

2001 WL 34396090 (C.D.Cal.) (Trial Pleading)
United States District Court, C.D. California.

James W. NEWTON, Jr. dba Janew Music, Plaintiff,

v.

Michael DIAMOND, Adam Horovitz and Adam Yauch, dba Beastie Boys, a New York Partnership, Capitol Records, Inc., a Delaware Corporation, Grand Royal Records, Inc., a California Corporation, Universal Polygram International Publishing, Inc., a Delaware Corporation, Brooklyn Dust Music, an entity of unknown origin, Mario Caldato, Jr., an individual, Janus Films, LLC, a New York Limited Liability Company, Criterion Collection, a California Partnership, Voyager Publishing Company, Inc., a Delaware Corporation, Sony Music Entertainment, Inc., a Delaware Corporation, BMG Direct Marketing, Inc., a Delaware Corporation, and the Columbia House Company, an entity of unknown origin, Defendants.

No. CV 00-04909-NM (MANx)
February 22, 2001.

First Amended Complaint (Copyright Infringement - 17 U.S.C. §101 et seq.)

[Alan Korn](#), SBN 167933, Law Office of Alan Korn, San Francisco, California, Jeffrey A. Berchenko, SBN 094902, Law Office of Jeffrey Berchenko, San Francisco, California, Attorneys for Plaintiff, [James W. Newton, Jr.](#) dba Janew Music.

DEMAND FOR JURY TRIAL

JURISDICTION AND VENUE

1. This Court has jurisdiction of the subject matter for this claim under the provisions of [28 U.S.C. §1338\(a\)](#), because this action arises under an Act of Congress relating to Copyrights, the Copyright Act of 1976, [Pub. L. 94-553, 90 Stat. 2541 et seq. 17 U.S.C. 101 et seq.](#)
2. This Court has jurisdiction of the subject matter of this claim under the provisions of [28 U.S.C. §1331](#), because the action arises under the laws of the United States, specifically the above-cited Copyright Act of 1976.
3. Venue is properly laid in the District Court for the Central District of California pursuant to [28 U.S.C. § 1391\(b\)](#), and [§ 1391\(c\)](#), since, *inter alia*, the causes of action asserted arose from or are connected with purposeful acts committed by the individual Defendants in this District, and the corporate and individual Defendants named herein are doing business, and therefore reside, in this District.

PARTIES

4. Plaintiff James W. Newton, Jr., dba Janew Music, (“NEWTON”) is an individual, residing within the State of California, whose business address is 4946 Stone Ridge Drive, Chino Hills, California 91209. Plaintiff is a critically acclaimed jazz and classical flautist, composer, performer and university professor, and author of the copyrighted composition *Choir* (referred to herein as “COMPOSITION” or “CHOIR”) released on Plaintiff’s 1982 solo album entitled *Axum*.

5. Plaintiff is, and at all relevant times was, a domiciliary of the United States.
6. Defendant Michael Louis Diamond, (“DIAMOND”), whose business address is in care of Gelfand, Rennert & Feldman, 1880 Century Park East, Los Angeles, California 90067, is a professional recording artist, performer and composer who is the co-author of derivative compositions and sound recordings, which said derivative compositions and sound recordings embody and reproduce, through their entirety, substantial excerpts of Plaintiff's copyrighted COMPOSITION. Plaintiff is informed and believes and thereon alleges that DIAMOND is responsible in some manner for the occurrences herein alleged, and that Plaintiff's injuries as herein alleged were proximately caused by the acts or omissions of DIAMOND.
7. Adam Keefe Horovitz, (“HOROVITZ”), whose business address is in care of Gelfand, Rennert & Feldman, 1880 Century Park East, Los Angeles, California 90067, is a professional recording artist, performer and composer who is the co-author of derivative compositions and sound recordings, which said derivative compositions and sound recordings embody and reproduce, through their entirety, substantial excerpts of Plaintiff's copyrighted COMPOSITION. Plaintiff is informed and believes and thereon alleges that DIAMOND is responsible in some manner for the occurrences herein alleged, and that Plaintiff's injuries as herein alleged were proximately caused by the acts or omissions of DIAMOND.
8. Defendant Adam Nathaniel Yauch, (“YAUCH”), whose business address is in care of Gelfand, Rennert & Feldman, 1880 Century Park East, Los Angeles, California 90067, is a professional recording artist, performer and composer who is the co-author of derivative compositions and sound recordings, which said derivative compositions and sound recordings embody and reproduce, through their entirety, substantial excerpts of Plaintiff's copyrighted COMPOSITION. Plaintiff is informed and believes and thereon alleges that DIAMOND is responsible in some manner for the occurrences herein alleged, and that Plaintiff's injuries as herein alleged were proximately caused by the acts or omissions of DIAMOND.
9. Defendants DIAMOND, HOROVITZ and YAUCH, at all times herein alleged, conducted business as a legal partnership existing under the laws of the State of New York under the fictitious name the Beastie Boys (“BEASTIE BOYS”), whose business address is in care of Gelfand, Rennert & Feldman, 1880 Century Park East, Los Angeles, California 90067. BEASTIE BOYS are a legal entity that have in the past, and are presently, doing business within the State of California as a recording and performing musical group within the genre of rap, hip-hop and popular music. Plaintiff is informed and believes, and hereby alleges, that the BEASTIE BOYS are the authors and/or co-authors of derivative compositions and/or sound recordings reproducing substantial portions of Plaintiff's copyrighted COMPOSITION.
10. Defendant Mario Caldato, Jr., (“CALDATO”), whose address is currently unknown, is the Producer and co-author, along with Defendants DIAMOND, HOROVITZ and YAUCH, of derivative compositions and sound recordings, which said derivative compositions and sound recordings embody and reproduce, through their entirety, substantial excerpts of Plaintiff's copyrighted COMPOSITION. Plaintiff is informed and believes and thereon alleges that CALDATO is responsible in some manner for the occurrences herein alleged, and that Plaintiff's injuries as herein alleged were proximately caused by the acts or omissions of CALDATO. Plaintiff will amend this Complaint as soon as Plaintiff ascertains the proper address for this Defendant.
11. Defendant Capitol Records, Inc. (“CAPITOL”), located at 2751 Centerville Road, Suite 205, Wilmington, Delaware 19808, is a corporation existing under the laws of the State of Delaware. CAPITOL is, and at all times herein mentioned was, doing business within the State of California as a record company involved in the business of licensing, manufacturing, publishing, distributing and performing analog and digital audio recordings and video recordings of popular recording artists, including audio and video recordings of Defendants BEASTIE BOYS embodying Plaintiff's copyrighted COMPOSITION.



12. Defendant Grand Royal Records, Inc. (“GRAND ROYAL”), located in care of Gelfand, Rennert & Feldman, 1880 Century Park East, #900, Los Angeles, California 90067 is a corporation existing under the laws of the State of California. GRAND ROYAL has in the past, and is presently, doing business within the State of California as a record company involved in the business of licensing, manufacturing, publishing and distributing analog and digital audio recordings and video recordings of popular and alternative recording artists, including audio and video recordings of Defendant BEASTIE BOYS embodying Plaintiff’s copyrighted COMPOSITION.

13. Defendant Universal Polygram International Publishing, Inc., (“UNIVERSAL”), located in care of Polygram Holding, Inc., 825 8th Avenue, New York, New York 10019, is a corporation existing under the laws of the State of Delaware. UNIVERSAL is, and at all times herein mentioned was, doing business within the State of California as a music publishing company involved in the business of authorizing the reproduction, synchronization, publication and performance of compositions, including derivative compositions embodying Plaintiff’s COMPOSITION, and collecting income arising from the exercise of such rights.

14. On information and belief, Plaintiff alleges that Defendant Brooklyn Dust Music (“BROOKLYN DUST”), located in care of Kenneth B. Anderson, Esq., Loeb and Loeb, 345 Park Avenue, 18th Floor, New York, NY 10154, is an entity of unknown origin existing under the laws of the State of New York and controlled in whole or in part by Defendant BEASTIE BOYS. BROOKLYN DUST is, and at all times herein mentioned was, doing business within the State of California as a music publishing company involved in the business of authorizing the reproduction, synchronization, publication and performance of compositions, including derivative compositions embodying Plaintiff’s COMPOSITION, and collecting income arising from the exercise of such rights.

15. Defendant Janus Films, LLC, (“JANUS”) which Plaintiff believes on information and belief is located in care of Jana Edelbaum, 18 East 67th Street, Suite 2B, New York, NY 10021, is a limited liability corporation existing under the laws of the State of New York. JANUS is, and at all times herein mentioned was, doing business within the State of California as a company involved in the business of authorizing the reproduction, distribution and sale of digital video disks (“DVD’s”), and specifically, DVD’s containing works by Defendant BEASTIE BOYS embodying Plaintiff’s COMPOSITION.

16. Defendant Criterion Collection (“CRITERION”), located at 1351 Pacific Coast Highway, Third Floor, Santa Monica, California 90401, is a partnership existing under the laws of the State of California. CRITERION is, and at all times herein mentioned was, doing business within the State of California as a company involved in the business of authorizing the reproduction, distribution and sale of digital video disks (“DVD’s”), and specifically, DVD’s containing works by Defendant BEASTIE BOYS embodying Plaintiff’s COMPOSITION.

17. Voyager Publishing Company, Inc. (“VOYAGER”), located at 578 Broadway, Suite 406, New York, NY 10012, is a corporation existing under the laws of the State of Delaware. On information and belief, Plaintiff alleges that VOYAGER is the owner of Defendant CRITERION. Accordingly, VOYAGER is, and at all times herein mentioned was, doing business within the State of California as a company involved in the business of authorizing the reproduction, distribution and sale of digital video disks (“DVD’s”), and specifically, DVD’s containing works by Defendant BEASTIE BOYS embodying Plaintiff’s COMPOSITION.

18. Defendant BMG Direct Marketing, Inc. (“BMG”) located at 1540 Broadway, New York, New York 10036, is a corporation existing under the laws of the State of Delaware. BMG is, and at all times herein mentioned was, doing business within the State of California as a record “club” involved in the business of licensing, manufacturing, distribution and sale of analog and digital audio recordings of popular recording artists, including recordings of Defendants BEASTIE BOYS embodying Plaintiff’s copyrighted COMPOSITION.

19. Defendant Sony Music Entertainment, Inc. (“SONY”), located at 550 Madison Avenue, New York, New York 10022, is a corporation existing under the laws of the State of Delaware. SONY is, and at all times herein mentioned was, doing business within the State of California as a record “club” involved in the business of licensing, manufacturing, publishing, distributing and performing analog and digital audio recordings recordings of popular recording artists, including recordings of Defendants BEASTIE BOYS embodying Plaintiff’s copyrighted COMPOSITION.

20. Defendant Columbia House Company (“COLUMBIA HOUSE”), located at 1221 Avenue of the Americas, New York, New York, 10020, is an entity of unknown origin existing under the laws of the State of New York. On information and belief, Plaintiff contends that COLUMBIA HOUSE is, and at all times herein mentioned was, doing business within the State of California as a record “club” involved in the business of licensing, manufacturing, publishing, distributing and performing analog and digital audio recordings of popular recording artists, including recordings of Defendants BEASTIE BOYS embodying Plaintiff’s copyrighted COMPOSITION.

BACKGROUND OF LITIGATION

21. Plaintiff is an internationally recognized jazz and classical flautist, composer, performer and university professor, who is an 18 consecutive year winner of the Downbeat Magazine Critics’ Poll (1982-99) and 17 consecutive year winner of the Downbeat Magazine International Reader’s Poll for “Best Jazz Flutist” (1983-99). A resume detailing Plaintiff’s numerous fellowships, grants, commissions, and other significant achievements in the field of jazz and classical music is attached hereto as Exhibit “A,” and incorporated herein by this reference.

22. Plaintiff is the sole author of the solo flute COMPOSITION *Choir*, written in or about 1976. Said COMPOSITION contains material original with Plaintiff, which original material constitutes copyrightable subject matter under the laws of the United States. Said COMPOSITION is widely recognized as one of Plaintiff’s “signature” compositions, and is subject to copyright registration as a musical work, United States Copyright Registration Certificate No. PAu-36-947 issued by the Register of Copyrights on August 4, 1978, a true copy of which is attached as Exhibit “B,” and which is incorporated herein by this reference.

23. Since 1976, Plaintiff Newton, dba Janew Publishing, has been, and still is, the proprietor of the statutory copyright in the COMPOSITION, and is duly possessed of all rights, title and interest therein.

24. Plaintiff’s COMPOSITION, which makes extensive use of a flute playing technique known as “vocalization,” is a jazz and classical music composition that also embodies elements of traditional, folk, African, Afro-American and avant-garde music.

25. Plaintiff, through his sole proprietor music publishing company, Janew Music, is the sole publisher of said COMPOSITION. The performing rights in and to Plaintiff’s COMPOSITION are registered with the American Society of Composers and Publishers (“ASCAP”), pursuant to Title Code No. 30066867, with the COMPOSITION author credited as James Weldon Newton, Jr. and COMPOSITION publisher credited as Janew Music. A true and correct copy of a Title Detail printout from the ASCAP website with respect to the COMPOSITION, dated January 31, 2000, is attached hereto as Exhibit “C,” and incorporated herein by this reference.

26. On or about August 21, 1981, Plaintiff entered into an agreement (the “AGREEMENT”) with ECM Records (“ECM”) in connection with the recording of a solo LP comprised of original flute compositions. A true and correct copy of this AGREEMENT is attached hereto as Exhibit “D,” and incorporated herein by this reference. Pursuant to this AGREEMENT, ECM retained the exclusive rights to those sound recordings recorded by Plaintiff on August 19-20, 1981, and Plaintiff retained all publishing rights in and to the compositions appearing therein.

27. On or about August 19-20, 1981, Plaintiff re-recorded the COMPOSITION for ECM pursuant to the above AGREEMENT. The ECM sound recording of this COMPOSITION (the "MASTER") was subsequently released on Plaintiff's critically acclaimed solo LP entitled *Axum*, issued by ECM in or about March 1982 (Catalogue No. ECM 1214). A true and correct copy digital audio copy of the *Axum* MASTER embodying Plaintiff's COMPOSITION is attached hereto on the accompanying CD-R as Exhibit "E," Track 1, and incorporated herein by this reference. A true and correct copy of the record jacket artwork accompanying the *Axum* MASTER is attached hereto as Exhibit "F," and incorporated herein by this reference. With respect to authorship of the compositions on *Axum*, the jacket artwork clearly provides "All compositions by James Newton." In addition, the back cover of said jacket artwork states with respect to the compositions: "Scores available: Janew Music Publications P.O. Box 43A47, Los Angeles, CA 90043-0108."

28. Plaintiff's unique compositional and performance technique, referenced in the *Mobius Music: The European & Afro-American Flute Traditions* and the *Penguin Guide to Jazz on CD*, is sometimes referred to by Plaintiff as "multiphonics." This unique compositional device involves the above-described vocalization techniques, along with the use of certain fingers to play two or three notes simultaneously. The COMPOSITION embodied on the *Axum* LP make substantial use of this "multiphonic" technique, in that the first 75 seconds of the 4-1/2 minute COMPOSITION features Plaintiff playing seven identical sustained phrases on flute, with each identical phrase consisting of multiple simultaneous notes and multiple contrapuntal vocal notes. These seven identical sustained phrases, comprising simultaneous notes and contrapuntal vocalizations, are again repeated throughout the remaining 70 seconds of the COMPOSITION.

CLAIM ONE COPYRIGHT INFRINGEMENT

29. Plaintiff repeats and realleges each of the allegations set forth in Paragraphs 1 through 28 inclusive, and by this reference incorporates the same as though fully set forth herein.

30. On information and belief, Plaintiff alleges that in or about 1991 or early 1992, Defendants DIAMOND, HOROVITZ, YAUCH, BEASTIE BOYS and CALDATO authored a derivative musical composition ("INFRINGEMENT COMPOSITION") and derivative sound recording ("INFRINGEMENT SOUND RECORDING"), each entitled *Pass the Mic* (collectively "THEINFRINGEMENT MASTER) by digitally sampling a six-second passage of Plaintiff's COMPOSITION and the *Axum* MASTER, by using Plaintiff's six-second passage as the unaccompanied introduction to Defendants' infringing work, and by looping this passage at least forty-two (42) additional times throughout Defendants' INFRINGEMENT MASTER for a total of approximately four minutes. Plaintiff alleges the four minutes of Plaintiff's COMPOSITION used by Defendants constitutes the heart of the copyrighted COMPOSITION. A true and correct digital audio copy of the INFRINGEMENT MASTER is attached hereto on the accompanying CD-R as Exhibit "E," Track 2, and incorporated herein by this reference

31. On information and belief, Plaintiff alleges that in or about 1991 or early 1992, the BEASTIE BOYS and their producer CALDATO authored a derivative "remixed" composition and derivative "remixed" sound recording entitled *Pass the Mic (Pt. 2, Skills to Pay the Bills)* ("collectively referred to herein as "INFRINGEMENT REMIX"), constituting a substantially different vocal and instrumental performance of the INFRINGEMENT MASTER, by again sampling six-seconds of Plaintiff's COMPOSITION and the *Axum* MASTER, and looping Plaintiff's six-second passage at least fourteen (14) times throughout said derivative INFRINGEMENT REMIX. Plaintiff contends this six-second solo flute passage with accompanying multiphonic vocalizations, repeated throughout the INFRINGEMENT REMIX, also constitutes the "heart" of his copyrighted COMPOSITION. A true and correct digital audio copy of the INFRINGEMENT REMIX is attached hereto on the accompanying CD-R as Exhibit "E," Track 3, and incorporated herein by this reference

32. On information and belief, Plaintiff alleges that in or about 1991 or early 1992, the BEASTIE BOYS and their producer CALDATO authored a separate derivative instrumental composition and derivative instrumental sound recording entitled *Dub*

the Mic (“collectively referred to herein as “INFRINGEMENT INSTRUMENTAL REMIX”), which derivative infringing work constitutes a substantially different instrumental performance of the INFRINGING MASTER, by again sampling six-seconds of Plaintiff’s COMPOSITION and *Axum* MASTER, and looping this six-second passage at least six (6) times throughout said derivative INFRINGING INSTRUMENTAL REMIX. Plaintiff contends this six-second solo flute passage with accompanying multiphonic vocalizations, incorporated without permission into the INFRINGING INSTRUMENTAL REMIX, constitutes the “heart” of his copyrighted COMPOSITION. A true and correct digital audio copy of the INFRINGING INSTRUMENTAL REMIX is attached hereto on the accompanying CD-R as Exhibit “E,” Track 4, and incorporated herein by this reference

33. On or about February 26, 1992, the BEASTIE BOYS entered into a “license and release” (the “SAMPLE LICENSE”) with ECM concerning the use of the MASTER, and the MASTER only, in derivative BEASTIE BOYS works, including but not limited to, the INFRINGING MASTER, the INFRINGING REMIX and the INFRINGING INSTRUMENTAL REMIX. Under Paragraph 1 of the “SAMPLE LICENSE,” the BEASTIE BOYS are granted the right “to copy portions ...of the sound recording entitled “Choir” performed by James Newton” (the “SAMPLE”), to use and incorporate digitally altered version of the SAMPLE in some or all versions of BEASTIE BOYS recordings collectively entitled *Pass the Mic*, and “to reproduce, distribute and otherwise exploit the Sample ... in all media, whether nor known or hereinafter developed, including without limitation, all record formats throughout the world in perpetuity.” A true and correct copy of the SAMPLE LICENSE is attached hereto as Exhibit “G,” and incorporated herein by this reference.

34. Notwithstanding the foregoing, at no time was Plaintiff ever contacted by ECM or any other Defendant concerning the SAMPLE, the SAMPLE LICENSE or the licensing of the MASTER for inclusion in derivative compositions and derivative recordings by Defendants. Attached hereto as Exhibit “H,” and incorporated herein by this reference is a letter dated April 4, 2000 from Manfred Eicher, founder of ECM, to Plaintiff which letter confirms that Plaintiff never received notice of, or income arising from, the SAMPLE LICENSE, and that Plaintiff was never told of the existence of the SAMPLE LICENSE because, allegedly, “[w]hen we spoke on the phone in 1993 I had no reason to mention this Beastie Boys situation, one of very many agreements that are too minor (sic) to be brought to my attention.”

35. Plaintiff contends, on information and belief, that it is common practice and custom in the music industry for composers, musicians, record companies and music publishers to obtain the right to use both the sound recording from the record company, and the right to use the underlying musical composition from composition’s publisher and/or author, whenever such a work is “sampled” for use in a derivative musical recording. *See, e.g.,* M. Ashburne, *Sampling in the Record Industry*, 2 (1994). Plaintiff further contends, on information and belief, that such practice and custom exists within the music industry whenever qualitatively substantial elements of a musical composition are looped throughout an entire song. *See, e.g.,* A. Kohn & B. Kohn, *Kohn on Music Licensing*, 2nd Ed., 1292 (1996) (“Even a very short phrase from a musical composition could be infringed by the use of a sample of that phrase if the sampled phrase is repeated through substantial portions of the sampler’s new work.”).

36. Notwithstanding the above-described practice and custom in the music industry, Plaintiff was never contacted by ECM, or any other Defendant, concerning the use of his COMPOSITION in the INFRINGING MASTER, INFRINGING REMIX or INFRINGING INSTRUMENTAL REMIX. Defendants’ failure to secure Plaintiff’s permission with respect to the derivative use of his copyrighted COMPOSITION in the INFRINGING MASTER, INFRINGING REMIX and INFRINGING INSTRUMENTAL REMIX violated Plaintiff’s rights under the Copyright Act, in that Plaintiff retained the exclusive right under the Copyright Act to authorize the adaptation, reproduction, performance and distribution of his COMPOSITION, including the exclusive right to authorize the creation of derivative works based on his COMPOSITION.

37. On information and belief, Plaintiff alleges that Defendants DIAMOND, HOROVITZ, YAUCH, BEASTIE BOYS and CALDATO entered into exclusive music publishing agreements with Defendants BROOKLYN DUST and UNIVERSAL concerning the underlying compositions embodied in the INFRINGING MASTER, the INFRINGING REMIX and the INFRINGING INSTRUMENTAL REMIX. Pursuant to these agreements, said Defendants granted BROOKLYN DUST



and UNIVERSAL certain copyrights and/or exclusive musical publishing rights and/or exclusive administration rights to compositions embodied in the INFRINGING MASTER, the INFRINGING REMIX and INFRINGING INSTRUMENTAL REMIX. In consideration for such rights, Plaintiff alleges that BROOKLYN DUST and UNIVERSAL agreed to perform a variety of services, including but not limited to, 1) securing any and all necessary rights from third parties in connection with the use of pre-existing works incorporated into said derivative and infringing compositions, 2) licensing, administering and otherwise authorizing the mechanical, performance, synchronization and other publishing rights in said derivative infringing compositions, 3) collecting mechanical, performance, synchronization and other income derived from the exploitation of said publishing rights in such derivative infringing compositions, and 4) paying said Defendants a percentage of income derived from the exploitation of publishing rights in and to said derivative compositions. Plaintiff alleges that BROOKLYN DUST's and UNIVERSAL's respective exercise of publishing and/or administration rights in and to the compositions embodied in the INFRINGING MASTER, INFRINGING REMIX and INFRINGING INSTRUMENTAL REMIX violated Plaintiff's exclusive rights in and to his COMPOSITION under the Copyright Act, and that said Defendants profited thereby.

38. On or about March 30, 1992, pursuant to their exclusive recording and or production agreement between the parties, Defendants infringed the statutory copyright in Plaintiff's COMPOSITION, including by duplicating a substantial part of Plaintiff's COMPOSITION in phonorecords serving to reproduce mechanically the recording of the INFRINGING MASTER, INFRINGING REMIX and INFRINGING INSTRUMENTAL REMIX on a "CD Single" entitled *Pass the Mic* (Catalogue Number C215827) (the INFRINGING SINGLE), and by making and distributing, or authorizing the making and distribution, of such phonorecords, and participating in and furthering such infringing acts or sharing in the proceeds therefrom. A true and correct photocopy of the INFRINGING SINGLE jacket artwork demonstrating the inclusion of the INFRINGING MASTER as Track 1, the INFRINGING REMIX as Track 4 and the INFRINGING INSTRUMENTAL REMIX as Track 2, is attached hereto as Exhibit "I," and incorporated herein by this reference.

39. The unauthorized derivative compositions and sound recordings contained on the INFRINGING SINGLE, including the INFRINGING MASTER, INFRINGING REMIX and INFRINGING INSTRUMENTAL REMIX, were reproduced and published in additional formats. Plaintiff alleges each additional adaptation, publication, reproduction, distribution and/or performance of said unauthorized derivative works in other formats (including but not limited to, vinyl, audio cassette and digital audio MP3 formats) constitutes a separate violation of Plaintiff's rights under the Copyright Act.

40. On or about April 13, 1992, Defendants, and each of them, infringed the statutory copyright in Plaintiff's COMPOSITION by duplicating a substantial part of Plaintiff's COMPOSITION in phonorecords serving to reproduce mechanically the recording of the INFRINGING MASTER on the best-selling BEASTIE BOYS full-length CD entitled *Check Your Head* (Catalogue No. CDP7989382) (hereafter, the "INFRINGING CD") and by making and distributing, or authorizing the making and distribution, of such phonorecords, and participating in and furthering such infringing acts or sharing in the proceeds therefrom. True and correct photocopies of jacket artwork from the INFRINGING CD, demonstrating inclusion of the INFRINGING MASTER, are attached hereto as Exhibit "J," and incorporated herein by this reference. Although permission was never sought from Plaintiff or Plaintiff's sole proprietorship publishing company, the inside panel of said jacket artwork acknowledges Plaintiff, his COMPOSITION, and his performance rights agency (ASCAP) as follows: "We'd like to 'knowledge' the following artists and sources of inspiration for their contributions. Thanks.... James Newton for "Choir," (ASCAP) Courtesy of ECM Records." (See Exhibit J at page 3).

41. Plaintiff alleges that the INFRINGING CD was also reproduced and published in a variety of additional audio formats. Plaintiff alleges that each adaptation, publication, reproduction, distribution and/or performance of the INFRINGING CD in other formats (including but not limited to, limited edition vinyl, audiocassette, minidisc and digital audio "MP3" formats) constitutes a separate violation of Plaintiff's rights under the Copyright Act.

42. On information and belief, Plaintiff alleges that the INFRINGING MASTER entitled *Pass the Mic* was at all times considered the “hit single” on said INFRINGING CD, and that the presence of the INFRINGING MASTER on the INFRINGING CD was a primary reason why consumers purchased, and continue to purchase, copies of said INFRINGING CD. On information and belief, Plaintiff further alleges that the INFRINGING CD is one of Defendants' most successful full-length recordings, that said INFRINGING CD has sold over two-million copies in the United States alone, and that said INFRINGING CD was awarded “Double Platinum” status by the Recording Industry Association of America (“RIAA”).

43. Plaintiff alleges that in or about 1992, Defendants, and each of them, authorized the creation, reproduction, distribution and performance of an audio-visual “music video” based on the INFRINGING MASTER, which music video consists of filmed visual performances by Defendants DIAMOND, HOROVITZ, YAUCH and BEASTIE BOYS in synchronization with the composition embodied on the INFRINGING MASTER (“the INFRINGING VIDEO”). Plaintiff alleges that the incorporation of his COMPOSITION into the INFRINGING VIDEO, and the reproduction, distribution and/or performance of this INFRINGING VIDEO over cable and broadcast television constitutes a separate violation of Plaintiff's exclusive rights under the Copyright Act.

44. On information and belief, Plaintiff contends that in or about 1992, Defendants, and each of them, authorized the release of the INFRINGING VIDEO on a music video collection entitled *Beastie Boys - The Skills to Pay the Bills*, which music video collection contains the INFRINGING VIDEO in conjunction with other audio-visual performances of Defendant BEASTIE BOYS (“the INFRINGING VIDEOCASSETTE”). Plaintiff alleges that the adaptation and incorporation of his COMPOSITION into the INFRINGING VIDEOCASSETTE, and the publication, reproduction, distribution and/or performance of such INFRINGING VIDEOCASSETTE constitutes a separate violation of Plaintiff's exclusive rights under the Copyright Act.

45. On information and belief, Plaintiff further alleges that Defendants, and each of them, authorized the “master use” of the INFRINGING MASTER and “synchronization use” of the composition embodied therein in timed relation to one or more motion pictures (the “INFRINGING MOTION PICTURE”). Plaintiff alleges that the adaptation and incorporation of his COMPOSITION as part of the INFRINGING MASTER used in timed relation with the INFRINGING MOTION PICTURE, and the publication, reproduction, distribution and/or performance of same, constitutes a separate violation of Plaintiff's exclusive rights under the Copyright Act.

46. Plaintiff further alleges that in or around the mid-1990s, Defendants, and each of them, authorized the “master use” of the INFRINGING MASTER and “synchronization use” of the composition embodied therein in one or more episodes of the animated MTV series “Beavis and Butthead” (the “INFRINGING ANIMATION”) and in commercially distributed videotapes of same (the “INFRINGING ANIMATION VIDEO”). Plaintiff alleges that the use of the INFRINGING MASTER in timed relation with the INFRINGING ANIMATION and INFRINGING ANIMATION VIDEO, and the publication, reproduction, distribution and/or performance of same, constitutes separate violations of Plaintiff's exclusive rights under the Copyright Act.

47. Plaintiff further alleges that Defendants, and each of them, authorized the sale of the INFRINGING MASTER, INFRINGING REMIX and INFRINGING INSTRUMENTAL REMIX over the Internet in the form of digital audio files, and that Defendants have sold and continue to sell the INFRINGING MASTER, INFRINGING REMIX and INFRINGING INSTRUMENTAL REMIX in the form of digital audio files, and that such adaptation, publication, reproduction, distribution and/or performance of said INFRINGING MASTER, INFRINGING REMIX and INFRINGING INSTRUMENTAL REMIX as digital audio files over the Internet constitutes a separate violation of Plaintiff's exclusive rights under the Copyright Act.

48. Plaintiff further alleges that on or about November 23, 1999, Defendants infringed the statutory copyright in Plaintiff's COMPOSITION, including by duplicating Plaintiff's COMPOSITION in phonorecords containing remastered recordings of the INFRINGING MASTER and INFRINGING INSTRUMENTAL REMIX on a double CD anthology entitled *Beastie Boys Anthology: The Sounds of Science* (Catalogue No. CAP22940) (the “INFRINGING ANTHOLOGY”) and by making and

distributing, or authorizing the making and distribution, of such phonorecords, and participating in and furthering such infringing acts or sharing in the proceeds therefrom. True and correct photocopies of the INFRINGING ANTHOLOGY jacket artwork and excerpts from the accompanying booklet, identifying the INFRINGING MASTER as Disc No. 1, Track No. 13, and the INFRINGING INSTRUMENTAL REMIX as Disc No. 2, Track No. 6, are attached hereto as Exhibit "K," and incorporated herein by this reference.

49. Plaintiff further alleges that on or about November 21, 2000 following Plaintiff's commencement of litigation in this matter, Defendants willfully authorized and the manufacture, reproduction and distribution of the INFRINGING ANTHOLOGY in a limited edition vinyl format ("INFRINGING VINYL ANTHOLOGY"). This INFRINGING VINYL ANTHOLOGY is sold in retail stores for a sum in excess of \$120. Plaintiff alleges that the adaptation, publication, reproduction, distribution and/or performance of the INFRINGING VINYL ANTHOLOGY constitutes a separate violation of Plaintiff's exclusive rights under the Copyright Act.

50. On information and belief, Plaintiff alleges that from approximately 1992 through the present, Plaintiff's recording of his COMPOSITION was, and continues to, be incorporated by Defendants DIAMOND, HOROVITZ, YAUCH and BEASTIE BOYS into derivative live, choreographed, concert performances of *Pass the Mic* (the "INFRINGING LIVE PERFORMANCE"). Plaintiff alleges that from 1992 through the present said Defendants have earned millions of dollars from live concert performances incorporating said INFRINGING LIVE PERFORMANCE, and that each unauthorized INFRINGING LIVE PERFORMANCE constitutes a separate violation of Plaintiff's exclusive rights under the Copyright Act.

51. Plaintiff further alleges that a digital audio recording of at least one INFRINGING LIVE PERFORMANCE (the "INFRINGING LIVE RECORDING") has been published, reproduced, distributed and performed over the Beastie Boys Internet website (<http://www.beastieboys.com>) with the authorization and consent of Defendants, and each of them. A true and correct printout of the BEASTIE BOYS' webpage dated April 17, 2000 containing the INFRINGING LIVE RECORDING is attached hereto as Exhibit "L," and incorporated herein by this reference. A true and correct copy of the INFRINGING LIVE RECORDING is attached hereto on the accompanying CD-R as Exhibit "E," Track 5, and incorporated herein by this reference. Plaintiff contends that the adaptation, publication, reproduction, distribution and/or performance of the INFRINGING LIVE RECORDING constitutes a separate violation of Plaintiff's exclusive rights under the Copyright Act.

52. Plaintiff further alleges, on information and belief, that other audio and/or audio-visual recordings of the INFRINGING MASTER, and/or INFRINGING REMIX, and/or INFRINGING INSTRUMENTAL REMIX have been published, reproduced, distributed and/or performed over the Internet and/or over the BEASTIE BOYS website (<http://www.beastieboys.com>) with the authorization and consent of Defendants, and each of them. True and correct black and white printouts of a Listen.com webpage dated April 17, 2000, a RollingStone.com webpage dated April 17, 2000, and a Launch.com webpage dated April 17, 2000 showing the unauthorized distribution of the INFRINGING VIDEO over the Internet are attached hereto as Exhibit "L," and incorporated herein by this reference. Plaintiff alleges that the adaptation, publication, reproduction, distribution and performance of the INFRINGING MASTER and INFRINGING VIDEO over the Internet as set forth above constitutes a separate violation of Plaintiff's rights under the Copyright Act.

53. On or about November 21, 2000, following the commencement of litigation in this matter, Defendants DIAMOND, YAUCH, HOROVITZ, CAPITOL, UNIVERSAL POLYGRAM, BROOKLYN DUST, GRAND ROYAL, CALDATO, JANUS, CRITERION and VOYAGER willfully authorized the manufacture, reproduction and distribution of an interactive DVD entitled "Beastie Boys: The Criterion Collection" (INFRINGING DVD), containing remixed versions of the INFRINGING MASTER, the INFRINGING REMIX in tandem with the INFRINGING VIDEO. Said INFRINGING DVD also contains a previously unreleased remix of the INFRINGING MASTER comprised solely of Plaintiff's recording of his COMPOSITION, coupled with a drum rhythm and sporadic turntable noise (the INFRINGING DVD REMIX). A true and correct copy of the INFRINGING DVD REMIX is attached hereto on the accompanying CD-R as Exhibit "E," Track 6. Plaintiff alleges the remixed INFRINGING

MASTER, the remixed INFRINGING REMIX and INFRINGING DVD REMIX each constitutes a separate violation of Plaintiff's exclusive rights under the Copyright Act.

54. Plaintiff further alleges that from approximately 1992 through the present, Defendants BMG, SONY and COLUMBIA caused to be manufactured, distributed and sold through their record "clubs" copies of the INFRINGING CD, the INFRINGING ANTHOLOGY and/or INFRINGING DVD each in violation of Plaintiff's statutory copyright in and to his COMPOSITION. Plaintiff alleges that the manufacture, reproduction and distribution of the INFRINGING CD, INFRINGING ANTHOLOGY and INFRINGING DVD by Defendants BMG, SONY and COLUMBIA as set forth above constitutes a separate violation of Plaintiff's rights under the Copyright Act.

55. Notwithstanding the above unauthorized uses of Plaintiff's COMPOSITION by Defendants, Plaintiff did not discover such use until approximately January 2000, when Plaintiff was asked by a student taking his U.C. Irvine course entitled "Charles Mingus Chamber Jazz Ensemble," whether Plaintiff had ever recorded with the BEASTIE BOYS. After responding he had never recorded with the BEASTIE BOYS, Plaintiff was told by the student that his name was included in the liner notes of INFRINGING CD. Approximately one week later, said student provided Plaintiff with a copy of the INFRINGING CD, at which time Plaintiff discovered Defendants' use of his name and the COMPOSITION on liner notes to the INFRINGING CD. With reference to Plaintiff, the INFRINGING CD liner notes state: "We'd like to 'knowledge' the following artists and sources of inspiration for their contributions. Thanks.... James Newton for 'Choir' (ASCAP) Courtesy of ECM Records." (See Exhibit I, page 3).

56. Upon discovering Defendants' unauthorized use of his COMPOSITION, Plaintiff became visibly distressed in front of his U.C. Irvine class and immediately thereafter Plaintiff explained to his class that he should have been paid for the derivative use of his COMPOSITION pursuant to music industry custom and practice. Immediately thereafter, Plaintiff sought and obtained counsel, and prior to the commencement of this litigation contacted Defendants concerning their unauthorized use of his COMPOSITION.

57. Plaintiff alleges that each publication, reproduction, distribution and/or performance of the INFRINGING MASTER as set forth above, constitutes a separate infringement of the COMPOSITION under the Copyright Act, and that Plaintiff is entitled to recover statutory damages in connection with each such infringing act pursuant to [17 U.S.C. § 504](#), based on Plaintiff's registration of the COMPOSITION with the Register of Copyrights prior to the commencement of Defendants' infringing acts as set forth above.

58. Plaintiff further alleges that it is common practice and custom in the music industry to obtain both a license to utilize a pre-existing sound recording and a license to use a pre-existing musical composition embodied in such sound recording whenever excerpts of a sound recording are "sampled," Defendants, and each of them, were aware that a sample license should have been obtained from Plaintiff in connection with the derivative use of the COMPOSITION. The deliberate and intentional refusal of Defendants, and each of them, to contact Plaintiff to obtain a sample license with respect to the derivative use of Plaintiff's COMPOSITION constitutes willful infringement as defined under the Copyright Act. Accordingly, Plaintiff is entitled to recover the maximum amount of statutory damages available under the Copyright Act based upon Defendants' deliberate and willful infringement of Plaintiff's exclusive rights.

59. Plaintiff has complied with all statutory requirements and applied to secure federal statutory copyright for said COMPOSITION under the copyright laws of the United States. Each instance cited above of the unauthorized and unconsented use of Plaintiffs' work constitutes a separate violation of the copyright Plaintiff has retained in said COMPOSITION in accordance with provisions 17 U.S.C. §500 *et seq.* As a direct and proximate result of these violations, Plaintiffs has suffered actual damages and Defendants have profited from the unauthorized use of Plaintiff's work in violation of his copyright. The exact extent of actual damage suffered by Plaintiff and profited by Defendants is as yet not ascertained, as the total nature

and extent of all unauthorized uses by Defendants is presently unknown. However, Plaintiff alleges that Defendants, and their contractors and agents, have commercially utilized, sold and licensed to others derivative recordings and compositions embodying Plaintiff's COMPOSITION as enumerated above, both in the United States and throughout the World. Plaintiff prays leave to amend this Complaint to set forth additional unauthorized uses of the COMPOSITION by Defendants, and the exact nature of actual damages suffered and the gross revenues received by Defendants in connection with such unauthorized uses, in an amount according to proof at trial.

CLAIM TWO INFRINGEMENT OF PLAINTIFF'S INTERNATIONAL COPYRIGHT (ALL DEFENDANTS)

60. Plaintiff repeats and realleges each of the allegations set forth in Paragraphs 1 through 59 inclusive, and by this reference incorporates the same as though fully set forth herein.

61. The United States has entered into international copyright relations with various countries of the world, including through the Universal Copyright Convention.

62. Upon information and belief, from time to time subsequent to February 1992, BEASTIE BOYS recordings and compositions entitled *Pass the Mic*, *Pass the Mic (Pt. 2, Skills to Pay the Bills)* and *Dub the Mic* were reproduced, distributed and publicly performed in various territories of the world outside the United States, including Canada, the United Kingdom and Australia, in direct violation of Plaintiff's international copyright.

63. Upon information and belief, from time to time subsequent to February 1992, phonorecords serving to reproduce mechanically the BEASTIE BOYS recordings of *Pass the Mic*, *Pass the Mic (Pt. 2, Skills to Pay the Bills)* and *Dub the Mic* were sold in various territories of the world outside the United States, including Canada, the United Kingdom and Australia, in direct violation of Plaintiff's international copyrights.

64. By reason of the foregoing, Defendants have infringed Plaintiff's international copyright to an extent to be more fully specified following discovery of Defendants' business records.

WHEREFORE, Plaintiff prays judgment against Defendants DIAMOND, HOROVITZ, YAUCH, BEASTIE BOYS, CALDATO, CAPITOL, GRAND ROYAL, UNIVERSAL, BOOKLYN DUST, JANUS, CRITERON, BMG, SONY and COLUMBIA HOUSE as follows:

1. That this Court grant a permanent injunction forever enjoining Defendants, Defendants' servants, and agents, and anyone acting on behalf of Defendant, from directly or indirectly using Plaintiff's COMPOSITION or any other work based upon Plaintiff's COMPOSITION in any manner which infringes upon the copyright in said COMPOSITION.

2. Direct Defendants to file with the Court and serve on Plaintiff a report setting forth the manner and form in which compliance with said permanent injunction against infringement has been made.

3. At the election of Plaintiff, said election to be made at any time before entry of final judgment, as authorized by [17 U.S.C. §504](#), that Defendant be required to pay damages to Plaintiff of either:

(a) Such actual damage as Plaintiff has sustained as a consequence of Defendant's infringement of Plaintiff's copyright, together with any profits of Defendant that are attributable to said infringement and are not taken into account in computing said actual damages pursuant to [17 U.S.C. §504\(b\)](#); or



(b) Statutory damages in the sum of one hundred and fifty thousand dollars (\$150,000.00) for each willful infringement by Defendants of Plaintiff's copyright and Plaintiff's COMPOSITION, as authorized by 17 U.S.C. §504(c)(2).

4. That Defendant be ordered to render an accounting to Plaintiff of the gross receipts obtained with respect to each use Of the INFRINGING MASTER, INFRINGING REMIX, INFRINGING INSTRUMENTAL REMIX and other derivatives based thereon, in which Plaintiff's copyrighted COMPOSITION was commercially utilized, through the date that Defendants ceased their infringing use.

5. That the Court impose a constructive trust upon such sums by which it may be found Defendants have been unjustly enriched, and for such other forms of equitable and legal relief as may be reasonable including but not limited to declaratory judgment and findings in favor of Plaintiff.

6. That Defendants be ordered to reimburse Plaintiff his attorneys' fees and reasonable costs incurred in connection with the aforementioned action; and

7. For such other and further relief as the Court deems just and appropriate in the premises.

JURY DEMAND

Plaintiff respectfully demands a jury trial of all issues in this case.

Date: February 22, 2001
LAW OFFICE OF ALAN DORN

By: , ALAN KORN, Attorneys for Plaintiff, James W. Newton, Jr., dba Janew Music.....