

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT NEW YORK

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RALPH VARGAS and	:	
BLAND-RICKY ROBERTS,	:	Case No. 04 CV 9772 (WHP)
	:	
Plaintiffs,	:	ECF CASE
	:	
- against -	:	Judge William H. Pauley III
	:	
PFIZER, INC., PUBLICIS, INC., FLUID	:	
MUSIC, EAST WEST COMMUNICATIONS,	:	
INC. and BRIAN TRANSEAU p/k/a "BT",	:	
	:	
Defendants.	:	
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**RULE 56.1 STATEMENT OF UNDISPUTED FACTS**

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Pursuant to Civil Rule 56.1 of the United States District Courts for the Southern and Eastern Districts of New York, Defendants submit this Statement of Undisputed Facts in connection with their Motion For Summary Judgment on the issue of whether Plaintiffs' musical composition *Bust Dat Groove* is sufficiently original to qualify for copyright protection..

This statement of undisputed facts is based on: (i) the Amended Complaint in this action (Docket # 3) ("Compl."); (ii) the Declaration of Anthony Ricigliano ("Ricigliano Decl.") and Exhibits thereto; (iii) the Declaration of Brad Stratton ("Stratton Decl."); (iv) the Declaration of Brian Transeau ("Transeau Decl."); (v) the Declaration of Rhys Moody ("Moody Decl.") and Exhibit thereto; (vi) the Declaration of Edward P. Kelly ("Kelly Decl.") and the Exhibit thereto.

For purposes of this motion, the material facts as to which there is no genuine issue to be tried are as follows:

1. Plaintiff Ralph Vargas claims to have "composed" *Bust Dat Groove*, the musical work on which Plaintiffs' copyright infringement claim is based, in 1993. (Compl. ¶ 16.)
2. Mr. Vargas registered the copyright in this music in 1995. (Compl. ¶ 17 & Ex. A.)
3. No other copyright registration certificate is provided with the Plaintiffs' Complaint. (Compl. ¶ 17 & Ex. A.)
4. This registration certificate describes *Bust Dat Groove* as "Music – Drum Rhythm/Drum Loops." (Compl. ¶ 17 & Ex. A.)
5. This registration certificate registers the underlying musical composition in *Bust Dat Groove*, not the sound recording of that composition being performed. (Compl. Ex. A.)
6. Plaintiffs' Initial Disclosures state that Plaintiffs seek damages only for "infringement of Plaintiffs' musical composition." (Kelly Decl., Ex. A at Section I(C)(a).)

7. Defendants' expert musicologist, Mr. Anthony Ricigliano, taught for over three decades at the Manhattan School of Music, is the author of two books on contemporary music, and has been a qualified expert witness in numerous copyright infringement cases. (Ricigliano Decl. ¶¶ 1-3 & Ex. A.)

8. *Bust Dat Groove* is a one-bar percussion pattern; though the recording runs approximately one minute, the entire work consists of the same drum pattern looped (repeated) approximately 27 times. (Ricigliano Decl. ¶ 5 & Ex. D, Track 1.)

9. *Bust Dat Groove* is a basic groove track that establishes a rhythmic bed or feel. (Ricigliano Decl. ¶ 5.)

10. Percussion patterns such as *Bust Dat Groove* rarely are distributed as popular music and are not meant to be listened to in their own right. Rather, they serve as background rhythm and accompany pitched instruments (*i.e.*, those supplying melody and harmony) in musical compositions. (Ricigliano Decl. ¶ 5.)

11. *Bust Dat Groove* consists entirely of four individual rhythmic or percussion elements – a high hat (cymbal), snare drum, tom-tom drum and bass drum. (Ricigliano Decl. ¶ 6.)

12. The constituent elements of *Bust Dat Groove*, singly and in combination, are so basic as to be found in elementary drum instruction books dating back to the 1960s. (Ricigliano Decl. ¶¶ 5-12 and examples cited therein.)

13. The high-hat (a series of eighth notes) and snare drum (quarter notes hit on beats 2 and 4) elements of *Bust Dat Groove* each are standard and commonplace when considered individually, and the combination of the two is rudimentary. (Ricigliano Decl. ¶ 7.)

14. These exact rhythms and combination may be found in numerous drumming instruction books, some pre-dating *Bust Dat Groove* by over two decades. (Ricigliano Decl. ¶ 7-8 & examples cited therein; *id.* Ex. D, Track 4.)

15. These same high-hat/snare drum rhythms and combination may be found in songs that were commercially released before (in some cases, two decades before) or contemporaneous with *Bust Dat Groove*. (Ricigliano Decl. ¶ 8 & Ex. D, track list (identifying songs), CD tracks 7-11; compare *id.* at ¶ 6 (transcription of *Bust Dat Groove*) with *id.* Ex. D (transcriptions for tracks 7-11).)

16. The tom-tom element of *Bust Dat Groove* – a short rhythmic figure known as a “ruff” – also may be found in instructional drum books, including books dating from 1967 and 1968. (Ricigliano Decl. ¶¶ 9-10 & examples cited therein.)

17. The individual note placement of the ruff in *Bust Dat Groove*, and its use in combination with the high-hat and snare drum patterns also is found in drumming textbooks. (Ricigliano Decl. ¶ 10.)

18. The final constituent element of *Bust Dat Groove*, the bass drum, consists of two basic three-note groups – one beginning with what is known as a pick-up note on the downbeat, the other containing a “short-long-short” note figure. (Ricigliano Decl. ¶ 11.)

19. These bass note configurations and their placement are found – in combination with the identical, basic high hat/snare drum rhythm patterns used in *Bust Dat Groove* – in exercises included in a 1972 rock drumming instruction book, and in songs released commercially over 20 years ago. (Ricigliano Decl. ¶¶ 11-12 & examples & tracks cited therein.)

20. That these elements are ubiquitous results not from copying or copyright infringement, but rather from the fact that works in the same musical style necessarily rely on a

limited number of rhythmic patterns used in a limited number of ways – in other words, the rhythmic patterns define the musical style. (Ricigliano Decl. ¶ 13.)

21. The Plaintiffs allege that the composition of *Bust Dat Groove* was contained in a “jingle” used, beginning in June 2003, to advertise the drug Celebrex, manufactured by defendant Pfizer, Inc. (Compl. ¶¶ 2, 4, 16, 26.)

22. The Celebrex advertisement contains pitched musical instrumentation not found in *Bust Dat Groove*, including a synthesizer, guitar and electric bass. (Ricigliano Decl. ¶ 19 & Ex. D, Track 2 & Ex. E).

23. These pitched elements are the featured, key musical parts of the commercial, containing its pitch and harmony as well as additional rhythm. (Ricigliano Decl. ¶ 19 & Ex. D, Track 2 & Ex. E; Stratton Decl. ¶ 7.)

24. At least one, but more often two, of these three additional pitched elements appear in every bar of the commercial. (Ricigliano Decl. ¶ 19.)

25. The music contained in the Celebrex commercial was prepared by defendant Fluid Music on behalf of Publicis, Inc., Pfizer’s former advertising agency. (Stratton Decl. ¶ 3-4.)

26. The background rhythm used in the Celebrex commercial came from a CD “sound library” known as *Breakz from the Nu Skool* (“*Breakz*”), which Fluid Music acquired from a music retailer. (Stratton Decl. ¶ 2.)

27. A Fluid Music producer used a drum loop from *Breakz* known as *Aparthenonia*, and combined it with synthesizer, guitar, and bass elements. (Stratton Decl. ¶ 5.)

28. The producers of the commercial’s music had never heard of, and had no access to, *Bust Dat Groove*. (Stratton Decl. ¶ 8.)

29. *Breakz* was prepared by defendant Brian Transeau (known professionally as BT), an accomplished performer, composer and producer of electronic music. (Transeau Decl. ¶ 2.)

30. Mr. Transeau has released numerous popular recordings of his own, produced “remixes” for some of the world’s best-known recording artist, and created the scores for several feature films. (Transeau Decl. ¶ 2)

31. *Breakz* is a sound library consisting of hundreds of separate tracks (including *Aparthenonia*), each one a simple drum pattern identically repeated just two to four times. (Transeau Decl. ¶ 3.)

32. These short drum loops are not meant to be listened to as musical works in their own right. Rather, *Breakz* is meant to be used only by other musicians and producers, who incorporate one or more of the tracks found on the CD as tempo or background for their own musical works. (Transeau Decl. ¶ 3.)

33. *Aparthenonia* was independently created by Mr. Transeau using his computer, off-the-shelf software applications, and drum machines. (Transeau Decl. ¶ 5.)

34. *Aparthenonia* is a programmed beat; the percussion elements originated from a music generation computer program known as Propellerhead Reason, and were mixed and equalized by Mr. Transeau on his own equipment. (Transeau Decl. ¶ 5.)

35. Prior to this litigation (which commenced over three years after *Aparthenonia* was created), Mr. Transeau had never heard of the Plaintiffs and had never heard of or listened to *Bust Dat Groove* or *Funky Drummer, Volume II*; he had no access to these works, and never possessed copies of them. (Transeau Decl. ¶ 6.)

36. *Aparthenonia* contains no “sampling” or recording of any other work. (Transeau Decl. ¶ 6.)

37. *Aparthenonia* is not a copy of *Bust Dat Groove*. (Transeau Decl. ¶ 6.; Ricigliano Decl. ¶¶ 16-18.)

38. *Aparthenonia* lasts approximately nine seconds, or two and one-quarter bars. (Ricigliano Decl. ¶ 14 & Ex. D, CD Track 3.)

39. Like *Bust Dat Groove*, *Aparthenonia* contains high-hat, snare drum, tom-tom drum and bass drum elements, but the only similarities between these shared elements consist of the same combination of a high-hat (consisting of straight eighth notes) and snare drums (quarter notes hitting on beats 2 and 4). This is a commonplace rhythm that is not original to *Bust Dat Groove* and is considered a rudimentary drumming technique. (Ricigliano Decl. ¶ 14.)

40. These common elements have been staples of the contemporary popular idiom for decades, and are fundamental building blocks for popular music and musical composition. (Ricigliano Decl. ¶¶ 13, 22-24; Transeau Decl. ¶¶ 7, 8.)

41. *Bust Dat Groove* and *Aparthenonia* differ in that every loop heard in *Bust Dat Groove* is identical, whereas the first and second bars in *Aparthenonia* contain a difference, in the use of the tom-tom element. (Ricigliano Decl. ¶ 16.)

42. The rhythmic placement of the tom-tom drum “ruff” differs between *Bust Dat Groove* and *Aparthenonia*. Specifically, *Aparthenonia* places the ruff in beat one of its second bar, whereas the ruff appears in the fifth eighth note of every bar in *Bust Dat Groove*. (Ricigliano Decl. ¶ 16.)

43. *Bust Dat Groove* and *Aparthenonia* differ in that, while the high-hat parts each contain an “open” or “splash” effect, this effect appears in a different place in the two works. (Ricigliano Decl. ¶ 15.)

44. *Bust Dat Groove* and *Aparthenonia* differ with respect to their bass portions.

Whereas the first bass drum portion of *Bust Dat Groove* consists of three notes, using a “pick-up” moving into two notes equal in time value (eighth notes), the first bass drum group in *Aparthenonia* contains no pick-up, and consists of only two notes of unequal time (an eighth note followed by a sixteenth note). (Ricigliano Decl. ¶ 17.)

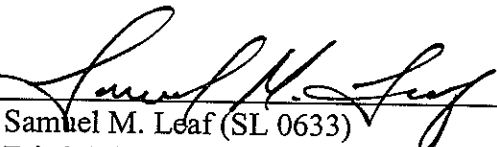
45. The second group of bass drum notes also differs between the works. In *Bust Dat Groove* this group consists of three notes in a “short-long-short” pattern. In contrast, the second group of bass drum notes in *Aparthenonia* consists of four notes in a “short-short-long-short” pattern. (Ricigliano Decl. ¶¶ 17-18.)

46. *Aparthenonia* does not contain a recording or “sample” of *Bust Dat Groove*. (Ricigliano Decl. ¶¶ 18, 22 & Ex. B; Moody Decl.)

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June 30, 2005

Respectfully submitted,

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