

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

APPLE CORPS. LIMITED and	:	
SUBAFILMS LTD.,	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
	:	
BUTTON MASTER, P.C.P., Inc.	:	NO. 96-5470
and PHILIP CECCOLA,	:	
Defendants.	:	

**MEMORANDUM AND ORDER**

Yohn, J.

March , 1998

Plaintiffs Apple Corps Limited (“Apple”) and Subafilms Ltd. (“Subafilms”) bring this action against defendants Button Master, P.C.P., Inc., and Philip Ceccola (“Ceccola”).<sup>1</sup> Plaintiffs contend that Ceccola, doing business as Button Master, misappropriated and infringed their property rights in the musical group, The Beatles, by manufacturing and selling pin-on buttons featuring the name and likeness of The Beatles and certain trademarks and copyrighted images belonging exclusively to plaintiffs. In their eleven-count complaint, plaintiffs seek recovery for trademark infringement, in violation of § 32(1) of the Lanham Act, 15 U.S.C. § 1114(1) (Count I); unfair competition, in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (Count II); trademark dilution, in violation of § 43(c) of the Federal Trademark Dilution

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<sup>1</sup> Defendant P.C.P., Inc. has not answered or appeared in this action.

Act of 1995, 15 U.S.C. § 1125(c) (Count III); copyright infringement, in violation of the Copyright Act, 17 U.S.C. §§ 106 and 501 (Counts IV and V); tortious misappropriation of rights of publicity (Count VI); state trademark infringement and dilution, in violation of 54 PA. CONS. STAT. ANN. § 1124 (Count VII); common law unfair competition (Count VIII); unjust enrichment (Count IX); constructive trust (Count X); and seizure, impounding, and destruction of counterfeit and infringing products, pursuant to 15 U.S.C. §§ 1116(d) and 1118, and 17 U.S.C. § 503 (Count XI). See Complaint, Counts I-XI. The court has federal question jurisdiction over plaintiffs' federal law claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over their state law claims pursuant to 28 U.S.C. § 1367.

Plaintiffs have moved for summary judgment against Ceccola on Counts I, II, IV, V, and VI, as to liability only. See Motion of Plaintiffs Apple Corps Limited and Subafilms Ltd. for Summary Judgment; Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's Mem.") at 1.<sup>2</sup> Ceccola has not filed any response to this motion. For the reasons stated below, plaintiffs' motion will be granted in part and denied in part. Specifically, the court will grant Apple's motion for summary judgment on its claims for trademark infringement and unfair competition with respect to Apple's registered trademark in the name, "The Beatles" and its unregistered trademark in "The Beatles" logo with the elongated "b" and "t" letters. The court will also grant

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<sup>2</sup> Plaintiffs have not requested summary judgment on Counts III, VII, VIII, IX, X, or XI. Although plaintiffs have brought this action against three defendants--Ceccola, Button Master, and P.C.P., Inc.--they have moved for summary judgment only against Ceccola. See Motion of Plaintiffs Apple Corps Limited and Subafilms Ltd. for Summary Judgment. In this memorandum and order, the court will therefore address plaintiffs' claims only with respect to defendant Ceccola.

summary judgment in favor of Apple on its claim for misappropriation of its right of publicity, and will grant summary judgment in favor of Subafilms on its claim for copyright infringement.

### **Background**

Apple is the successor in interest to The Beatles and is wholly owned by Paul McCartney, George Harrison, Richard Starkey (who is professionally known as “Ringo Starr”), and Yoko Ono Lennon, the widow of John Lennon. Apple has managed the business affairs of The Beatles since 1967. See Aspinall Decl. ¶ 2. By letter agreements dated March 5, 1980, McCartney, Harrison, Starr, and Lennon each assigned to Apple “the merchandising and other intangible rights in the name ‘The Beatles,’ and in the likenesses and performances of the [individual performers] as Beatles, to the extent not previously distributed to Apple Corps.” Exhibit 1 to Aspinall Decl. Apple registered “The Beatles” trademark with the Patent and Trademark Office and received a federal registration number on February 16, 1993, effective July 2, 1986. See Aspinall Decl. ¶ 4; Exhibit 3 to LiCalsi Aff.

From October 1985 through October 1995, Apple exploited its proprietary rights in The Beatles through its exclusive licensee, Determined Productions, Inc. See Aspinall Decl. ¶ 7. Since November 1995, Apple has exploited its rights through Sony Signatures. See id. As Apple's exclusive licensing agent, Sony Signatures has the sole authority--subject to Apple's approval and express authorization--to license the use of The Beatles' name, likeness, trademarks, and copyrighted images in connection with

the manufacture, distribution, and sale of merchandise. See id. Apple has authorized Sony Signatures to license the use of The Beatles' name, likeness, trademarks, and copyrighted images in connection with a wide variety of merchandise, including lapel pins and buttons. See id. ¶ 8.

An affiliate of Apple, Subafilms owns the copyrights in thirty-nine animated television programs based on and featuring The Beatles. See id. ¶ 5. Subafilms also owns the copyright in The Beatles' full-length animated film, "Yellow Submarine." See id. ¶ 6; Exhibits A, B, and C to Complaint; Exhibit 4 to LiCalsi Aff.

Ceccola, doing business as Button Master, manufactures and sells laminated, pin-on buttons featuring the name and likeness of The Beatles as well as titles and phrases from The Beatles' record albums, compact discs, motion pictures, and songs. Ceccola alleges (and for purposes of this motion, it is accepted as true) that he entered into separate contractual agreements with John Lennon, Paul McCartney, George Harrison, and Ringo Starr in the 1970s. Specifically, he entered into the first of these agreements with John Lennon in November 1974 and the last of these agreements with Ringo Starr in November 1977. See Exhibit 9 to LiCalsi Aff. Each of these agreements provides that Ceccola may sell up to "1,000 of any given image" of the individual performer "in exchange for 5% of the gross sales." Id.<sup>3</sup> Each agreement further provides that royalties are to paid directly to the named performer, to the performer's favorite charity, or "to Apple Corp. if it should still be in existence." Id. In addition, each

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<sup>3</sup> Ceccola's agreement with Paul McCartney uses slightly different language, providing that Ceccola may sell "up to 1,000 of any graven image." Exhibit A. His agreement with Ringo Starr provides that he may sell "a maximum of 1,000 of any given piece." Id.

agreement provides that the named performer is guaranteed a minimum of \$200 per year in royalties. See id. Ceccola has never paid any royalties or any percentage of the gross sales earned on the manufacture and sale of buttons using the name or likeness of McCartney, Harrison, Starr, or Lennon directly to the individual performers, their favorite charities, or to Apple. See Ceccola Dep. at 221, 331-340, 357-361, 392-396.

Customers purchase Ceccola's merchandise at "rock and roll" expositions and fairs throughout the country. At these fairs, Ceccola distributes a promotional flyer that lists both a local Philadelphia number and a toll-free "800" number for nationwide "cash on delivery" purchases. See Ceccola Dep. at 49-91, 106-118, 130-132, 149-164; Simmons Aff. ¶¶ 2-5; Exhibits A, B to Simmons Aff. During the early 1980s, Ceccola sold his buttons in his store, Button Master, located in Wildwood, New Jersey. See Ceccola Dep. at 55-59. He also advertised his buttons in rock and roll magazines. See id. at 65-66, 354.

At a marketing event and festival known as Beatlefest '96-New York Metro, held at the Meadowlands Hilton Hotel in New Jersey from March 15 through March 18, 1996 ("Beatlefest '96"), Ceccola maintained a booth where he displayed buttons that featured pictures of The Beatles, titles from The Beatles' record albums and compact discs, and images from the Cartoon Series and the film, Yellow Submarine. See Ceccola Dep. at 114-116; Simmons Aff. ¶ 2. Plaintiffs' private investigator attended Beatlefest '96, stopped by Ceccola's booth, and obtained a Button Master wholesale order form. See Simons Aff. ¶ 2; Exhibit A to Simmons Aff.

Plaintiffs' counsel wrote to Ceccola by certified letter dated April 17, 1996,

demanding that he stop manufacturing and selling buttons and any other merchandise featuring The Beatles' name and likeness. See LiCalsi Aff. ¶ 15; Exhibit 6 to LiCalsi Aff. The letter was returned unclaimed. See LiCalsi Aff. ¶ 15.

Plaintiffs' private investigator subsequently placed a telephone order with Ceccola for 1000 buttons, including four each of over 200 different buttons using the name and likeness of The Beatles. See Simmons Aff. ¶ 4. After plaintiffs' investigator received these buttons, plaintiffs' attorney sent Ceccola another certified letter on June 28, 1996, demanding that he stop infringing plaintiffs' trademark, copyright, and publicity rights. Counsel sent this letter to three addresses uncovered by plaintiffs' investigator. However, Ceccola failed to respond to this letter. See LiCalsi Aff. ¶ 17; Exhibit 7 to LiCalsi Aff. Plaintiffs thereupon commenced this action.

During the pendency of this lawsuit, Ceccola has continued to sell buttons featuring The Beatles' name, likeness, trademarks, and copyrighted images. Specifically, he sold these buttons at a recent Chicago Beatlefest, from August 16 to August 18, 1996. See LiCalsi Aff. ¶ 18; Ceccola Dep. at 107-118.

### **Standard of Review**

Summary judgment is to be granted upon motion of any party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Any issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477

U.S. 242, 248 (1986). The court must make its determination after considering the facts and all reasonable inferences drawn from them in the light most favorable to the nonmoving party. See id. at 255-56.

The moving party bears the initial burden of showing that there is an absence of evidence to support the nonmoving party's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, "an adverse party may not rest on the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party must specifically identify evidence of record which supports its claims and upon which a verdict in its favor may be based. See Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995) (citation omitted).

The court, however, may not grant an uncontested summary judgment motion without making an inquiry into the merits of the moving party's motion. See U.S. Dist. Ct. E.D. Pa. L. Rule 7.1(c).<sup>4</sup> Rule 56(e) expressly provides that the court may grant a motion for summary judgment only "if appropriate," even if the nonmoving party fails to oppose or to answer the motion. See Mellon Bank, N.A. v. Arentz, 1995 WL 314521 at \*2 n. 1 (E.D. Pa. May 22, 1995). Where, as here, the moving party bears the burden of proof on the relevant issues, summary judgment is appropriate if the court determines

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<sup>4</sup> Local Rule 7.1(c) provides: "[A]ny party opposing [a] motion shall serve a brief in opposition, together with such answer or other response as may be appropriate, within fourteen (14) days after the service of the motion and supporting brief . . . In the absence of a timely response, the motion may be treated as uncontested except that a summary judgment motion, to which there has been no timely response, will be governed by Fed. R. Civ. P. 56(c)."

that the “facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law.” Anchorage Assocs. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 175 (3d Cir. 1990).

## Discussion

### I. Trademark Infringement and Unfair Competition

Apple seeks summary judgment as to liability only on its claim for federal trademark infringement, pursuant to 15 U.S.C. § 1114(1),<sup>5</sup> and its claim for federal unfair competition, pursuant to § 43(a) of the Lanham Act.<sup>6</sup> Apple argues that Ceccola intentionally reproduced and used its registered and unregistered trademarks in violation of these statutes.

The law of trademark infringement “is but a part of the law of unfair competition

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<sup>5</sup> 15 U.S.C. § 1114(1) provides, in relevant part:

Any person who shall, without the consent of the registrant . . . use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided.

15 U.S.C. § 114(1).

<sup>6</sup> Section 43(a) of the Lanham Act provides, in relevant part:

Any person who . . . uses in commerce any word, term, name, symbol, or device . . . which . . . is likely to cause confusion, or cause confusion, or cause mistake, or to deceive . . . as to the origin, sponsorship, or approval of his or her goods . . . by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

and the same test is applied in determining each claim.” American Footwear Corp. v. General Footwear Co., 609 F.2d 655, 664 (2d Cir. 1979), cert. denied, 445 U.S. 951 (1980) (quotation omitted); see also Fisions Horticulture, Inc. v. Vigoro Industries, Inc., 30 F.3d 466, 473 (3d Cir. 1994); New West Corp. v. NYM Co. of California, Inc., 595 F.2d 1194, 1201 (9th Cir. 1979) (“Whether we call the violation infringement, unfair competition or false designation of origin, the test is identical.”).

A plaintiff establishes federal trademark infringement by proving that “(1) the marks are valid and legally protectable; (2) the marks are owned by the plaintiff; and (3) the defendant's use of the marks to identify goods or services is likely to create confusion concerning the origin of the goods or services.” Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 192 (3d Cir. 1990).

The first prong of this test is satisfied if the mark at issue is federally registered and has become “incontestable” within the meaning of 15 U.S.C. §§ 1058 and 1065. Id. at 194.<sup>7</sup> If the mark is not federally registered or has not achieved incontestability,

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<sup>7</sup> Section 1065 provides, in relevant part:

- [T]he right of the registrant to use [a] registered mark in commerce for the goods or services on or in connection with which such registered mark has been in continuous use for five consecutive years subsequent to the date of such registration and is still in use in commerce, shall be incontestable: *Provided*, That--
- (1) there has been no final decision adverse to registrant's claim of ownership of such mark for such goods or services, or to registrant's right to register the same or to keep the same on the register; and
  - (2) there is no proceeding involving said rights pending in the Patent and Trademark Office or in a court and not finally disposed of; and
  - (3) an affidavit is filed with the Commissioner within one year after the expiration of any such five-year period setting forth those goods or services stated in the registration on or in

validity is satisfied if the mark is inherently distinctive. See Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 291-92 (3d Cir.), cert. denied, 502 U.S. 939 (1991) (citations omitted). Distinctive marks include words, symbols, and pictures which are in “common linguistic use but which, when used with the goods or services in issue, . . . [do not] describe any ingredient, quality or characteristic of those goods or services.” Ford Motor, 930 F.2d at 292 n.18 (citation omitted).<sup>8</sup>

If the mark is merely descriptive, however, the plaintiff must demonstrate that it has secondary meaning. The plaintiff can establish secondary meaning by showing that “in the minds of the public, the primary significance of [the mark] . . . is to identify the source of the product rather than the product itself.” Id. at 292 (quoting Freixenet, S.A. v. Admiral Wine & Liquor Co., 731 F.2d 148, 152 (3d Cir. 1984)).

The second prong of the test--ownership--is satisfied if a federally registered

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connection with which such mark has been in continuous use for such five consecutive years and is still in use in commerce, and the other matters specified in paragraphs (1) and (2) of this section; and

(4) no incontestable right shall be acquired in a mark which is the generic name for the goods or services or a portion thereof, for which it is registered.

15 U.S.C. § 1065.

<sup>8</sup> Trademark law evaluates marks along a continuum of distinctiveness, from the nondistinctive to the inherently distinctive: Marks are (1) generic, (2) descriptive, (3) suggestive, or (4) arbitrary or fanciful. Generic marks are interchangeable with the products themselves. Descriptive marks merely describe the product. A suggestive mark suggests the product, but the suggestion requires “imagination, thought or perception.” An arbitrary or fanciful mark has no meaning related to the product; rather, it is a name or a made up word. Distinctive marks include those which are suggestive, arbitrary or fanciful. See Cave Springs, Inc. v. Zommers, Inc., 1997 WL 537405, at \*3 (E.D. Pa. July 31, 1997) (citing Dranoff-Perlstine Ass'n v. Sklar, 967 F.2d 852, 855 (3d Cir. 1992); Berner Int'l Corp. v. Mars Sales Co., 987 F.2d 975, 979 (3d Cir. 1993)). The characterization of a mark is a factual issue for the jury. See id.

mark becomes incontestable within the meaning of 15 U.S.C. §§ 1058 and 1065. See Ford Motor, 930 F.2d at 291; 15 U.S.C. § 1115(b) (“To the extent that the right to use the registered mark has become incontestable under section 1065 of this title, the registration shall be conclusive evidence of . . . the registrant's ownership of the mark . . .”). Federal registration, alone, is prima facie evidence of the registrant's ownership of the mark. See 15 U.S.C. § 1115(a). A plaintiff can establish ownership rights in an unregistered mark by showing that it was the first party to adopt and continuously to use the mark in commerce. See Ford Motor, 930 F.2d at 292 (citations omitted).

The third prong of the test is likelihood of confusion, which exists “when the consumers viewing the mark would probably assume that the product . . . it represents is associated with the source of a different product . . . identified by a similar mark.” Scott Paper Co. v. Scott's Liquid Gold, Inc., 589 F.2d 1251, 1229 (3d Cir. 1978). “Proof of actual confusion is not necessary; likelihood is all that need be shown.” Opticians Ass'n, 920 F.2d at 195. The showing of proof that a plaintiff must make for this requirement depends on whether the goods or services offered by the trademark owner and the alleged infringer are in direct competition. The Court of Appeals for the Third Circuit has adopted a ten-factor test to determine likelihood of confusion when the plaintiff and defendant deal in non-competing products or services. The factors include:

- (1) the degree of similarity between the owner's mark and the alleged infringing mark;
- (2) the strength of the owner's mark;
- (3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase;
- (4) the length of time defendant has used the mark without evidence of actual confusion arising;
- (5) the intent of the defendant in adopting the mark;
- (6) the evidence of actual confusion;
- (7) whether the goods, though not competing, are marketed through the same channels of trade and advertised through the same media;
- (8) the extent to which the targets of the parties' sale efforts are the same;
- (9) the

relationship of the goods in the minds of the public because of the similarity of function; (10) other factors suggesting that the consuming public might expect the prior owner to manufacture a product in the defendant's market.

Ford Motor, 930 F.2d at 293 (quoting Scott Paper Co., 589 F.2d at 1229). Although the court has not had occasion squarely to consider the issue of likelihood of confusion in a competing products case, it has explained, in dicta, that when the trademark owner and the alleged infringer “deal in competing goods or services, the court need rarely look beyond the marks [themselves].” Fisions, 30 F.3d at 472 (citations omitted). In such cases, the court should focus on the marks to determine whether they are “confusingly similar.” Id. (citing Country Floors, Inc. v. Gepner, 930 F.2d 1056, 1063 (3d Cir. 1991)). Each of the marks must be compared in its entirety. See Country Floors, 930 F.2d at 1065.

A. The Beatles' Name and Logo

Apple argues that Ceccola has infringed both its registered trademark in the name “The Beatles,” see Plaintiffs' Mem. at 14, and its unregistered trademark in “The Beatles” logo with the “big 'B' and long 't'” letters (“the unregistered mark”). See Plaintiffs' Mem. at 16. In order to satisfy the first prong of the test for trademark infringement with respect to its unregistered mark, Apple must show either that the mark is inherently distinctive or that it has acquired secondary meaning. See Ford Motor, 930 F.2d at 291-92. Apple must make the same showing for its registered mark because it has submitted no proof that the mark has become incontestable within the meaning of 15 U.S.C. § 1065. See 15 U.S.C. § 1065 (requiring the registrant to file an

affidavit with the Commissioner between the fifth and sixth years of registration, stating that the mark has been registered, that it has been in continuous use for five consecutive years, and that there are no pending proceedings and have been no adverse decisions concerning the registrant's ownership or right to registration).

There is no question that both Apple's registered mark and unregistered logo are distinctive. "The Beatles" is an arbitrary name--a word that is in "common linguistic usage but which, when used with the goods . . . in issue, neither suggest[s] nor describe[]s any ingredient, quality or characteristics[] of those goods . . . ." Ford Motor, 930 F.2d at 292 n.18. Apple has thus satisfied the first prong of the test for trademark infringement with respect to its registered and unregistered marks in the name, "The Beatles."

In order to satisfy the second prong of the test, Apple must show that it owns the marks. Apple has satisfied this prong with respect to its registered mark because registration is prima facie evidence of a registrant's ownership of a mark, see 15 U.S.C. § 1115(a), and Ceccola has not submitted any evidence suggesting otherwise. Apple acquired ownership rights in the unregistered mark as part of its contractual agreement with The Beatles, the first party to adopt and continuously to use the mark in commerce. See Exhibit 1 to Aspinall Decl.<sup>9</sup>

The court also finds that there is no genuine issue of material fact as to the third prong of the test, likelihood of confusion. Because Apple and Ceccola deal in competing goods, the court will begin its analysis by focusing on the marks to determine

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<sup>9</sup> The contracts each transfer to Apple "the merchandising and other intangible rights in the name 'The Beatles' . . . ." Exhibit 1 to Aspinall Decl.

whether they are “confusingly similar.” Fisions, 30 F.3d at 472 (citation omitted). Specifically, the court will analyze them under the “sound, sight, and meaning trilogy.” See Bell Publishing Corp. v. Bantam Doubleday Dell Publishing Group, Inc., 1990 WL 55102, at \*3 (E.D. Pa. April 26, 1990) (citing 2 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, § 23:4 (2d ed. 1984)). This test requires the court to compare: (1) the appearance of the marks; (2) the pronunciation of the marks; and (3) the suggestiveness, meaning, or impression created by the marks. See New York Style Bagel Chip Co. v. That's Entertainment, Inc., 1992 WL 46854, at \*8 (E.D. Pa. March 9, 1992).

Application of this test leads to only one conclusion: Ceccola's mark is confusingly similar to Apple's unregistered and registered marks. To begin, there is no question that the marks sound the same. They consist of the same exact two words: “The Beatles.” The marks look the same, too. In Apple's unregistered mark, the letters “b” and “t” are elongated. See Exhibit 5 to LiCalsi Aff. On almost all of Ceccola's buttons, the letters “b” and “t” are similarly elongated. See Exhibit D to Complaint. Admittedly, “The Beatles” logo looks slightly different on some of Ceccola's buttons. For example, on some buttons, the mark appears in block capital letters, see Buttons D-4, E-2, E-4, E-9; on others, the mark appears in script or in lowercase typeface, see Buttons D-5, E-1; and on still another, the mark is printed with an elongated “b” and “s,” see Button D-6, Exhibit D to Complaint. These differences, however, are minor. Consumers are likely to remember the words that they see printed on the buttons, rather than the exact shapes or typefaces of the letters in the words.

There are also slight differences between the appearance of the letters in

Apple's registered mark and the appearance of the letters in Ceccola's mark. Specifically, in Apple's registered mark, none of the letters is elongated, and all of the letters appear in regular typeface. See Exhibit 3 to LiCalsi Aff. In Ceccola's mark, by contrast, some of the letters are elongated and some appear in different typefaces. See Exhibits D, E to Complaint. However, as noted above, these differences in the size and shape of the letters are minor. For purposes of the “sight, sound, and meaning” test, the court concludes that the marks look the same.

The marks satisfy the third part of the test, as well. Because Apple's and Ceccola's marks consist of the exact same name, the marks have the same meaning. There is thus no genuine factual issue as to whether the marks are substantially identical. Under the sight, sound, and meaning test, there is a likelihood of confusion. See Opticians Ass'n, 920 F.2d at 195 (“[L]ikelihood of confusion is inevitable, when, as in this case, the identical mark is used concurrently by unrelated entities”); Brockum Company v. Blaylock, 729 F. Supp. 438, 445 (E.D. Pa. 1990) (finding likelihood of confusion as to the source of “Rolling Stones” T-shirts when defendants intended to sell T-shirts featuring “the very name of the Rolling Stones” adjacent to sales of authorized Rolling Stones merchandise featuring the same mark); cf. Bell Publishing Corp. v. Bantam Doubleday Dell Publishing Group, Inc., 1990 WL 55102 (E.D. Pa. April 26, 1990) (finding likelihood of confusion as to the source of competing puzzle magazines bearing the marks, “Dell” and “Bell”); Nugget Distributors Cooperative of America, Inc. v. Mr. Nugget, Inc., 776 F. Supp. 1012 (E.D. Pa. 1991) (finding likelihood of confusion as to the source of competing fish products bearing the marks, “Nugget” and “Mr. Nugget”).

Applying the Scott Paper factors applicable to non-competing goods yields the same result.<sup>10</sup> The first factor, the “degree of similarity between the owner's mark and the alleged infringing mark,” is equivalent to the sight, sound, and meaning test. See Bell Publishing, 1990 WL 55102, at \*4. The second factor, strength of the owner's mark, favors granting summary judgment to Apple. Apple and its predecessor have used the registered and unregistered marks for over thirty years. In addition, as discussed above, the marks are arbitrary, which enhance their strength. The third factor, the price of the goods, weighs in Apple's favor, as well. Ceccola's buttons are relatively inexpensive (\$.40 to \$.45 each button, see Exhibit A to Simmons Aff.), suggesting that consumers do not take much care in selecting the product. There is no evidence as to the length of time the allegedly infringing mark has been used without evidence of actual confusion (the fourth factor), and there is no evidence of actual confusion (the sixth factor). There is also no evidence that Ceccola adopted “The Beatles” mark “with the intent of obtaining unfair commercial advantage from plaintiff's reputation.” Taj Mahal Enterprises, Ltd. v. Trump, 742 F. Supp. 892 (D. N.J. 1990). The seventh factor weighs in favor of Apple; the evidence shows that the goods are marketed through the same channels of trade and advertised through the same media. See Plaintiffs' Mem. at 19 (“Defendant marketed and sold the Unauthorized Beatles Buttons at Beatlefests, a marketplace for licensed Beatles' products.”). The court

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<sup>10</sup> Although Apple and Ceccola deal in competing goods, courts routinely consider the Scott Paper factors when deciding such cases. See, e.g., Bell Publishing, 1990 WL 55102, at \*4; New York Style Bagel Chip Co., 1992 WL 46854, \*13 (E.D. Pa March 9, 1992). The court agrees that these factors are instructive, even in cases involving competing goods.

concludes that there is a likelihood of confusion under the Scott Paper test.

Because Apple has demonstrated that its registered and unregistered trademarks in the name “The Beatles” are valid and protectable; that it owns the marks; and that Ceccola's use of the marks to identify competing goods is likely to create confusion concerning the origin of these goods, the court grants summary judgment as to liability in favor of Apple on its claims for trademark infringement and unfair competition with respect to its registered and unregistered marks in the name, “The Beatles.”

B. The Green Apple Logo

Apple argues that Ceccola has infringed its unregistered trademark in the green apple logo. See Complaint ¶¶ 14(a), 42-50. Apple contends that the first prong of the test for trademark infringement is easily satisfied: “the validity and protectability of the many unregistered marks wrongfully appropriated by defendant, including, inter alia, . . . Apple's green apple logo . . . are indisputable.” Plaintiff's Mem. at 16. According to Apple, the green apple logo is “distinctive and immediately associated in the mind of the consuming public with only one source and sponsor--The Beatles.” Id.

The court agrees that there is no genuine issue of material fact as to whether the green apple is a distinctive mark. This symbol does not “describe any ingredient, quality or characteristic” of Apple's Beatles merchandise. See Ford Motor, 930 F.2d at 292 n.18 (citation omitted). It is neither descriptive nor necessarily associated with products such as The Beatles' buttons. See Midway Mfg. Co. v. Bandai-America, Inc., 546 F. Supp. 125, 155 (D. N.J. 1982), aff'd, 775 F.2d 70 (1985), cert. denied, 475 U.S.

1047 (1986). No reasonable jury could conclude otherwise.

However, the court finds that there are genuine issues of material fact as to the second and third prongs of the test for trademark infringement. Apple has not submitted any evidence on the issue of ownership; it has not shown that it was the first party to adopt this trademark and continuously to use it in commerce. See Ford Motor, 930 F.2d at 292 (citations omitted).

There is also a genuine issue of material fact as to likelihood of confusion. Some of Apple's buttons display an image of a very small apple immediately next to the words "Apple Corps Limited." See Exhibit 5 to LiCalsi Aff. It is not clear from Apple's exhibits that this apple is indeed of a green color. See id. Apple has submitted into evidence only one button, sold by Ceccola, featuring the image of an apple. This apple is red and is considerably larger than the one that appears on Apple's buttons. See Button D-4, Exhibit D to Complaint. There remains a genuine issue of material fact as to whether these marks are confusingly similar.

C. Titles, Words, and Phrases from Record Albums, Compact Discs, Motion Pictures, and Songs

Apple argues that Ceccola has infringed its unregistered trademarks in certain titles from its record albums, compact discs, motion pictures, and songs, see Complaint ¶¶ 14(b), (c), 42-50, as well as in certain words and phrases from its songs. See Complaint ¶¶ 14(c), 42-50.

1. Titles from Record Albums, Compact Discs, Motion Pictures, and Songs

Apple contends that the first prong of the test for trademark infringement is easily satisfied: “the validity and protectability of the many unregistered marks wrongfully appropriated by defendant, including, inter alia, . . . the titles 'Abby Road' and 'Sgt. Pepper's Lonely Hearts Club Band,' are indisputable.” Plaintiff's Mem. at 16. According to Apple, these marks are all “distinctive and immediately associated in the mind of the consuming public with only one source and sponsor--The Beatles.” Id.

Titles from The Beatles' record albums, compact discs, and songs can receive trademark protection only if they have acquired secondary meaning. See 1 MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 10.02(1) (3d ed. 1996) (“[C]ourts have given trademark protection to literary titles of one-shot, single works only upon a showing of secondary meaning, even though the title is not descriptive of the contents of the work.”). Although there are numerous cases analyzing secondary meaning, there is “no consensus on its elements.” See Ford Motor Co., 930 F.2d at 292 (quotation omitted). A non-exclusive list of factors which may be considered includes the extent of sales and advertising leading to buyer association, length of use, exclusivity of use, the fact of copying, customer surveys, customer testimony, the use of the mark in trade journals, the size of the company, the number of sales, the number of customers, and actual confusion. See id. (citations omitted).

The court finds that plaintiffs have not established that there is no genuine issue of material fact as to whether titles from The Beatles' record albums, compact discs, motion pictures, and songs--including “Abby Road,” “Help!,” “A Hard Days' Night,” “Let It Be,” “Magical Mystery Tour,” “Yellow Submarine,” and “Sgt. Pepper's Lonely Hearts Club Band”--have acquired secondary meaning entitling them to trademark protection.

Apple has submitted only one piece of evidence relevant to this issue: Apple contends that, according to the Recording Industry Association of America, Volume 1 of The Beatles' three volume "Anthology" of recordings sold eight million copies in just a little over a year. See LiCalsi Aff. ¶ 4. This fact, standing alone, constitutes a "mere . . . scintilla of evidence in support of [Apple's] position," and is therefore insufficient. Anderson, 477 U.S. at 252.<sup>11</sup> Without more evidence, there remains a genuine issue of material fact as to whether, "in the minds of the public, the primary significance of [the titles] . . . is to identify the source of [the record albums, compact discs, motion pictures, and songs]." Ford Motor, 930 F.2d at 292 (quoting Freixenet, S.A. v. Admiral Wine & Liquor Co., 731 F.2d 148, 152 (3d Cir. 1984)). The court therefore denies Apple's motion for summary judgment on this claim.

## 2. Words and Phrases from Songs

The court also finds that plaintiffs have not established that there is no genuine issue of material fact as to whether the words and phrases from The Beatles' songs have acquired secondary meaning. Words and phrases such as "All You Need Is Love," "I Get By with a Little Help from My Friends," and "Yesterday," see Complaint ¶ 14(c), are neither arbitrary, fanciful, nor suggestive. Arbitrary, fanciful, and suggestive words "almost automatically tell a customer that they refer to a brand." Qualitex Co. v.

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<sup>11</sup> The "fact of copying" is an important factor in the secondary meaning analysis. It should be noted that, although Apple has presented evidence showing that Ceccola copied photographs and pictorial images of The Beatles, see Ceccola Dep. at 82-83, Apple has presented no evidence showing that Ceccola copied titles, words, or phrases associated with The Beatles' record albums, compact discs, motion pictures, and songs.

Jacobson Products Co., Inc., 514 U.S. 159, 162-63 (1995). These words and phrases, by contrast, do not automatically identify the source of Apple's buttons. Apple thus must demonstrate that these words and phrases have acquired secondary meaning.<sup>12</sup>

Apple, however, has failed to make the requisite showing. Apple has, in fact, failed to identify the specific words and phrases in which it claims to have acquired trademark rights. Apple conclusively states that “the wide variety of . . . words, used by defendant on the Unauthorized Beatles Buttons, [have] all . . . acquired enduring association in the mind of the consuming public with only one source or sponsor--The Beatles.” Plaintiffs' Mem. at 18. More proof is needed because the court cannot find on the current record that there is no genuine issue of material fact as to whether Apple has satisfied the first prong of the test for trademark infringement with respect to the words and phrases from The Beatles' songs, it will deny Apple's motion for summary judgment on this claim.

## II. Copyright Infringement

Subafilms seeks summary judgment against Ceccola as to liability on its copyright infringement claim. Specifically, Subafilms contends that Ceccola infringed its copyright in thirty-nine animated television programs based on and featuring The

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<sup>12</sup> The court notes that there is another reason why Apple must show that these “words” and “phrases” have acquired secondary meaning: these “words” and “phrases” are also song titles. As such, they must acquire secondary meaning in order to receive trademark protection. See 1 MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 10.02(1) (3d ed. 1996) (“[C]ourts have given trademark protection to literary titles of one-shot, single works only upon a showing of secondary meaning, even though the title is not descriptive of the contents of the work.”).

Beatles (“the Cartoon Series”) and in The Beatles' full-length animated film, “Yellow Submarine.” See Complaint, Counts IV, V.

Copyright infringement is established if a plaintiff proves that: (1) “it owned the copyrighted material” and (2) “the copyrighted material was copied by the defendant.” Ford Motor Co., 930 F.2d at 290 (citations omitted). Certificates of registration issued by the United States Copyright Office constitute prima facie evidence of the validity and ownership of copyrighted material. See id. at 290-91. A plaintiff demonstrates that a defendant “copied” its material by showing that the defendant infringed any of the copyright owner's five exclusive rights, as set forth in 17 U.S.C. § 106. Id. This section grants a copyright owner the exclusive rights to reproduce (whether in original or derivative form), distribute, perform, and display the copyrighted work. See 17 U.S.C. § 106.<sup>13</sup> Because direct evidence of copying is rarely available, it may be inferentially proven by showing that: (1) the defendant had access to the allegedly infringed work;

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<sup>13</sup> Section 106 of the Copyright Act states in relevant part:  
Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and authorize any of the following:  
(1) to reproduce the copyrighted work in copies or phonorecords;  
(2) to prepare derivative works based upon the copyrighted work;  
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;  
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and  
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.  
17 U.S.C. § 106.

(2) the allegedly infringing work is substantially similar to the copyrighted work; and (3) one of the rights guaranteed to copyright owners by § 106 is implicated by the defendant's actions. See Ford Motor Co., 930 F.2d at 291.

A. Ownership of the Copyrighted Material

There is no genuine issue of material fact as to whether Subafilms owns the copyrights in the Cartoon Series and Yellow Submarine. Subafilms has submitted certificates of registration issued by the United States Copyright Office for all thirty-nine animated television programs in the Cartoon Series and for motion picture titled, "The Yellow Submarine." See Exhibits A-C to the Complaint; Exhibit 4 to LiCalsi Aff. These certificates constitute prima facie evidence that Subafilms owns these materials. See Ford Motor Co., 930 F.2d at 290-91.

B. Copying of the Copyrighted Material

Subafilms must also show that Ceccola copied its copyrighted material. Subafilms has presented a considerable amount of evidence showing that Ceccola cut out and copied photographs and images from various magazines in order to create his own buttons:

- Q: Where does the picture come from [when you make up a button]?  
A: The pictures, we were cutting them out of magazines.  
Q: Were you copying what you cut out of a magazine?  
A: Initially, no. Eventually, yes.

Ceccola Dep. at 52. At his deposition, Ceccola explained that he used his own "personal photographs" of The Beatles and copied them on a photocopy machine "or

. . . cut them out of magazines and then . . . duplicate[d] them using xerography or photocopy copies.” Id. at 83 (emphasis added). He also testified that he believed that his contracts with Lennon, Starr, Harrison, and McCartney gave him permission to sell “any image [of The Beatles] taken by anybody or put together by anybody or anything.” Id. at 349.

This evidence, however, does not conclusively show that Ceccola copied Subafilms' copyrighted work; Ceccola has not conceded that he copied images from the Cartoon Series or Yellow Submarine. The court will therefore consider whether Subafilms has proven copying inferentially by showing that Ceccola had access to its copyrighted work; that the images on Ceccola's buttons are substantially similar to Subafilms' copyrighted images; and that Ceccola's actions implicate at least one of Subafilms' five § 106 rights as a copyright owner.

#### 1. Access

A plaintiff can demonstrate that a defendant had access to its work in one of three ways. It can show that (1) the defendant had direct access; (2) the defendant had access through a third party; or (3) there are “striking similarities” between the works such that there is “no reasonable way that the defendant could have arrived at the end product without copying the plaintiff's work.” Roginski v. Time Warner Interactive, Inc., 907 F. Supp. 821, 825 (M.D. Pa. 1997); Lipton v. Nature Co., 71 F.3d 464, 471 (2d Cir.1995); Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th Cir.), cert. denied, 484 U.S. 954, 108 S. Ct. 346 (1987).

There is no evidence that Ceccola had direct access to the Cartoon Series or

Yellow Submarine. Nor is there evidence that Ceccola had access to these works through a third party. However, Subafilms has submitted evidence establishing striking similarities between Subafilms' copyrighted images and the images featured on Ceccola's buttons. A visual comparison of the images can lead to only one conclusion: the similarities in facial characteristics, expressions, hair, and clothing are so striking that "the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded." Roginski, 967 F. Supp. at 826-27. In "virtually every detail," Midway Mfg. Co. v. Dirkschneider, 543 F. Supp. 466, 482-83 (D. Neb. 1981), Ceccola's images are identical to Subafilms'. See Exhibits F, G to Complaint.<sup>14</sup> Ceccola's deposition testimony that he created his Beatles buttons by photocopying images that he cut out from magazines provides further circumstantial evidence that he had access to the images in the Cartoon Series and Yellow Submarine. See Roginski, 967 F. Supp. at 827 (noting that some courts require plaintiffs to "present additional circumstantial evidence to establish a reasonable probability of access").

## 2. Substantial Similarity

In addition to establishing that Ceccola had access to Subafilms' copyrighted images, Subafilms must also show that the images are substantially similar to one

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<sup>14</sup> Some courts require the plaintiff to present expert testimony when the plaintiff seeks to establish that two works are strikingly similar, without first establishing direct proof of defendant's access to the copyrighted work. See, e.g., Testa v. Janssen, 492 F. Supp. 198, 203 (W.D. Pa.1980). However, this court holds that expert testimony is not needed in cases, such as this one, where the "subject matter is not in a technical field such that the trier of fact is unable to make the determination." Blue Fish Clothing, Inc. v. Kat Prints, 1991 WL 71113, at \* 7 (E.D. Pa April 29, 1991); M.S.R. Imports, Inc. v. R.E. Greenspan Co., Inc., 1983 WL 1778, at \*11 (E.D. Pa April 27, 1983).

another. "Substantial similarity" is determined through a two-prong test. Id. The first prong, known as the "extrinsic test," asks "whether there is sufficient similarity between the two works in question to conclude that the alleged infringer used the copyrighted work in making his own." Id. (quoting Whelan Associates, 797 F.2d at 1232). The second prong, called the "intrinsic test," asks whether, from a lay perspective, the copying was an unlawful appropriation of the copyrighted work. See Whelan Associates, 797 F.2d at 1232; Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir. 1975).

The court need not engage in a lengthy analysis of the evidence in order to decide this issue because it has already found that there are "striking similarities" between Subafilms' copyrighted images and the images featured on Ceccola's buttons. The "striking similarity" test is a "much more difficult standard than the 'substantial similarities' test." Roginski, 967 F. Supp. at 827 n.10; see also Hofmann v. Pressman Toy Corp., 790 F. Supp. 498, 508 (D. N.J. 1990) ("Striking similarity . . . goes far beyond the measure for substantial similarity required for the second element of a copyright claim."). The court's determination that the similarities between the images are so striking as to infer access to Subafilms' copyrighted material "necessarily determine[s] that the similarities are also so substantial as to warrant an inference that [Ceccola] copied [this material]." Roginski, 967 F. Supp. at 827 n.10.

### 3. Subafilms' Section 106 Rights

In addition to showing that Ceccola had access to its copyrighted material and that he copied this material, Subafilms has also demonstrated that Ceccola's actions

implicate four of its five rights as a copyright owner. Specifically, Subafilms has shown that Ceccola has infringed its rights to reproduce its copyrighted work, to prepare derivative works based upon its copyrighted work, to distribute copies of its copyrighted work to the public by sale, and to display its copyrighted work. See 17 U.S.C. § 106. Summary judgment as to liability in favor of Subafilms on its copyright infringement claim is therefore proper.

### III. Tortious Misappropriation of Right of Publicity

Apple has moved for summary judgment as to liability on its state law claim for tortious misappropriation of its right of publicity in the name and likeness of The Beatles. See Plaintiffs' Mem. at 24.

Pennsylvania recognizes the common law right of publicity, which grants a person an “exclusive right to control the commercial value of his name and likeness and to prevent others from exploiting that value without permission.” Brockum Co., 729 F. Supp. at 445 (citation omitted); Eagles Eye, Inc. v. Ambler Fashion Shop, Inc., 627 F. Supp. 856, 862 (E.D. Pa. 1985) (“Pennsylvania has recognized the right of publicity . . . .”); Vogel v. W.T. Grant Co., 327 A.2d 133, 136 (Pa. 1974) (adopting § 652 of the Restatement (Second) of Torts, Tentative Draft, and thereby recognizing that “appropriation of another's name or likeness for commercial purposes” is one of four causes of action for invasion of privacy). Musical groups as well as individual performers have protectable rights of publicity. See Philadelphia Orchestra Ass'n v. Walt Disney Co., 821 F. Supp. 341, 349 (E.D. Pa. 1993); Bi-Rite Enterprises, Inc. v.

Button Master, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983).<sup>15</sup>

A defendant violates a plaintiff's right of publicity by "appropriating its valuable name or likeness, without authorization, [and using] it to defendant's commercial advantage." Philadelphia Orchestra, 821 F. Supp. at 349; see also Seale v. Gramercy Pictures, 964 F. Supp. 918, 929-30 (E.D. Pa. 1997) (finding no Pennsylvania case law clearly setting forth the elements for a right of publicity claims and predicting that the Pennsylvania Supreme Court will clarify the law by adopting the Restatement (Third) of Unfair Competition).

There is no genuine issue of material fact as to whether Apple owns the right of publicity in the name and likeness of The Beatles. By letter agreements, all four members of The Beatles assigned to Apple their rights in the name and trademark "The Beatles," as well as their rights in their likeness "as Beatles." Exhibit 1 to Aspinall Decl. Apple is therefore the exclusive owner of the right of publicity. There is also no question that Ceccola has appropriated The Beatles' valuable likeness and used it to his commercial advantage. See Ceccola Dep. at 82-83; Exhibits D-H to Complaint.

Ceccola, however, argues in his defense that he is authorized to use the likeness

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<sup>15</sup> The law of Great Britain does not recognize a right to control commercial exploitation of personal names or likenesses. See Nice Man Merchandising Inc. v. Logocroft Ltd., 1992 WL 59133, at \*4 (E.D. Pa. March 18, 1992). When a federal court exercised supplemental jurisdiction over state law claims, such as Apple's right of publicity claim, it must apply the choice of law rules of the forum state. See id. at \*5. Pennsylvania has adopted a rule for deciding conflict of laws questions in tort cases which permits an analysis of the policies and interests underlying the particular issue before the court. See id. As the conduct in this case involves the sale of buttons solely within the United States and has no impact upon free commerce within Great Britain, Pennsylvania common law will be applied. See id.; Bi-Rite, 757 F.2d at 443-46 (applying Massachusetts' choice of law rules and concluding that the right of publicity was applicable).

of The Beatles because he entered into a contract with each of the four Beatles before they assigned their proprietary rights to Apple. See Answer ¶¶ 75-76; Defendant's New Matter Against Apple Corp., Ltd. and Subafilms, Ltd. ¶ 2; Ceccola Dep. at 296. Ceccola believes that the "spirit of [the contracts] does mean that [he] can . . . use [the images] of [The Beatles] on buttons." Ceccola Dep. at 218-19.

The court notes that none of Ceccola's contracts grants him a right of publicity in the likeness of The Beatles as a group. Rather, each contract grants him a right of publicity in the likeness of an individual performer. Therefore, his argument is unavailing; he may not sell buttons featuring the likeness of The Beatles musical group. However, Ceccola may not even place on his buttons the likeness of any one performer (without the likenesses of the other performers). Under Pennsylvania contract law, "one who materially breaches a contract first cannot demand subsequent adherence to the terms of that contract by the other party." Bohm v. Commercial Union Bank of Tennessee, 794 F. Supp. 158, 162 (W.D. Pa. 1992); United States ex rel. E.C. Cernst, Inc. v. Curtis T. Bedwell & Sons, Inc., 506 F. Supp. 1324, 1327 (E.D. Pa. 1981). There is no factual dispute as to whether Ceccola has materially breached his agreement with each of the former Beatles. He has readily admitted that he has never paid any royalties directly to Lennon, Harrison, McCartney, or Ringo, to their pet charities, or to Apple. See Ceccola Dep. at 221; 331-32; 335-40; 358-60; 372-73; see id. at 333 ("I said the heck with it and just did not pay attention to any of the terms of the contract [with John Lennon] because I also thought, well, what the heck, they're never going to find out about it.") The court finds that no reasonable jury could conclude that Ceccola's contracts grant him valid rights of publicity in the likeness of The Beatles as a

group, or in the likenesses of the individual performers. Summary judgment as to liability in favor of Apple on its claim for misappropriation of the right of publicity is therefore proper.

#### IV. Injunctive Relief

A district court may enter a permanent injunction only after considering four factors: (1) the moving party's success on the merits; (2) the probability of irreparable injury to the moving party in the absence of relief; (3) the potential harm to the non-moving party; and (4) the public interest. See Fechter v. HMW Industries, Inc., 879 F.2d 1111, 1116 (3d Cir. 1989) (citation omitted); see also Opticians Ass'n, 920 F.2d at 187.

Apple has succeeded on its claims of trademark infringement and unfair competition with respect to its registered and unregistered trademarks in the name, “The Beatles.” See supra Discussion, Part I.A. Apple has also succeeded on its claim for misappropriation of its right of publicity. See supra Discussion, Part III. Subafilms has succeeded on its claim for copyright infringement. See supra Discussion, Part II.

In this circuit, a prima facie showing of trademark or copyright infringement creates a rebuttable presumption of irreparable harm. See Opticians Ass'n, 920 F.2d at 196; Educational Testing Servs. v. Katzman, 793 F.2d 533, 543-44 (3d Cir. 1986). Ceccola has offered no proof in opposition to this presumption. Even in the absence of this presumption, however, actual irreparable harm is apparent. Irreparable harm arises from the “inherent difficulty of proving damages caused by confusion” and “the impairment of intangible values such as the strength of [a] mark, reputation and good

will.” Schering Corporation v. Schering Aktiengesellschaft, 667 F. Supp. 175, 190 (D. N.J. 1987). The same difficulty in proving impairment of intangible values also arises from Ceccola's appropriation of The Beatles' name and likeness. See Brockum Co., 729 F. Supp. at 446 (concluding that plaintiffs suffered irreparable harm because defendants violated their right of publicity); Winterland Concessions Co. v. Sileo, 528 F. Supp. 1201, 1215 (N.D. Ill. 1981) (same). The court thus finds that the irreparable harm requirement has been met.

Because this court has determined that plaintiffs will suffer irreparable injury unless an injunction issues, this court need next consider whether the issuance of a permanent injunction will unduly harm Ceccola. See Opticians Ass'n, 920 F.2d at 197. The court is satisfied that a permanent injunction will not unduly harm him.

The final consideration is whether the issuance of a permanent injunction furthers the public interest. In a trademark case, the public interest is “most often a synonym for the right of the public not to be deceived or confused.” Opticians Ass'n, 920 F.2d at 197. Having already established that there is a likelihood of consumer confusion created by Ceccola's use of Apple's trademarks, it follows that if such use continues, the public interest will be damaged. Enforcing the federal copyright law and the common law right of publicity furthers the public interest, as well.

Apple is therefore entitled to a permanent injunction, prohibiting Ceccola from using Apple's registered and unregistered trademarks in the name, “The Beatles,” as well as the individual and collective likenesses of The Beatles in connection with the manufacture, distribution, promotion, sale, and offering of buttons. Subafilms is entitled to a permanent injunction, prohibiting Ceccola from using Subafilms' copyrighted

images in connection with the manufacture, distribution, promotion, sale, and offering of buttons.

An appropriate order follows.