instead referred to "list attached to deposit." *Id.* at 24. The Board also observed that there is no indication that the deposit material was packaged and intended to be marketed and sold to the public as a single integrated unit. It further noted additional evidence indicating that the works were marketed or sold to the public as single sound recordings and *not* as a single, integrated unit. *Id.* Finally, the Board pointed out that registration of a unit of publication only covers those works that were first published as parts of the same unit, and that to the extent that some of the works were parts of units of publication, the record indicated that several of the works were first published as parts of different units at different points in time. *Id.* at 24-25, citing *R.F.M.A.S., Inc. v. Mimi So*, 619 F. Supp. 2d 39, 40-42 (S.D.N.Y. 2009); and *McLaren v. Chico's FAS, Inc.*, 2010 U.S. Dist. LEXIS 120185. *5-*11 (S.D.N.Y. Nov. 9, 2010). The Board therefore concluded that the work is ineligible for registration under one application. *Id.*

The Board also noted its concerns as to whether the works are original works of authorship as an additional apparent deficiency. The Board noted its difficulty in understanding MRT's explanation of how the sound recording "simulations" were created as well as its shared reaction with the United States District Court for the Central District of California which described MRT's explanation of its "simulation" process as "obscure and undefined pseudo-scientific language." *Id.* at 25, citing *Capitol Records, LLC et al. v. BlueBeat, Inc. et al.*, No. CV 09-8030-JST (JCx), slip op. at 9 (C.D.Cal. December 8, 2010). The Board, in reiteration of its previous statement that MRT would have to address unit of publication and originality in the event that satisfactory responses were received regarding the inadequate deposit and unlawful use of preexisting material, indicated that it would require a much clearer, more comprehensible explanation of the means by which these 'simulations' were created. *Id.*[4]

L. Outstanding Issues -- Supplement to Second Request for Consideration and Other Submitted Materials

On February 4, 2011, the Office received a "Supplement to Request for Second Consideration" from Benedict O'Mahoney (Supplement to Second Request). In the letter MRT noted that the application was refused because "it appeared that Applicant had not obtained permission from the copyright holders of the underlying music compositions." (Supplement to Second Request, at 1). MRT also pointed to the submission of a new deposit that has enabled access and examination of the Works.[5] *Id.* MRT set out to demonstrate that the simulations were eligible for registration by offering proof of licensing and that they are "copyrightable subject matter," accepting the Board's invitation to offer more information in support thereof. *Id.* at 2.

1. Unit of Publication

The Board raised the deficiency with respect to the unit of publication in its Second Refusal. *See supra* at - 17 -. MRT has not addressed this deficiency. For this reason, the Board upholds the refusal to register the works. Furthermore, registration is refused and its appropriateness is questioned for additional reasons, as set forth below.

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[4] The Board was unable to fully address issues regarding originality as it did not possess a deposit from which it could perceive the Works.

[5] If the Simulations were eligible for registration the effective date of registration would be March 1, 2011, the date upon which the perceptible deposit was received by the Office.

2. Subject Matter of Copyright

In the *Supplement*, you provided information "discuss[ing] the Simulation process and the *copyrightable subject matter* contained therein...." (Supplement to Second Request, at 2 (emphasis added)). This material was also complemented by letters the Office received on your behalf from Ralph Oman, Pravel Professorial Lecturer in Intellectual Property Law, the George Washington University Law School, dated January 12, 2012 and February 17, 2012. Additionally, MRT's assertions that the simulations are within the subject matter of copyright also dates as far back as 2008.

MRT's application of September 17, 2008 sought to register the simulations as original works of authorship. In an effort to convince the Office the Simulations were original, MRT explained how they were created. *See supra* at 10-11, citing (Email from Archie Robinson to Jane Rinard, dated September 19, 2008).

The Office refused to register the simulations, stating that "it appears that the basis for the claims in these elements is in the digital process used to reformat the musical sounds, which are not copyrightable elements." *See supra* at 11-12, citing (Letter from Jane Rinard to Archie Robinson, dated September 25, 2008).

In the first request for reconsideration of the refusal to register, MRT sought to clarify that Mr. Risan and MRT make no application for copyright in reformatted musical sounds but rather that the claim is in new, wholly original, independent creations of sound that are perceived by the human ear to be near perfect simulations of the original works. *See supra* at 12-13, citing (Letter from Robinson to Rinard, dated October 2, 2008).

In a letter dated June 16, 2009, Virginia Giroux-Rollow, Attorney Advisor, in the U.S. Copyright Office Examining Division, rejected MRT's request for reconsideration. *See supra* at 14, citing (Letter from Giroux-Rollow to Robinson, dated June 16, 2009). Subsequently, MRT sought to clarify that the sound recordings that it sought to register were not the series of static disturbances or noises, but rather were the simulations that were protected from infringement by series of static disturbances or noises. *See supra* at 17, citing (Letter from Robinson to Copyright R&P Division, dated August 21, 2009).

In the *Supplement*, MRT again asserted the works were within copyrightable subject matter. (Supplement to Second Request, at 2). MRT's letter generally described how it created the simulations, but a more detailed explanation was set forth in Exhibit E, which described "four elements" of the BlueBeat Simulation Program:

I. Sound Bank Archive
II. Sound Generation and Spherical Harmonic Formulae
III. Frequency Analyzer
IV. Simulation Generator

(Supplement to Second Request, Exhibit E, at 1).

MRT described the creation of the Sound Bank Archive as involving "sampl[ing], categorize[ing] and digitally fingerprint[ing]" "literally thousands of vintage and original musical instruments and voices." *Id.* at 2. MRT took between two and five samples of each instrument, including "individual notes, chords, progressions and riffs." *Id.* "The samples of the vintage and original instruments and voices were passed through a spectrum analyzer and saved in the Sound Bank Archive as digital .wav files. . . . Once a critical mass of sounds was archived, sophisticated

analysis of individual and groups of sounds could be performed. For example, in comparing commercially produced sound recordings (Media Recordings) to the equivalent sounds in the Sound Bank Archive, substantial variations between the sounds were found in all frequency ranges." *Id.* at 3.

MRT then went on to discuss the Sound Generation and Spherical Harmonic Formulae – the "core" of the process. *Id.* "These formulae are heuristically created to enable the Simulation Generator to produce a synthetic reproduction of the sounds contained in the Sound Bank Archive." *Id.* "The Sound Generation formulae employ psychoacoustic perceptual coding techniques to model the sounds in the Sound Bank Archive." *Id.* MRT compared its process to a less sophisticated version of the same method, which would exclude algorithms, "involve[] human judgment, and produce[] results of acceptable quality at least for some applications." *Id.* at 4. MRT described the "Ideal String" formula MRT utilizes, which "allows for the computationally efficient generation of new sound at any frequency bandwidth, including the simulated voice of John Lennon, based on the Sound Bank Archive." *Id.* at 7. According to Exhibit E, MRT realized that the "Ideal Plucked String" could be "generalized such that the BlueBeat Simulation Program could simulate new sounds based on a parametric score, as well as all sounds in the Sound Bank Archive." *Id.* MRT noted that the sounds generated by these formulae "regain their natural timbre because they are newly generated sounds modeled on actual live sounds." *Id.*

New "point sources" were created for each sound by the Spherical Harmonic algorithms. *Id.* MRT described setting up performances in "virtual auditory space..." such that the "Spherical Harmonic Generator allow[ed] for the capture...of the generated source point of sound in the virtual 3D environment." *Id.* at 8.

Moving on to the Frequency Analyzer, MRT stated that this was "the only point of interface with the Media Recording. Basically, the Frequency Analyzer read a Media Recording frame by frame and created a score, or parametric field, for each frame." *Id.* at 9. The parametric field consisted of (1) pitch; (2) timbre; (3) speed; (4) duration; (5) volume; and (6) space. *Id.* "The Frequency Analyzer then passed each parametric field created to the Simulation Generator." *Id.* MRT claimed that "only certain copyrightable elements of the Media Recording will be extracted from the analysis of the Frequency Analyzer and ultimately passed on through the program to ultimately be embodied in the resulting simulation." *Id.* at 10. These elements included the music composition. *Id.*

Finally, MRT described how the simulation Generator functions: "the Frequency Analyzer passed in a parametric field consisting of the six parameters outlined above. The Simulation Generator then passed the parametric field into the six dimensional parametric model which generated a bitstream of digital audio through application of the Sound Generation and Spherical Harmonic formulae, which were in turn based on the data provided by the Sound Bank Archive." *Id.* at 12.

Notwithstanding MRT's August 21, 2009 assertions of the presence of an artistic operator during the process, MRT's recent explanation of the BlueBeat Simulation Program in the Supplement to the Second Request makes no mention of human authorship.

In January, 2012, the Office received a letter from Ralph Oman, Pravel Professorial Lecturer in Intellectual Property Law, the George Washington University Law School, in support of registration of MRT's works. Mr. Oman stated his understanding that the process for creating the works is essentially the same one used to create traditional sound-alike imitations in the analog world that is authorized under 17 U.S.C. § 114(b). He asserted that the only difference is that the acoustic

analysis and fixation of the new works are done by a computer assisted technician. While Mr. Oman conceded that "on the non-literal side, the two recordings are essentially identical," he added his conclusion that Congress expressly permitted "otherwise infringing non-literal copying of a sound recording, when in Section 114(b). it authorized the making of sound alike recordings." He went on to state that "[i]f the creator of the sound-alike could not copy the tempi, styling, improves, ad-libs, and harmonies of the original, the new work would not sound like the original , and the statute would not make sense." Mr. Oman then referred to the basic tenets of statutory construction, that require, whenever possible, the interpretation of one statutory provision in a way that renders another provision meaningless, as reason for the Board to preserve Congress's specific language permitting sound-alike covers. (Letter from Ralph Oman, Pravel Professorial Lecturer in Intellectual Property Law, the George Washington University Law School, of January 12, 2012).

In March 2012, the Office received another letter from Ralph Oman dated February 17, 2012. In this letter, he sought to address the issue of the simulation of performer's voices. Mr. Oman analogized voices to traditional musical instruments. He asserted that the various overtones can be broken apart and each component part systematically replaced with one of Mr. Risan's generated sounds. Mr. Oman asserted that the recording is a new creation, with no copying from the original. He concluded that such a new recording "bears no resemblance to the original, but it sounds uncannily like the original." (Letter from Ralph Oman, Pravel Professorial Lecturer in Intellectual Property Law, the George Washington University Law School, of February 17, 2012).

3. Unlawful Use of Underlying Musical Works

With respect to licensing of the underlying music compositions, MRT stated that the "Simulations at issue were transmitted digitally from the BlueBeat website from approximately 2004." (Supplement to Second Request, at 1). MRT asserted that at the time of the copyright application, the simulations were used for "transmissions" only, "not...as Digital Phonorecord Downloads (DPDs), and consequently no mechanical license, compulsory or otherwise was required," citing *Kohn on Licensing* for the practice of obtaining mechanical licenses after a cover recording is made, but prior to distribution. *Id.* at 4-5. MRT also cited *Nimmer on Copyright* and 17 U.S.C. § 112(a) for the principle that obtaining a license pursuant to 112(a) enables a user to make a single copy of a record. *Id.* With respect to these transmissions, MRT offered several exhibits to its Supplement, including license agreements with performance rights organizations. *Id.* at Exhibit B.

MRT then described the procurement of mechanical licenses, which it says were obtained when it decided to distribute copies of the simulations to the public. *Id.* at 5. MRT stated that it sent "Notices of Intention in April, 2009 to ASCAP, BMI, SESAC, Harry Fox Agency, and the Copyright Office," with the goal of securing a section 115 compulsory license, yet MRT ultimately entered into an agreement with the Harry Fox Agency. *Id.* at 6. The agreement with the Harry Fox Agency, dated December 10, 2009, was attached as Exhibit C. MRT quoted from a license agreement with the Harry Fox Agency to support the assertion that the Works, although created without mechanical licenses in place, were properly licensed by MRT at the time of distribution and as such, were not infringing, stating "the DPD License is not temporally constrained in that compliance is tied to timely reporting of downloads, not the time of creation of the Simulations." *Id.* at 7.

MRT also referred to Mr. Risan's statement regarding licensing, which the Office relied upon in its previous letter. *Id.* The statement reads, in part, "[MRT] and its affiliates...have diligently attempted to negotiate individually with the major labels. However, the labels have created a financial barrier of entry for MRT so prohibitive that we cannot afford to pay their price...Therefore, we wish to obtain a Compulsory License under Section 115." *Id.*, citing (Letter

from Mr. Risan to Copyright Office, dated October 22, 2007). MRT "respectfully submitted" that the statement was taken out of context. *Id.* at 7-8.

Finally, with respect to the musical works, MRT argued that *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193 (10th Cir. 2005), cited by the Board in its previous letter for the proposition that failure to obtain compulsory or consensual licenses from the copyright owners of the underlying musical compositions used in sound recordings is a bar to registration, was distinguishable because "unlike [MRT], it was undisputed that Palladium produced its sound recordings without licensing from the copyright owners of the underlying musical works." *Id.* at 9. MRT also noted that it obtained "appropriate licensing from ASCAP, BMI and SESAC., and [MRT] has thus legally used the preexisting material." *Id.* at 8-9.

4. Unlawful Use of Underlying Sound Recordings -- 17 U.S.C. § 114(b)

At various times, as recounted above, MRT has referred to section 114(b) in support of copyrightability of the works. *See supra* at 13, 24. More recently, in Exhibit E to the *Supplement*, MRT relied on the operation of the Frequency Analyzer, stating that "because none of the sounds in the Media Recording are recaptured, none of the copyrightable subject matter of the performance or production are reproduced or passed through by the Frequency Analyzer," citing 17 U.S.C. 114(b). (Supplement to Second Request, Exhibit E, at 11).

Mr. Oman's letter to the Office also advanced MRT's argument that § 114(b) dictates that the simulations are registerable. Mr. Oman writes:

> On the non-literal side, the two recordings are essentially identical – not only do they share the same structure, sequence and organization of the original, but the embellishments, harmonies, styling, improvisations, in some cases words, and background doo-wops as well. If this recreation were a computer program, the second version would be a clear infringement of the non-literal elements of the original program. But it is not a computer program. It is a sound recording. And that difference has important consequences. Congress expressly permitted this otherwise infringing non-literal copying of a sound recording when, in Section 114(b), it authorized the making of sound-alike recordings.

(Letter from Mr. Oman to Tanya Sandros, of January 12, 2012, at 2).

Mr. Oman stated that "the only aspect of the original sound recording that BlueBeat cannot copy is the actual fixed sounds themselves," and cautioned that reading the statute any other way renders § 114(b) meaningless. *Id.* at 2-3.

II. DECISION

After reviewing the application, deposit materials submitted for registration, and the arguments that have been presented, the Copyright Office Review Board affirms the refusal to approve MRT's application for copyright registration of approximately 800,000 sound recording simulations. The Board reviewed these materials *de novo*, focusing not on past evaluations by the Office's Registration and Recordation Program (formerly designated as the Examining Division) but rather on whether the materials, as presented, may be registered for copyright protection.

A. Unit of Publication

The Board's January 19, 2011 letter clearly indicated that the deficiency in MRT's application with respect to unit of publication would have to be addressed in the event that satisfactory responses were received pertaining to unlawful use of preexisting material in the subject Sound Recordings and inadequate deposit. *See supra* at 20-21. Despite this directive, MRT has not addressed the deficiencies regarding unit of publication as explained in the Board's previous letter. As such, the Board must refuse registration because the Works do not qualify to be registered as a single work. That alone would be a sufficient ground for refusal to register, but additional, independent reasons also compel the Board to refuse registration, as is set forth below.

B. Subject Matter of Copyright

Copyright protection is only available for "original works of authorship." 17 U.S.C. §102(a). The Supreme Court has stated that originality consists of two elements– "independent creation plus a modicum of creativity." *Feist Publ'ng Inc.*, 499 U.S. at 346; *see also, e.g., Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) ("'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary.") (footnote omitted); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). Even if the Works do not contain the "actual sounds fixed" in the original underlying sound recordings, as the quoted term is used in section 114(b), copyright protection is still only available to works that contain "independent creation plus a modicum of creativity." *Feist Publ'ng Inc.*, 499 U.S. at 346. This threshold is not modified by section 114(b). Instead, section 114(b) merely confines the scope of exclusive rights held by owners of sound recordings to reproduce and to prepare derivative works. Under section 114(b), the creator of a perfect imitation or simulation might not be subject to claims of infringement of the sound recording upon which the imitation is based, but at the same time a perfect imitation or simulation may not be eligible for its own copyright protection because there is a lack of protectable originality.[6]

1. Independent Creation

In order to enjoy copyright protection, a work must have independently created protectable authorship. *Feist Publ'ng Inc.*, 499 U.S. at 345-346 ("Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity") (citing 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §§ 2.01[A], [B] (1990)). Furthermore, copyright law requires that the requisite independent effort "owe its origin to a human being." *Compendium of Copyright Office Practices, Compendium II*, § 202.02(b). As Nimmer states, "an artist who makes such an exact reproduction of a Rembrandt that even the experts cannot distinguish from the original, undoubtedly exhibits great skill, training, knowledge and judgment, but in failing to create a 'distinguishable variation,' he has not produced anything that 'owes its origin' to him and hence, has not engaged in an act of authorship." M. Nimmer & D. Nimmer, *Nimmer on Copyright* §§ 2.01[A], citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). In other words, in order to obtain copyright protection, an author must go above and beyond simply replicating pre-existing material.

In the Board's examination of the Works, it was unable to distinguish these works from the sound recordings upon which they are based. To the lay ears of the members of the Board, the

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[6] As set forth below, while section 114(b) limits the scope of protection for sound recordings, it does not modify the originality requirement as a threshold to copyright protection.

Works sound identical to the original sound recordings.[7] Furthermore, the record includes repeated documented analysis confirming that these records are sonically identical to the originals. On September 19, 2008, Mr. Robinson stated that "the new resultant simulated sounds are perceived by the brain as the same sounds as the original recording." *Id.* Mr. Robinson also stated that the sounds "are perceived by the human ear to be near perfect simulations of the original works." (Letter from Robinson to Rinard, dated October 2, 2008). The uniformity of sounds between MRT's simulations and the originals was additionally confirmed by expert witnesses in *Capitol Records, LLC v. Bluebeat, Inc.*, 765 F. Supp. 2d 1198 (C.D. Cal. 2010). In the testimony, which MRT provided to the Board, plaintiff's expert found that "there was no detectable difference in timing or speed with respect to *any* sonic feature – instrumental, rhythmic, vocal or otherwise – at any point in the recordings." (Testimony of Tom Schlum, at paragraph 6). MRT's expert also concluded that "the end result of [psychoacoustic simulation] may eventually be a closer facsimile of the original than any human cover artist could produce with live instrumentation." (Testimony of Peter Rothman at 13). Finally, the Office recently received statements from Ralph Oman on MRT's behalf. Mr. Oman observes "[o]n the non-literal side, the two recordings are *essentially identical.*" (Letter from Ralph Oman to Tanya Sandros of January 12, 2012, at 2) (emphasis added). He also noted that the Works sound "uncannily like the originals." (Letter from Ralph Oman to Tanya Sandros of February 17, 2012, at 2). Lacking any "distinguishable variation," MRT's simulations do not rise to the level of originality necessary to sustain copyright protection under the standard set forth in *Feist*.

Despite the findings that the Works are indistinguishable from the original sound recordings, the Board takes notice of MRT's attempt to prove the simulations and the original sound recordings on which they are based are not the same sound recordings by providing the binary form code of one simulation and the work it is based on. However, the Board also observes that an .mp3 and .wav file of the same recording will reflect differences in binary form, despite the fact that the recording sounds *the same*. In other words, physical differences in the medium or technical differences in the format in which the two works are embodied without any accompanying distinction do not reflect originality in the final expression. *See L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) ("to support a copyright there must be at least some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium."). In the absence of any "substantial variation" in the resulting expression, nuances in the medium and in the accompanying technical readout of the sound recordings are irrelevant.

Additionally, the Board notes MRT's most recent description of "psychoacoustic simulation,"[8] which states that a "parametric field" consisting of (1) pitch, (2) timbre, (3) speed,[9] (4) duration, (5) volume, and (6) space is "extract[ed] from a Media Recording...and pass[ed]...to a Simulation Generator which uses the Sound Generation formulae...to generate a new performance,

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[7] The Board did not review all of the approximately 800,000 works, but instead only listened to a small sample and compared them to the "original" underlying sound recordings. In its examinations of each of the sampled works, which were, presumably not incidentally, identified in Metadata by the name of the performers of the "original" sound recordings, the Board was unable to distinguish the Works from the "original" sound recordings. The practical limitations of examining approximately 800,000 works is related to the policy behind the other basis for refusal, the fact that the submission does not qualify as a Unit of Publication.

[8] Different descriptions of the psychoacoustic simulation process were presented in letters and emails from you to the Copyright Office dated February 13, 2008, March 24, 2008, April 16, 2008, July 23, 2008, September 19, 2008, October 2, 2008, June 24, 2009, August 21, 2009 and February 4, 2011.

[9] The Board notices that you omitted "speed" from an earlier description of this "psycho-acoustic simulation" process. (Letter from Archie Robinson to Copyright R&P Division of dated August 21, 2009) (*Second Request for Reconsideration*).

which is embodied in a bitstream placed in an MP3 container in step 5."[10] (Letter from Benedict O'Mahoney to Copyright Office of February 4, 2011 at 3-4) (Supplement to Second Request); *see also* (Supplement to Second Request, Exhibit E, at 10) ("certain copyrightable elements of the Media Recording will be extracted from the analysis of the Frequency Analyzer and ultimately passed on through the program to ultimately be embodied in the resulting simulation."). While MRT correctly points out that not all aspects of a sound recording are copyrightable (equalization, for example), the Board understands that the elements taken from each original preexisting sound recording collectively constitute the perceptible attributes of each particular recording. Pitch, timbre, duration, and volume are words used to describe how humans perceive the physical parameters of sound (*e.g.*, pressure, frequency, spectrum, and duration).[11] *See* Rossing, Moore and Wheeler, *The Science of Sound*, Third Ed., at 94-95 (Pearson Education, Inc. 2002). These four perceptible attributes of sound are, by MRT's own admission, captured from each original preexisting sound recording and are passed through a simulation generator to generate the simulations. (Supplement to Second Request at 2-4).[12]

By all indications, these perceptible attributes of sound are taken from the original preexisting sound recording and are embodied in the simulations. Additionally, the fact that the simulations depend entirely on these parameters, which are "extracted" from preexisting original sound recordings, prevents the Board from finding that the simulations are independent creations that are original to the author. *See Feist Publ'ng Inc.*, 499 U.S. at 345.[13] Based on MRT's own descriptions of how it came to create these simulations, the Board understands that the perceptible aspects of the simulations are wholly dependent upon and created from the original sound recordings and are thus not independent creations eligible for copyright protection.[14]

In MRT's Supplement to Request for Second Reconsideration, the method by which the simulations were generated was summed up as:

> 1. Vintage and original instruments and voices are sampled and archived in the Sound Bank Archive.
>
> 2. Sound Generation and Spherical Harmonic Formulae are heuristically created and matched against the original sounds in the Sound Bank Archive.
>
> 3. A Media Recording is analyzed by the Frequency Analyzer which extracts a score, or parametric field, containing six parameters.

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[10] Step 5 is defined as "the resulting bitstream represents the newly-generated synthetic sound and is placed in an .mp3 container for transport and playback." (Supplement to Second Request at 2).

[11] "Sound" is defined as "an auditory sensation in the ear." Rossing, Moore and Wheeler, THE SCIENCE OF SOUND, Third Ed., at 3 (Pearson Education, Inc. 2002) (hereinafter *Science of Sound*). It is also described as "the disturbance in a medium that can cause this sensation. *Id.* Thus, "sound" refers to both what we hear and the particular vibrations in sound waves that cause our perceptions.

[12] The Board also notes MRT's August 21, 2009 letter which states "the original sounds were captured during the simulation process." (*Second Request for Reconsideration*, at 4).

[13] The Central District of California also observed that "Bluebeat's simulations can only be made using the original songs from the CDs." *Capitol Records, LLC v. Bluebeat, Inc.*, 765 F. Supp. 2d 1198, 1202.

[14] While it is true that 17 USC 114(b) does exempt certain "sound-alike" sound recordings from being deemed as infringing original preexisting sound recordings, that exemption does not mean that all such non-infringing newly created sound recordings exhibit independent creation, which is a separate requirement for copyright protection.

> 4. The parametric field is passed to the Simulation Generator which takes the six score parameters and generates a synthetic sound using the six parameters as values for canonical functions in a six-dimensional parametric model derived from the Sound Generation and Spherical Harmonic formulae.
>
> 5. The resulting bitstream represents the newly-generated synthetic sound and is placed in an .mp3 container for transport and playback."

(Letter from Benedict O'Mahoney to Tanya Sandros of February 4, 2011 at 2).

This description of the simulation process does not even allege human authorship. However, the Board recognizes that in previous submissions, MRT did refer to the role of an artistic operator:

> "...BlueBeat partitioned the original sounds into segments for observation. These segments were then analyzed by an artistic operator who, employing principles of psychoacoustics and advanced harmonic analysis, synthesized an independent parametric model of the sounds...Positing assumptions as to the location of the microphone in special relationship to the voice and instruments involved in that recorded performance, the artistic operator then generated and fixed new sounds by selecting new capture points and new source points in a new virtual 3-dimenstional computer-staged environment...During the process of simulation, all five artistic parameters of sound are adjusted by the human operator."

(Letter from Archie S. Robinson to Copyright R&P Division of August 21, 2009 at 5). Thus, the record with respect to human authorship is, at best, confusing.

Even if an "artistic operator" was involved in the simulation generation, as indicated above, the result is no more than a slavish copy. As such, his or her contribution does not rise to the level of sufficient independent human authorship for copyright registration. Without satisfying the requirement of independent creation of copyrightable authorship, registration of the Works must be refused.[15]

2. Creativity

In order to enjoy copyright protection, a work must "display some minimal level of creativity." *Feist Publ'ng Inc.*, 499 U.S. at 358. While it is true that most works meet or surpass this requisite level quite easily, the *Feist* decision, which states that "[t]here remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent," makes clear that some works do not. *Feist Publ'ng Inc.*, 499 U.S. at 359. As we have stated

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[15] The Office notes that if in fact there is not any human authorship in the creation of each "simulated recording," and instead the process of creating each such recording is simply accomplished by means of computer programming or other automated methods, that alone would be sufficient grounds to refuse registration. *See Compendium II* § 495 (Registration as a sound recording is not authorized if original authorship is lacking, as for example, where there is no human authorship and the recording results from a purely mechanical process). The Board has not attempted to determine the issue of whether the Works are merely the result of a mechanical process. If the Board were to do so, it would necessarily explore the inconsistencies in the explanations submitted throughout the extensive record and ask for further explanations. However, in light of the other reasons for refusing registration, we need not engage in that exercise.

previously, *Feist* represents the teaching regarding the acceptable level of creativity to sustain copyright protection. The authority MRT cited to on this point (*Chamberlin v. Uris Sales Corp.*, 150. F.2d 512 (2nd Cir. 1945); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2nd Cir. 1951); *Sheldon v. Metro Goldwyn Pictures*, 81 F.2d 49 (2nd Cir. 1936)) does not contradict or alter the applicability of the *Feist* standard.

Listening to the simulations, one can immediately recognize that they include creative authorship. However, it is apparent that the creativity is that of the performers and producers of the original sound recordings, and not of MRT's replication of the original authorship. The Board can detect nothing creative in the simulations apart from that preexisting authorship, a finding that is confirmed by other expert observers. *See supra* at 28. Lacking any such creativity attributable to MRT, the simulations do not rise to the level of originality necessary to sustain copyright protection under the standard set forth in *Feist*. Therefore, registration of the Works must be refused.

C. Unlawful Use of Underlying Musical Works

As stated in the Board's previous letter dated January 19, 2011, regardless of whether or not the sound recording simulations are in fact original works of authorship, the sound recordings in question are recordings of musical works, and the latter must be used lawfully in order for the former to be eligible for copyright protection. Copyright protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully. *See* 17 U.S.C. § 103(a); *Compendium II* § 204.04 ("This means that where a work is based on a preexisting work, without authorization of the copyright owner and unlawfully, the new material may be subject to copyright protection only to the extent that it can be separated from the preexisting work."); *see also Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1119-1200 (10th Cir. 2005) ("[Plaintiff's] sound recordings are derivative works, and its copyrights in the sound recordings are invalid and unenforceable because it has failed to obtain compulsory or consensual licenses from the copyright owners of the underlying musical compositions").

Despite MRT's arguments to the contrary, which are addressed below, it appears that the Works employ protected musical compositions and that MRT *has used* this material unlawfully. However, having found that the simulations do not rise to the level of originality necessary to sustain copyright protection under the standard set forth in *Feist*, the Board does not find it necessary to base its refusal to register on a determination of whether the simulations unlawfully use protected musical compositions such that copyright protection is not available pursuant to section 103(a).[16] Nevertheless, the Board offers the following observations with respect to MRT's claims that its use of the musical works was lawful.

Section 112

MRT asserted that, at the time of the applications, its use of the underlying musical works was limited to transmissions only and that consequently no mechanical license, compulsory or

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[16] Copyright protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully. *See* 17 U.S.C. § 103(a), Compendium II § 204.04 ("This means that where a work is based on a preexisting work, without authorization of the copyright owner and unlawfully, the new material may be subject to copyright protection only to the extent that it can be separated from the preexisting work."). In the case of an unauthorized sound recording of a musical work, the new material is incapable of being separated from the preexisting musical work since without that musical work, there would be nothing to record.

otherwise was required. MRT pointed to alleged acquisition of necessary rights pursuant to 17 U.S.C. § 112(a), citing to 2 *Nimmer on Copyright* § 8.06 [G][1][d]. However, the Board notes that eligibility for the benefit of section 112(a) requires that the transmitting organization must be "entitled to transmit to the public a performance or display of a work."[17] While MRT has offered various license agreements in which Performance Rights Organizations, such as ASCAP, BMI and SESAC, have granted the right to publicly perform musical works, these agreements do not provide sufficient basis for determining that Hank Risan, MRT or Bluebeat.com was eligible to benefit from section 112(a) at the time the simulations were fixed and first published on January 1, 2003. MRT provided two ASCAP license agreements. The first of these ASCAP license agreements indicates Music Public Broadcasting as the licensee and has an execution date of August 5, 2002. The other ASCAP license indicates BlueBeat, Inc. and has an execution date of December 28, 2004. While the licensee in the latter agreement, BlueBeat, Inc., does bear similarity to "Bluebeat.com," which is named in the application for registration of the simulations, that agreement was not executed until almost two years from the date that the simulations were created and first published.[18] MRT also provided a BMI license that indicates Music Public Broadcasting as the licensee with a term beginning on October 14, 2001. Finally, MRT provided a SESAC license that indicates Music Public Broadcasting as the licensee with an effective date of January 1, 2001. Without a license for the public performance of the musical works, obtained by the author of the works as of the date of creation of the simulations, the benefits of section 112(a) are not available. *See* Exhibit B (Licenses).

Additionally, the Board questions whether MRT satisfies other requirements of section 112(a). It appears as doubtful to the Board that the simulations, which are comprised of approximately 800,000 sound recordings, qualify as a transmission program, which is defined as "a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public *in sequence and as a unit*." 17 U.S.C. § 101 (emphasis added). The Board also questions whether only one copy, made pursuant to section 112(a), was retained and used solely by the transmitting organization that made it, and whether no further copies or phonorecords are reproduced from it, or whether the phonorecords were destroyed within six months from the date the

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[17] 17 U.S.C. § 112(a)(1):

> Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license, including a statutory license under section 114(f), or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a), or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis, to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—
>
> (A) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and
>
> (B) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and
>
> (C) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

[18] The September 17, 2008 application indicates that the Works were completed in 2003 and that they were published on January 1, 2003. However, the *ASCAP Experimental License Agreement*, submitted as part of Exhibit B indicates that the Licensee Name as Bluebeat, Inc., and that it was executed on December 28, 2004.

transmission program was first transmitted to the public, or if retained for preservation whether such preservation was exclusively for archival purposes.[19]

Section 115

MRT also referred to Notices of Intention to obtain section 115 compulsory licenses, which were sent to various entities in April 2009. These attempts to properly license the musical works do not establish lawful use of the underlying musical works. The section 115 license clearly states that "[a]ny person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner." 17 U.S.C. § 115(b)(1). Creation of the simulations in 2003 (as stated on the Application for registration) required reproduction of the underlying musical works. Therefore, Notices of Intention sent in 2009, several years after the Works were created, would have been insufficient. Furthermore, the Board notes that the Notices of Intention sent in April 2009 were sent on behalf of a company named baseBeat, Inc. and not Hank Risan, MRT or BlueBeat.com, the named creators on the application submitted to the Office. The Board also observes that the records of the California Secretary of State indicate that baseBeat, Inc. was registered as a corporate entity in 2007, well after reproduction of the underlying musical works took place in 2003.[20]

MRT also referred to an agreement with the Harry Fox Agency dated December 10, 2009. This attempt to properly license the musical works does not establish that use of the underlying musical works in 2003 was lawful. First, the Harry Fox Agency agreement was agreed and accepted on December 12, 2009. (HFA Agreement). This acceptance occurred several years after the making of phonorecords of the underlying musical works in 2003 and distribution of phonorecords of the underlying musical works from the Bluebeat website from approximately 2004. (Supplement to Second Request, at 1). The Board understands that use of the underlying musical works in order to create the simulations, in 2003, was unlawful.[21] *See Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1119-1200 (10th Cir. 2005) ("The concept is simple. In order for a party in Palladium's position to lawfully use preexisting, copyrighted musical works to create and sell its sound recordings, it must ***first*** secure the appropriate licensing from the copyright owners of those musical works.") (emphasis added). Second, the agreement with the Harry Fox Agency states that the compulsory licensing provisions pursuant to section 115 govern the DPD license. As set forth in the previous paragraph, the statute's strict terms with regard to timely licensing indicates against a finding that MRT lawfully used the underlying musical works when it reproduced them in 2003. Finally, the Board notes that the agreement with the Harry Fox Agency was with baseBeat, Inc. and not Hank Risan, MRT or BlueBeat.com, the named author and claimant on the application submitted to the Office.

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[19] The Board notes that the Simulations were apparently retained from the date of completion in 2001 until submission of a perceptible deposit, which was received on March 1, 2011. The Board also notes that the Simulations were apparently also used for the purpose of digital phonorecord deliveries on approximately October 30, 2009. See http://www.wired.com/epicenter/2009/10/beatles-finally-for-sale-online-on-bluebeat/

[20] The records of the California Secretary of State also indicate that baseBeat, Inc. has been dissolved.

[21] The preamble in Attachment A of the DPD Licensing Agreement with the Harry Fox Agency states: "Your making and distributing of DPDs of any of such copyrighted works shall constitute assent to these terms. Upon your doing so, you shall have all the rights which are granted to, and all the obligations which are imposed upon users of said copyrighted works under the compulsory license provision of the Copyright Act..." (HFA Agreement, Attachment A). The Board understands this to mean that only upon assent to the agreement does a grant of rights take effect, and that no grant occurs prior to such assent.

The Board observes that MRT attempted to distinguish *Palladium* by asserting that unlike Palladium, MRT obtained licenses to publicly perform the underlying musical works from performance rights organizations such as ASCAP, BMI and SESAC. The Board observes that any such public performance rights, except as addressed above with regard to section 112(a), are not applicable to the reproduction or preparation of derivative works based on the musical works.[22] The Board understands that ASCAP, BMI and SESAC do not license the right to reproduce or prepare derivatives of the musical works they represent. Indeed, ASCAP is foreclosed from licensing the right to reproduce the works it represents by virtue of a consent decree entered into with the U.S. Government. The agreements MRT provided both confirm this understanding and make clear that ASCAP, BMI and SESAC made no grant of the right to reproduce or prepare derivative works based on the musical works they represent.[23] Thus, there is no meaningful distinction between Palladium's and MRT's production of sound recordings without licensing from the copyright owners of the underlying musical works.

For the reasons stated above, the Board questions whether MRT acquired the necessary rights to use the underlying musical compositions contained in the Works and whether MRT has used this material lawfully. Any unlawful use of preexisting material in which copyright subsists took place with regard to a great majority (if not virtually all) of the Works.[24] Furthermore, any such unlawful use extends to virtually every part of the Works. While the Board does not find it necessary to base its refusal on such questions regarding unlawful use of musical works, it notes that any such unlawful use would foreclose registration of the Works.

D. Unlawful Use of Underlying Sound Recordings -- 17 U.S.C. § 114(b)

As indicated previously, the originality threshold set forth in 17 U.S.C. §102(a) and expressed in *Feist* is not modified by section 114(b).[25] Instead, section 114(b) merely presents restrictions on the *scope* of exclusive rights held by owners of sound recordings to reproduce and to prepare derivative works. Therefore, regardless of whether Congress sought to expressly permit otherwise infringing non-literal copying of a sound recording, as Mr. Oman suggests in his letter dated January 12, 2012, there is no indication that Congress sought to remove the originality requirement as a threshold to copyright protection or registration. Furthermore, the Board notes that,

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[22] Also and significantly, as addressed above, ASCAP, BMI and SESAC licenses provided to the Board were also entered into with entities other than Hank Risan, MRT or BlueBeat.com

[23] *See* ASCAP Agreement paragraphs 4, 6(d), 6(e) and 6(f); BMI Agreement paragraph 3(a) and 3(d); SESAC 2001 Agreement paragraph 3; and SESAC 2001 Agreement paragraphs 4 and 5.

[24] While MRT has not attempted to identify specific Works that merely employ musical compositions that are in the public domain, it is apparent that may be the case for some of the Works.

[25] 17 U.S.C. § 114, "Scope of exclusive rights in sound recordings" states:

...(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118 (f)): Provided, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

contrary to indications made by Mr. Oman, this understanding of the scope of copyright protection in no way renders section 114(b) meaningless. Pursuant to section 114(b), sound-alike cover recordings of existing sound recordings of musical works do not necessarily infringe the existing sound recordings. However, at the same time, such recordings are not entitled to copyright protection unless they are original works of authorship.

Having found that the simulations do not rise to the level of originality necessary to sustain copyright protection under the standard set forth in *Feist*, the Board does not find it necessary to base its refusal to register on a determination of whether the simulations unlawfully use the "actual sounds" of preexisting sound recordings such that copyright protection is not available pursuant to section 103(a)[26] and 114(b). However, the Board does wish to note its difficulty in understanding MRT's claims as to how the Works were created and that the Works do not contain the "actual sounds" from the original sound recordings.[27] As indicated in its previous letter, the Board shares the sentiments of the United States District Court for the Central District of California which described MRT's "simulation" process as "obscure and undefined pseudo-scientific language." (Letter from Tanya Sandros to Archie Robinson, of January 19, 2011 (*Second Refusal)* at 25), citing *Capitol Records, LLC et al. v. BlueBeat , Inc.* et al., No. CV 09-8030-JST (JCx), slip op. at 9 (C.D.Cal. December 8, 2010).

III. CONCLUSION

For the reasons stated above, the Copyright Office Review Board concludes that the approximately 800,000 sound recording simulations that are the subjects of MRT's application for copyright registration cannot be registered. This decision shall constitute final agency action.

Sincerely,

Tanya M. Sandros
Deputy General Counsel
for the Review Board
United States Copyright Office

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[26] Copyright protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully. See 17 U.S.C. § 103(a), Compendium II § 204.04 ("This means that where a work is based on a preexisting work, without authorization of the copyright owner and unlawfully, the new material may be subject to copyright protection only to the extent that it can be separated from the preexisting work.").

[27] While the Board considered the letters submitted by Ralph Oman dated January 12, 2012 and February 17, 2012, the Board notes that these letters were well outside the thirty day time frame extended in the Board's letter dated January 19, 2011.