United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

January 19, 2011

ROBINSON & WOOD: INC.
ATTN: ARCHIE ROBINSON
227 NORTH FIRST ST.
SAN JOSE, CA 95113

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

Dear Mr. Robinson:

I write on behalf of the Copyright Office Review Board (Board) in response to your letter dated August 21, 2009, in which you requested a second reconsideration of the Copyright Office's (Office) refusal to register approximately 800,000 sound recordings simulations. 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

[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."

published on August 15, 2002. (Media Rights Technologies 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 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 copyright claimants. It indicates that the work was completed in 2007 and first published on August 11, 2001. (Media Rights Technologies 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. (Media Rights Technologies 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. (Media Rights Technologies 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 letter asserts that the sound recordings addressed in the applications were made pursuant to Section 112 licenses. The letter also indicates that Media Rights Technologies ("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 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).

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, Mr. Robinson 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." Mr. Robinson 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, Mr. Robinson 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, Mr. Robinson 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. He 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.
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> 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, Mr. Robinson 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, Mr. Robinson indicated that MRT's 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, Mr. Robinson 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, Mr. Robinson 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.*

Mr. Robinson 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, Mr. Robinson 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 Mr. Robinson chose to seek reconsideration of the refusal, he 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 will 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, Mr. Robinson 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. Mr. Robinson responded in a July 23, 2008 email in which he 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, Mr. Robinson 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). Mr. Robinson replied in a September 8, 2008 email stating that MRT "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)]." Mr. Robinson further indicated that a formal application would be forthcoming. (Email from Robinson to Rinard, dated August 26, 2008).

In a September 12, 2008 email, Mr. Robinson 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 Mr. Robinson as to whether MRT 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 Mr. Robinson to attach a copy of the new application (Email from Rinard to Robinson, dated September 18, 2008). In a September 19, 2008 email, Mr. Robinson did not verify whether MRT 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, he 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, doing business as 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, doing business as Media Rights Technologies, Inc application dated September 17, 2008).

In his September 19, 2008 email, Mr. Robinson asked that the previously submitted hard drive serve as the deposit. Mr. Robinson 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, Mr. Robinson 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.
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> 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.
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> 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.

Mr. Robinson 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. Mr. Robinson 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 Mr. Robinson 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 Mr. Robinson 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 Mr. Robinson wished to pursue registration of the refused application, he 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 Mr. Robinson to Ms. Rinard dated October 2, 2008, Mr. Robinson wrote to request that the Office reconsider its refusal. Mr. Robinson observed that Ms. Rinard did not consider registration of MRT's 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). He 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. He 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.*

Mr. Robinson asserted that the nature of the application had not been properly addressed. In doing so, Mr. Robinson sought to clarify that Mr. Risan and MRT make no application for copyright in "reformatted musical sounds." Referring to Mr. Robinson's email to Ms. Rinard dated September 19, 2008, he 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. He 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, he claimed that MRT's recordings are simulations that contain nothing that was carried over from the original recordings. He 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 Mr. Robinson 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, Mr. Robinson 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).

Mr. Robinson 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. He 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. Mr. Robinson 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, Mr. Robinson expressed his intent that the application makes no claim for copyright in the lyrics of the original sound recordings. He 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, Mr. Robinson requested to use the hard drive deposit that the Office had in its possession to apply for a separate copyright registrations. 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. Response First Request for Reconsideration of Refusal of Current Application

In a letter from Virginia Giroux-Rollow, Attorney Advisor, in the U.S. Copyright Office Examining Division to Mr. Robinson dated June 16, 2009, Ms. Giroux-Rollow stated that after considering Mr. Robinson's request for reconsideration, the application and deposit, she was unable to register a copyright claim in his client's 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 1 7 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. *Id.*

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*

Publications v. Rural Telephone Service, 499 U.S. 340 (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 (definitions).

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 (definitions). She then pointed out that the submitted material was, by Mr. Robinson'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 Mr. Robinson's client 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. 3rd805, 81 1 (9' 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, Mr. Robinson 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).

Mr. Robinson stated that "the atonal 'noises' described in your rejection are not the simulations for which registration is sought." Mr. Robinson 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." Mr. Robinson 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.*

Mr. Robinson 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. Mr. Robinson 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, Mr. 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. Sec. 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 & 495.003. However, she went on to observe that Mr. Robinson had not provided information concerning any re-mastering or re-mixing of sounds of the original recordings; and he confined his description of the new authorship in these 800,000 recordings to "original simulations." Furthermore, she noted that by Mr. Robinson'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 Mr. Robinson 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 Mr. Robinson's client 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, Mr. Robinson wrote to request that the Office reconsider its refusal to register works submitted in the hard drive submitted with the Office, which Mr. Robinson 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 his characterization of the procedural background regarding his client's applications for registration, Mr. Robinson stated that his client seeks reconsideration of the Office's refusal to register its 800,000 sound recording simulations. He further noted that his client "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.'" Mr. Robinson 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, Mr. Robinson asserted that the applicant 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.

Mr. Robinson began the substantive portion of his request by asserting that the sound recording simulations contained in his client's deposit are "sound recordings" as defined in 17 U.S.C. § 101. Furthermore, he 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. He 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. He 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 (definitions).

In support of his assertion that the sound recording simulations contained in his client's deposit are the product of original authorship, Mr. Robinson characterized the works as "new impressionistic performances." He stated that the sound recording simulations represent the original production of a series of new sounds, created by human operators. While he conceded that they are perceived by the human ear to resemble certain artistic elements of original compositions or melodies, he asserted that they are not mere reproductions of existing copyrighted sound recordings. He maintained that the sound recording simulations are original artistic expressions. He 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. He 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.

Mr. Robinson then provided a recitation of what he referred to as a review of fundamental psychoacoustic principles. He 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. Mr. Robinson 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. He stated that five of the most important artistic characteristics – or parameters – in music are pitch, loudness, duration, timbre and space. *Id.* at 4-5.

Mr. Robinson went on to offer that in creating the subject sound recording simulations his client 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. He stated that a firewall was utilized to ensure independence between the sounds of the model and those of the original recording. *Id.* at 5.

He claimed that by making assumptions as to the location of the microphone in spacial 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.* Mr. Robinson maintained that the simulation "contains new and original spherical source point waves." *Id.* He 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. Mr. Robinson 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. He 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. He 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 he 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), Mr. Robinson asserted that the artistic expression of the simulations contains substantial, not trivial, originality. Citing *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102-3 (2d Cir. 195 1) and *Sheldon v. Metro Goldwyn Pictures*, 81 F.2d 49, 54 (2d Cir. 1936), he 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 Publications Inc. v. Rural Telephone Service Company Inc.*, 499 U.S. 340 (1991), and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), Mr. Robinson stated that the simulations contain appreciable authorship beyond slavish or "sweat of the brow" mechanical reproduction. *Id.*, at 6.

Mr. Robinson 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* supra at 103. He 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, he stated that his client 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.

Mr. Robinson then turned to address the Office's repeated concerns regarding the appropriateness of the application. Mr. Robinson 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).

He asserted that the administrative record reveals the original examiner's inquiries concerning, and ensuing explicit acceptance of, his client's proffered 5 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). Mr. Robinson also cited to "Circular 50, FL-105, revised May 2009 and section 202.25 of Title 37, U.S. Code." *Id.*

Mr. Robinson 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, he asserted due process compels that the subject applications be reviewed impartially on their merits without further undue delay. *Id.* at 6-7

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 Examining Division's (currently designated as the Registration and Recordation Program) refusal to approve the application of Hank Risan (Doing Business as Media Rights Technologies, Inc./BlueBeat.com) 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 (formally designated as the Examining Division) but, rather, on whether the materials, as presented, may be registered for copyright protection. The Board concludes that the

sound recording simulations that are the subjects of the application for registration employ preexisting works in a pervasive manner, without authorization of the copyright owner, and therefore constitute unauthorized derivative works that are not eligible for copyright protection, and that the Office does not have a sufficient deposit for purposes of registration.

A. Unlawful use of preexisting material in the applied for Sound Recordings

Regardless of whether or not the sound recording "simulations" are in fact original works of authorship, the Board notes that the sound recordings in question are recordings of musical works which MRT has not obtained permission to record. The copyrights in those approximately 800,000 musical works are owned and administered by a large number of persons and entities.

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."). *Also See*, *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1200 (10th Cir. Okla. 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")

As stated in Ms. Rinard's December 17, 2007 letter to Mr. Risan, it is not the Office's general practice to require applicants to provide written indication of authorization or permission to use the original underlying material in a derivative work. However, the Office does require such proof of authority in unusual cases such as this one where statements by the applicant and the overall context make it doubtful that such authority has been obtained. In this case, Mr. Risan, in a letter to the Copyright Office dated October 22, 2007, stated:

> Media Rights Technologies and its affiliates, Bluebeat.com, Basebeat.com and theMOMI.org 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. Each of the four major labels: Sony, Warner Bros., Universal, and EMI, asked for one million dollars upfront and 50% of our gross revenues. Therefore, we wish to obtain a Compulsory License under Section 115

(Letter from Risan to Copyright Office, dated October 22, 2007).

It is thus apparent that MRT had not obtained the necessary licenses to make and distribute phonorecords of nondramatic musical works, and that MRT wishes to obtain compulsory licenses pursuant to 17 U.S.C. § 115. The Board observes that the current

application indicates that the approximately 800,000 sound recording simulations were completed in 2003, several years before Mr. Risan indicated, in his October 22, 2007 letter, that MRT desired to obtain the necessary section 115 compulsory licenses for approximately 800,000 musical works. *Id.* The Board also observes that 17 U.S.C. § 115 requires that any person who wishes to obtain the compulsory license must serve notice of intention to do so "*before or within thirty days after making*, and before distributing any phonorecords of the work." 17 U.S.C. § 115.

In light of previous statements to the Office by Mr. Risan and the context of the application, the Board must conclude that MRT has not acquired either compulsory or consensual licenses from the copyright owners of the underlying musical compositions. Therefore, the sound recordings in which MRT is claiming copyright are not subject to copyright protection, since a preexisting musical works pervades the entirety of each sound recording. See M. Nimmer, Nimmer on Copyright §3.06 (2010).

We recognize that this ground was not relied upon by Ms. Rinard or Ms. Giroux-Rollow. However, the Board's review of a determination to refuse registration is de novo, and the Board may rely upon a ground not raised below. The Board is not bound by erroneous conclusions made by the registration specialist, nor must the Board overlook grounds for refusing to register simply because the registration specialist overlooked those grounds.

However, because we recognize that you may not have had an opportunity to address this issue, the Board will hold its decision in abeyance for 30 days in order to give you an opportunity, if you elect to do so, to assert and explain any factual or legal errors in the Boards' conclusion on this point. If, for example, MRT did obtain mechanical licenses for each of the musical works that were recorded, you should provide evidence of such licenses.

B. Inadequate Deposit

Based on the extensive, and often confused, record of the various applications by Hank Risan, Media Rights Technologies, and BlueBeat.com to register approximately 800,000 sound recordings as well as the actual hard drive deposit and access instructions received by the Office on or about August 12, 2008, it appears as if the material on the hard drive deposit either 1) contains 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) contains complete sound recordings which are encrypted, requiring contemporaneous transmission of additional encryption key data from MRT servers in order for the sound recordings to be renderable.[2]

[2] Mr. Robinson's April 16, 2008 email to Ms. Rinard appears to describe such an encryption key when it states "a special authorization code will be provided via an online account that will permit the sound recordings to be decrypted." (Email from Robinson to Rinard dated May 15, 2008). Furthermore, MRT's instructions to "access the 831,842 derivative sound recordings," received by the Office on or about August 12, 2008, indicate that a contemporaneous connection to MRT servers and transmission of additional

In either case, the deposit falls outside of the Office's regulations addressing when a deposit is "complete" pursuant to 17 U.S.C. § 408. The Office's regulations regarding deposit of copies and phonorecords for copyright registration dictate that in the case of sound recordings, a "complete copy includes *all* elements comprising the unit of publication of the best edition of the work, including elements that, if considered separately, would not be copyrightable subject matter or would otherwise be exempt from mandatory deposit requirements under paragraph (c) of this section." 37 C.F.R. § 202.19(b)(2) (emphasis added), *Also See* 37 C.F.R. § 202.20(b)(2)(v). The hard drive deposit submitted with the Office is not "complete" within the meaning of the Office's regulations. The hard drive's lack of either sound recording data that may be required in order to enable the hard drive to comprise complete renderable sound recordings, or an encryption key to enable complete sound recordings on the hard drive to be rendered means that the hard drive constitutes 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).

The Board also observes that *Compendium II* § 805.02(a)(2), addressing the meaning of "complete" deposit for published works, sets forth that:

> Where certain physically separable elements are missing from the deposit, a copy or phonorecord will still be accepted as a complete copy, if:
>
> 1) All the parts of the work for which registration is sought are present; and
> 2) The removal of the missing elements did not physically damage the copy or phonorecord or garble its contents; and
> 3) The work is exempt from mandatory deposit under section 407 of the copyright law (see 17 U.S.C. 407, and 37 C.F.R. 202.19(c)) or the copy deposited consists entirely of a container, wrapper, or holder which is exempt from the identifying material requirements because it can be stored flat.

(Compendium II § 805.02(a)(2)). In this case, the authorization code is a missing element. Furthermore, the absence of the authorization code garbles the contents of the phonorecords contained on the deposit. Indeed, garbling the contents of the deposit is the intended result of the missing authorization code. The absence of such an element prevents the deposit from being "complete" for the purposes of registration.

The Board also notes that in order for a deposit of a phonorecord of a sound recording to be acceptable, the sound recording must be perceptible from the deposit. Furthermore, provision of an access code via an online connection to outside servers in order to enable a registration specialist to listen to the sound recording during examination of the claim without permitting subsequent independent perception of the sound recording would defeat some of the fundamental purposes of a copyright deposit.

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encryption key data is required in order for the sound recordings to be renderable. (Letter from Allie Richards, Systems Administrator, MRT to Copyright office, received on or about August 12, 2008).

A deposit that cannot be perceived as a self-contained whole would be useless for purposes of being included in the Library of Congress' collection, which has no use for "copies" of works from which the works cannot be perceived. And, such a deposit would not serve the purpose of documenting the authorship that is being registered.

The Board recognizes your assertion that the deposit was presented pursuant to an agreement, and your citation to an email from Ms. Rinard to Mr. Robinson dated May 15, 2008 in which Ms. Rinard stated that "We will accept the hard drives as described below in your message of April 16." (Email from Jane Rinard to Mr. Robinson dated May 15, 2008). In light of the confused record, covering various claims of authorship and various descriptions of the works that were to be perceived on the deposit, the Board understands that there is room for debate as to whether the submitted hard drive conforms to the description set forth in your April 16, 2008 email. Regardless of any alleged agreement, and as noted above, the Board reviews requests for reconsideration on a *de novo* basis and is not bound by any perceived acceptance by the registration specialist of an inadequate deposit. As set forth above, the Board has found that the submitted hard drive falls short of fulfilling the legal requirements for a "complete" deposit and does not fulfill several of the fundamental purposes of a copyright deposit. Therefore, it cannot be accepted for purposes of registration.

If the Board's understanding of the nature of the deposit is in error and if the works may be perceived without a connection to an external network, you may advise us of those facts and of the means by which access to the works may be gained, on a permanent basis, to the works on the hard drive within the next 30 days.

III. ADDITIONAL OBSERVATIONS

There are additional apparent deficiencies in the application. Although the Board does not base its refusal to register the works on the following deficiencies at this point in time, these deficiencies would have to be addressed in the event that satisfactory responses were received pertaining to the two grounds for refusal set forth above.

A. Unit of Publication

The Office's regulations regarding registration as a single work state that "[i]n the case of published works: all copyrightable elements that are otherwise recognizable as self-contained works, that are included in a single unit of publication, and in which the copyright claimant is the same" shall be considered a single work. 37 C.F.R. § 202.3(b)(4)(i)(A). While the phrase "unit of publication" is not defined in the regulations, the written practices of the Office's Performing Arts Division regarding unit of publication for online works states that:

> 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, Publication/Creation, Part C, Unit of Publication requirements for online works).

The Form CO application attached to Mr. Robinson's September 19, 2008 email did not include a title but instead referred to "list attached to deposit." Therefore, the applied for material has no title that identifies the approximately 800,000 sound recordings as a single integrated unit, particularly since the component works do have individual titles.[3] Similarly, it does not appear that the deposit material is packaged and intended to be marketed and sold to the public as a single integrated unit. The Board has taken administrative notice of the fact that the applicant marketed and sold the relevant sound recordings to the public as single sound recordings.[4] Furthermore, there is no indication that the applicant's webcasts of the sound recordings were packaged and intended to be marketed and sold to the public as a single integrated unit. As such, the applied for material falls outside of Office's Performing Arts Division Online Practices criteria regarding unit of publication for online works, and is ineligible to be registered under a single application.[5]

Moreover, registration of a unit of publication only covers those works that were *first* published as part of the same unit. *R.F.M.A.S., Inc. v. So, 619 F. Supp. 2d 39, 40-42 (S.D.N.Y. 2009); McLaren v. Chico's FAS, Inc., 2010 U.S. Dist. LEXIS 120185, *5-*11 (S.D.N.Y. Nov. 9, 2010).* Thus, the Board would not be willing to approve a registration of all of the approximately 800,000 works in a single registration unless it were satisfied that they were all first published as part of the same unit at the same time. The record

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[3] The individual titles for each of the approximately 800,000 sound recording files are apparent on the hard drive deposit.

[4] "Beatles Finally for Sale Online ... on BlueBeat?" http://www.wired.com/epicenter/2009/10/beatles-finally-for-sale-online-on-bluebeat/
("BlueBeat.com is selling the entire Beatles catalog, including recently-released remastered albums, for the low price of 25 cents per MP3")
"BlueBeat sells Beatles MP3s, permission be damned"
http://www.macworld.com/article/143602/2009/10/bluebeat.html
("First off, the company has started selling MP3 music downloads for the low low price of 25 cents a track.)

[5] The Board observes that "Circular 50" and "FL-105," which are cited in Mr. Robinson's to Copyright R & P Division, dated August 21, 2009, address the possibility of registering "published collections" and "units of publication" of musical compositions. However, the language in these Office publications does not contradict or call into question the Office's Performing Arts Division Online Practices regarding unit of publication for online works. The Board also notes that "section 202.25 of Title 37, U.S. Code" (or 37 C.F.R. § 202.25) is not a valid citation.

before us indicates that several of the sound recordings at issue were first published as part of different units at different points in time. For example: 792,852 of the sound recordings were alleged to have been published as a unit on August 15, 2002 (Media Rights Technologies application dated August 15, 2007); 796,138 of the sound recordings were alleged to have been published as a unit on August 11, 2001 (Media Rights Technologies application dated September 14, 2007); and 786,678 of the sound recordings were alleged to have been published as a unit on January 1, 2003 (Media Rights Technologies application for "BlueBeat.com Derivative Works," dated October 22, 2007).

B. "Simulations" as Original Sound Recordings

The Board has serious reservations relating to whether what you describe as "simulations" of the original sound recordings are in fact original works of authorship, and whether they are unauthorized derivative works. While the Board has difficulty understanding your explanation of how the sound recording "simulations" were created, we find the recent description by the United States District Court for the Central District of California of similar arguments offered by Bluebeat as "obscure and undefined pseudo-scientific language" to coincide with our initial reaction. *Capitol Records, LLC et al. v. BlueBeat, Inc. et al.*, No. CV 09-8030-JST (JCx), slip op. at 9 (C.D.CA December 8, 2010). If the Board were to reach the merits of this question, it would require a much clearer, more comprehensible explanation of the means by which these "simulations" were created.

CONCLUSION

For the reasons stated above, the Copyright Office Board of Appeals concludes that the applied for approximately 800,000 sound recordings simulations cannot be registered for copyright protection. This decision shall constitute final agency action thirty days from the date of this letter unless, prior to that time, the Board receives a request to reconsider the conclusions set forth above in Parts II.A. and B., along with a explanation of all factual and legal grounds for the request.

Sincerely,

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