Rock band's lawsuit takes aim at videogame

By Susan Butler
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NEW YORK (Billboard) - Cover bands and tribute bands have been a mainstay of the music scene for decades. When a company licenses a composition, it may find that licensing the original master recording is outside the budget or unavailable for licensing. Hiring the original band members to rerecord the song may not be an alternative because of contractual rerecording restrictions in the band's record deal, the members no longer sound like they once did or they may be dead.

So when someone wants to record a cover version of a song, when does it violate the original artist's rights?

Michael Novak, the Detroit-based personal lawyer for the Romantics, says he believes a violation occurs when consumers think they're listening to the original band.

That's the basis of a recent lawsuit by three original members of the Romantics against Activision Publishing and others. And though music publishers have been looking at the solidly growing videogame industry as a strong source of potential license revenue, the Romantics' lawsuit may throw a crimp in the plan.

On November 20, Wally Palmar, Mike Skill, Coz Canler and the Romantics, a.k.a. Master Beat, sued the developers and publishers of "Guitar Hero Encore: Rocks the 80s." They claim that the game's sound-alike recording of "What I Like About You" improperly imitates the band's sound that the members have developed since 1979. The recording makes it "virtually indistinguishable from the authentic version" and confuses consumers into believing that the band actually recorded the music and endorsed the product, the suit claims.

"Guitar Hero" is a series of videogames that play songs through audio speakers while the video monitor on a Sony PlayStation 2, which connects to a simulated guitar, shows color-coded musical notes and animated characters playing guitars. The object of the game is to play the notes in the same order and at the same time as those on the monitor, receiving points for accuracy.

The composition was licensed from copyright holder EMI Music Publishing, but the game developers and publishers did not license the original master recording. Instead, WaveGroup Sound recorded a cover version of the song to sound like the Romantics, the suit claims.
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Filed in the federal District Court in Detroit, the suit alleges claims for violation of the right of publicity, false endorsement and unfair competition. It names as defendants Activision, Harmonix Music Systems, RedOctane and WaveGroup Sound.

About half of the states in this country protect a person's right of publicity -- i.e., the right to prevent others from using his or her identity for commercial purposes without permission. If a state doesn't specifically recognize a right of publicity, it likely protects an individual's right of privacy, which often includes protection of an individual's identity.

But there are limitations in this protection. Only about a dozen states permit heirs of a deceased person to prevent commercial use of the deceased's identity, and then only under certain circumstances. The right is also an individual's right, not a right that a corporation or business entity may claim. And the right of publicity typically only protects a famous, distinctive voice.

In the 1980s, Bette Midler won a lawsuit based on her right of publicity against Ford Motor. The automaker's ad agency hired a sound-alike singer to perform Midler's "Do You Want to Dance" (licensed from the publisher) for the commercial when Midler turned down the offer. Then in the '90s, Tom Waits won a suit against Frito-Lay after the company used a singer to impersonate Waits' voice to sing for a chips commercial.

But Nancy Sinatra lost an unfair competition claim in the 1970s against Goodyear Tire and Rubber. A commercial featured "These Boots Are Made for Walkin','" one of Sinatra's biggest hits. The singers allegedly imitated Sinatra's voice, style and way of dressing. The Ninth Circuit Court of Appeal wrote that the defendants "had paid a very substantial sum to the copyright proprietor to obtain the license for the use of the song and all of its arrangements." To give Sinatra damages for their use of the song would clash with federal copyright law, the court wrote.

In the Romantics' suit, the plaintiffs will likely have to establish that their sound is truly distinctive and argue that a band's sound is protected like that of an individual's sound.

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