

(your name)  
(your address)  
(city, state zip)  
Phone: (your phone number)  
Fax: (your fax number, if any)  
Email: (your email address, if any)  
*Defendant in proper person*

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF (YOUR DISTRICT)**

SLEP-TONE ENTERTAINMENT	)	
CORPORATION, et al.,	)	<b>CASE NO.:</b> (your case number)
	)	
Plaintiff(s),	)	
	)	
vs.	)	
	)	
(NAME OF FIRST DEFENDANT, et al.,)	)	
	)	
Defendants.	)	
_____	)	

**MOTION TO DISMISS**

**COMES NOW**, Defendant (your name), in proper person, and herein moves to dismiss Plaintiff's Complaint on file herein. This motion is made pursuant to Federal Rule of Civil

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Procedure 12(b), the Points and Authorities attached hereto, the pleadings and papers on file herein and any oral argument as may be given at time of hearing.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2012.

By \_\_\_\_\_  
(your name)  
(your address)  
(city, state zip)  
Phone: (your phone number)  
Fax: (your fax number, if any)  
Email: (your email address, if any)  
*Defendant in proper person*

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## **POINTS AND AUTHORITIES**

### **Statement of facts**

Plaintiff, Slep-Tone Entertainment Corporation (“Slep-Tone”) [and Piracy Recovery, LLC (“Piracy Recovery”) which claims to be the successor- in- interest to certain rights formerly belonging to Chartbuster Karaoke] (referred to collectively as “Slep-Tone”)] has in multiple federal district court venues across the country sued hundreds of karaoke hosts (“karaoke jockeys” or “KJs”) and karaoke venues seeking damages for the alleged unauthorized display of the Sound Choice [and Chartbuster] logo(s) which Slep-Tone claims constitutes trademark infringement. Of approximately fifty lawsuits, only one, *In Re Slep-Tone Entertainment Corp. consolidated cases*, Case No. 5:11-cv--32/RS-CJK, filed in the Northern District of Florida, Panama City Division, has gone to trial. There, Slep-Tone finally tried a case against three defendants and received a judgment against two of the defendants totaling only \$9,585.00. No attorney’s fees were awarded. *See* Exhibit 1, Judgment in the case of *In Re Slep-Tone Entertainment Corp. consolidated cases*, Case No. 5:11-cv--32/RS-CJK, filed July 17, 2012 in the Northern District of Florida, Panama City Division. [see end instructions with respect to exhibits]

Instead of litigating cases, Slep-Tone has attempted to force numerous defendants into settling with threats of million dollar judgments and the seizure of the KJ’s equipment. Slep-Tone then generally fails to pursue discovery. *See, i.e.*, Exhibit 2 and 3, Proposed Discovery Plan and Scheduling Orderd filed by the Hot Shots Defendants and the PTs Defendants in the case of *Slep-Tone Entertainment Corporation v. Ellis Island Casino & Brewery, et al.*, Case No. 2:12-cv-00239-KJD-RJJ, filed in the District of Nevada, Southern Division (“Las Vegas case”).

[see end instructions with respect to exhibits] Slep-Tone's trolling for settlements strategy consists of suing multiple, unrelated defendants in regional lawsuits because such joinder of unrelated defendants who are generally in competition with one another increases each defendant's litigation costs making settlement for less than the defendant's estimated attorney's fees more attractive.

Slep-Tone has not sued for copyright infringement. Instead, Slep-Tone has sued for the display of its Sound Choice [and Chartbuster] trademark logo[s] during the playing of a karaoke track from a computer copy. However, the vast majority of Sound Choice discs do not have a "TM" or "®" symbol following the Sound Choice logo on the face of the disc, and none of the Sound Choice discs in this defendant's collection have the TM or ® mark next to the Sound Choice logo when the disc is actually played and the Sound Choice logo is displayed on a television screen. *See* Exhibit 4, Affidavit of (your name) in Support of Motion to Dismiss, para. 2. [see end instructions with respect to exhibits]

Sound Choice discs do contain a warning of a different nature which, if followed to the letter, would not allow for any karaoke performance at any public venue. Such "karaoke shows" are now, and have always been, Slep-Tone's and all other karaoke disc manufactures' bread and butter as the shows introduce people to karaoke, and most karaoke discs are sold to KJs specifically for that purpose. The warning states,

**WARNING: THIS MATERIAL IS PROTECTED BY FEDERAL COPYRIGHT LAWS, UNAUTHORIZED DUPLICATION, PUBLIC PERFORMANCE, OR BROADCAST IS A VIOLATION OF APPLICABLE LAWS. THESE ARE PROFESSIONAL RE-CREATIONS AND NOT RENDITIONS BY THE ORIGINAL ARTIST. *See* Exhibit 4, para. 3.**

.....

This Court should note that this warning makes no mention of copying or displaying the Sound Choice trademark logo and makes no mention of the word “trademark” which is the basis of the present lawsuit. This warning is simply designed to protect the song and music from copyright infringement, and nearly all karaoke venues, which also play background or jukebox music, generally satisfy their obligations to the original artists by paying monthly fees to ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.) and SESAC, Inc.

Thus, the warning on the face of some Sound Choice discs bears no relationship to the present case, and Slep-Tone has without warning, and without clearly identifying the Sound Choice logo as a trademark, sued the defendants in the present case. Nowhere in the Complaint is there any mention of the specific Sound Choice discs which were allegedly observed being played at each individual defendant’s karaoke show making it impossible to determine whether the tracks being played from a computer had specified on the face of the disc from which the track was taken the Sound Choice logo with the appropriate trademark designation.

#### **Standard of review**

“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice,” and “only a complaint that states a plausible claim for relief survives a motions to dismiss.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009). To survive a motion to dismiss a complaint must include “enough facts to state a claim to relief that is plausible on its face,” and this “requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.” *Ashcroft*, 129 S.Ct. at 1960, *quoting*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). Factual allegations “must be enough to

raise a right to relief above the speculative level,” and provide more than, “a suspicion [of] a legally cognizable right of action,” and, “[w]here a complaint pleads facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Toyota Motor Sales, U.S.A., 6 Inc. v. Tabari*, 610 F.3d 1171, 1175-76 (9th Cir. 2010).

To withstand a motion to dismiss, the complaint must set forth sufficient facts to establish all necessary elements of a claim for relief so that the adverse party has adequate notice of the nature of the claim and the relief sought. *Johnson v. Riverside Healthcare*, 534 F.3d 1116, 1123 (9th Cir. 2002); Fed. R. Civ. P. 8(a). The Court is not required to accept as true allegations that are merely conclusory. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action’s elements that is conclusory does not state a claim to relief plausible on its face. *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008).

**Slep-Tone’s allegations are too generalized and conclusory to survive a motion to dismiss.**

Slep-Tone’s Complaint is filled with generalized, conclusory allegations which are not directed to any specific defendant. Most of the allegations are made against all the defendants in mass. In that regard, Slep-Tone’s allegations are formulaic recitations of the elements of its claims and fail to allege specific claims against specific defendants plausible on their face. Slep-Tone’s allegations are generally speculative and have been made in a vain attempt to be consistent with the defendants being liable under the alleged causes of action, but Slep-Tone’s allegations only state Slep-Tone’s suspicion that it has legally cognizable causes of action. Slep-

Tone's Complaint fails to establish all necessary elements of its claims for relief and fails to provide defendants adequate notice of the nature of its claims because Slep-Tone's claims are all based of the defendant's failure to adhere to Slep-Tone's fabricated conditions of tolerance which have no legal basis, and Slep-Tone then simply concludes that defendants must then be liable for acts of counterfeiting as if defendants are duplicating Sound Choice karaoke discs and offering those discs for sale although none of the defendants are so accused. No consumers are alleged to have been fooled into believing that a disc they purchased was an original, genuine Sound Choice disc.

The defendants are not alleged to have sold any discs, counterfeit or otherwise. The defendants are not alleged to have tried to convince any patron of any karaoke venue that karaoke song tracks played from the defendants' computers have been copied to the defendants' computers with any input, sanction or involvement of Slep-Tone or Sound Choice [or Chartbuster]. In fact, as will be demonstrated herein, Slep-Tone cannot input, sanction or involve itself in any way in the copying of its karaoke discs to a computer because Slep-Tone has no authority to authorize or sanction any media or format shifting of its product.

**Slep-Tone's Complaint must be dismissed as it relates to trademark infringement because the defendants have no obligation to inform Slep-Tone or receive permission from Slep-Tone to make a media and format shift.**

Slep-Tone's Complaint makes reference to certain conditions which Slep-Tone has called from time to time "conditions of tolerance" in defining what constitutes a pirated karaoke accompaniment track which allegedly displays a counterfeit Sound Choice trademark. *See, i.e.,* Exhibit 5, Complaint in the Las Vegas case, ¶¶ 71-73. Reference to this arbitrary standard under which Slep-Tone tolerates but does not approve of a computer copy being made from one of its

karaoke accompaniment discs confuses the theory upon which Slep-Tone claims entitlement to relief. *See* Complaint ¶¶ (list the paragraphs of the complaint which mention Slep-Tone's conditions of tolerance).

Slep-Tone claims it never authorizes media-shifting or format-shifting of its karaoke accompaniment tracks for any commercial purpose. Slep-Tone also claims it does not authorize media-shifting or format-shifting *outside its conditions of tolerance*. Thus, while it would appear Slep-Tone authorizes media-shifting and format-shifting copying of its product so long as its conditions of tolerance are met, Slep-Tone cannot actually give any such authority. Because of its contracts with the holders of the copyrighted materials, Slep-Tone cannot and will not approve, authorize or license any media or format shifting of its karaoke disc product. Slep-Tone only *tolerates* such copying by agreeing not to sue so long as its conditions of tolerance are met. *See* Exhibit 4, para. 4, 5.

Clearly not all of Slep-Tone's conditions of tolerance are enforceable. Slep-Tone is not damaged so long as the KJ has 1:1 correspondence meaning that a Sound Choice disk was purchased to back up each copy on the KJ's computer. With proper labeling and warning, and assuming Slep-Tone does not itself have unclean hands, such a condition of tolerance may be tenable. However, Slep-Tone is not damaged if the KJ fails to notify Slep-Tone every time the KJ copies a Sound Choice disc. That conditions of tolerance are excessive because Slep-Tone is not damaged by any failure to comply with the registration or notification condition and because compliance with Slep-Tone's conditions of tolerance enable Slep-Tone to financially benefit by being able to keep track of the KJ for marketing purposes. *See* Exhibit 4, para. 4. The Panama City Court made no mention of the defendant failing to notify Slep-Tone of a media and format



shift or of the defendant failing to register with Slep-Tone but, instead, the Panama City court, which did not consider all the arguments made in this motion, confined its ruling to whether a 1:1 correspondence was maintained.

**Slep-Tone's Complaint must be dismissed because Slep-Tone has come to a court of equity with unclean hands.**

One who comes into equity must come with clean hands. In the present case, Slep-Tone seeks the assistance of this Court to further an illegal relationship and, therefore, is not entitled to relief. *See Loughran v. Loughran*, 292 U.S. 215, 229-30 (1934).

Slep-Tone set up a "safe harbor" website whereby Slep-Tone encourages KJs to make computer copies of its product for ease of putting on a karaoke show so long as the KJ allows Slep-Tone to audit their computer to guarantee a 1:1 correspondence between any song track on the KJ's computer and the song tracks contained in the KJ's Sound Choice karaoke disc library. The KJ must also register with Slep-Tone which allows Slep-Tone to more easily market further product to the KJ. *See Exhibit 4, para. 4.*

Kurt Slep, CEO of Sound Choice, admitted,

We do not have the rights from the Music Publishers (who represent the song writers) to grant the transfer of our music from the CDG to a hard drive, that is why we have not licensed "hard drives" per se. *See Exhibit 4, para. 5.*

Slep-Tone cannot authorize a computer copy being made of its karaoke disc product but encourages KJ's to make such computer copies by setting up its safe harbor whereby a KJ may receive from Slep-Tone a covenant not to sue in return for the KJ abiding by Slep-Tone's conditions of tolerance when making a computer copy of a Sound Choice disc. Since Slep-Tone's Complaint seeks the seizure of defendants' karaoke equipment, Slep-Tone is coming to a

court of equity with unclean hands and is not entitled to the equitable relief it seeks because Slep-Tone is fostering an illegal relationship by encouraging potential copyright infringement.

Slep-Tone is encouraging copyright infringement upon the original artist's works so long as Slep-Tone makes its profit from selling karaoke discs and so long as Slep-Tone can gather marketing information from any KJ who wants to take advantage of technological innovation. Slep-Tone is seeking this Court's assistance to continue its facilitation of copyright infringement. This cannot be allowed, and Slep-Tone's Complaint must be dismissed.

**Slep-Tone cannot prevail under the applicable statutes because the defendants are not alleged to have made a false designation of origin or a false or misleading representation of fact.**

15 U.S.C. § 1125(a)(1) states in pertinent part,

Any person who, on or in connection with any goods or services...uses in commerce any word...name, symbol, ...or any combination thereof, or any false designation of origin, ...or false or misleading representation of fact, which— (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, 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.

To prevail upon a claim for direct trademark infringement, "the moving party must establish (1) ownership of the trademark at issue, (2) use by the defendant, without authorization, of a copy, reproduction, counterfeit or colorable imitation of the moving party's mark in connection with the sale, distribution or advertising of goods and services and (3) that defendant's use of the mark is likely to cause confusion, to cause mistake or to deceive." *Toho Co., Ltd. v. William Morrow and Company, Inc.*, 33 F.Supp.2d 1206, 1210 (C.D. Cal 1998),

*citing*, 15 USC § 1114(a); *E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1288, FN 2 (9th Cir. 1992).

Slep-Tone's Complaint is confusing in its cause of action. In essence, it alleges that the defendants made computer copies of Sound Choice discs to assist them in producing karaoke shows. The projection on the television screen and the music played in the background remained the same except instead of the KJ needing to keep track of a thousand discs, loading and unloading them into a karaoke disc play, the KJ merely needed to search for the correct song track in the KJ's computer and click on the appropriate song. In that regard, nothing has changed in what is projected or heard.

What Slep-Tone alleges through pure speculation is that the KJ would not be able to produce a karaoke show the old fashion way because Slep-Tone speculates that the KJ does not have, or does not *still* have, all the discs to put on the same karaoke show by using all the original discs and tediously feeding them one after another into a karaoke disc player. However, Slep-Tone has failed to allege any defendant has made a false designation of origin or a false or misleading representation of fact.

**There is no likelihood of confusion because Slep-Tone sells to purchasers of Sound Choice karaoke discs and not to patrons of a karaoke bar waiting for their opportunity to sing who do not purchase any karaoke disc from the KJ.**

If the court determines as a matter of law from the pleadings that confusion is unlikely, then the complaint should be dismissed. *Murray v. Cable Nat'l Broadcasting Co.*, 86 F.3d 858, 860 (9th Cir. 1996), *citing*, *Toho Co. Ltd. v. Sears Roebuck & Co*, 645 F.2d 788, 790-791 (9th Cir. 1981). A likelihood of confusion exists when a consumer viewing a service mark is likely to

....

purchase the services under a mistaken belief that the services are, or are associated with, the services of another provider. *Murray*, 86 F.3d at 860-61 (9th Cir. 1981).

Trademark law is concerned with the protection of symbols used to identify a product in the marketplace and to prevent confusion as to its source. *RDF Media Ltd. v. Fox Broad. Co.*, 372 F.Supp.2d 1, 13 (C.D. Cal. 2004). Trademark claims are subject to a commercial use requirement “to secure the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.” *Bosley Med Inst., Inc. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005), quoting, *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992).

The United States Trademark Trial and Appeal Board held in *In re The W W Henry Company, L.P.*, 82 U.S.P.Q.2d 1213 (T.T.A.B. 2007), held that Confusion between the two products carrying nearly the same mark (“PATCH ’N GO” vs. “PATCH & GO”, one a chemical filler sold to plastic manufactures and one a drywall patch sold to do-it-yourselfers, respectively) was unlikely because the two products would be sold “to different classes of purchasers through different channels of trade. Similarly, the Federal Circuit in *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713 (Fed. Cir. 1992), held that confusion because two products carrying nearly the same mark (“E.D.S.” v. “EDS”, one selling data processing services to medical insurers and one selling batteries and power supplies to makers of medical equipment, respectively) was unlikely even though both parties sold products to the medical industry.

In the present case, Slep-Tone has alleged ownership of a valid trademark, but Slep-Tone must also allege likelihood of confusion from the defendant’s use of the mark. Slep-Tone must also allege commercial use of its mark, that its business’s goodwill is being diminished by the

use of its mark and that the relief sought will protect the ability of consumers to distinguish Sound Choice from among competing producers.

Confusion in the present case is unlikely as a matter of law because viewers and participants in karaoke shows are not Slep-Tone customers; Slep-Tone sells Sound Choice karaoke discs to KJs and enthusiasts. Neither the KJ nor the venue sale karaoke discs, and the KJ and venue merely provide a service of putting on karaoke shows. Neither the KJ nor the venue compete with Slep-Tone in the production and marketing of karaoke accompaniment compact discs. The relief requested does not protect the ability of consumers to distinguish Slep-Tone's product from the KJ's or venue's services.

Slep-Tone is not in the business of providing services, so a customer is not likely to be confused about whether Sound Choice is associated with putting on the karaoke show. The consumer is not likely to misspend their money because of any confusion causing them to patronize the venue and spend money at the bar.

Based on the allegations made in the Complaint, confusion is unlikely as a matter of law requiring the dismissal for failure to state a claim.

**Slep-Tone has no claim for a non-trademark use of the Sound Choice mark.**

Infringement laws do not apply to a non-trademark use of a mark. *New Kids on the Block v. New Am. Publ'g, Inc.*, 971 F.2d 302, 307 (9th Cir. 1992). Direct trademark infringement attaches to "those who actually manufacture or sell infringing materials." *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

The KJ and venue are not selling CDs with the Sound Choice trademark on them. Unauthorized disc copies stamped with the Sound Choice trademark would be true counterfeits

of the Sound Choice product. Sound Choice has no case because its mark applies to the marketing of CDs, not to the provision of services.

Neither the KJs nor the venues are alleged to have actually manufactured or sold infringing product materials.

**Slep-Tone has no cause of action for counterfeiting.**

15 U.S.C. § 116(d)(1)(B)(I) defines a “counterfeit mark” as a “counterfeit of a mark that is registered on the principal register...for such goods or services sold, offered for sale, or distributed”.

18 U.S.C. § 2320(e)(1)(A)(iii) defines a “counterfeit mark” as a “spurious mark...that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office.”

The legislative history found in 130 Cong. Rec. H. 12078-79, (joint statement on 1984 trademark counterfeiting legislation) and reprinted in Vol. 8, at p. 34-619, states, “[B]ecause this act is intended to reach only the most egregious forms of trademark infringement, it does not affect cases in which the defendant uses a registered mark in connection with goods or services for which the mark is not registered.” *See also, Gilson on Trademarks*, § 5.19.

To meet the definition of a “counterfeit mark,” “[15 U.S.C.] Section 1116(d) requires that the mark in question be (1) a non-genuine mark identical to the registered, genuine mark of another, where (2) the genuine mark was registered for use on the same goods to which the infringer applied the mark.” *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 945-46 (9th Cir. 2011). In order to sustain a counterfeiting claim a plaintiff must allege and

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prove that the defendant is using the allegedly counterfeit mark in connection with the exact good and services set forth in its registration. *Louis Vuitton*, 658 F.3d at 945-46.

At best, the Sound Choice mark was merely displayed as part of the karaoke show service. The Sound Choice mark are not alleged as having been displayed on the same goods or in the same context as the product sold by Slep-Tone. Defendants are not alleged to have counterfeited anything sold to the public whereby the public was fooled into believing that the goods being sold were manufactured by Sound Choice as, for example, would be the case of a counterfeit Rolex watch sold in Hong Kong for \$40.00 where the buyer might actually believe he got a great deal on a genuine Rolex. The goods and services used during a karaoke show are different from the goods Slep-Tone sales or as genuine Sound Choice discs. Slep-Tone has no cause of action for counterfeiting.

**Any display of the Sound Choice mark was a nominative fair use and is non-actionable.**

The issue of nominative fair use may be considered on a motion to dismiss. *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1466-67 (9th Cir. 1993). Three factors determine whether a nominative fair use has occurred; they are (1) whether the product was “readily identifiable” without use of the mark, (2) whether the defendant used more of the mark than necessary and, (3) whether the defendant falsely suggested he was sponsored or endorsed by the trademark holder. *Toyota Motor Sales, U.S.A., 6 Inc. v. Tabari*, 610 F.3d 1171, 1175-76 (9th Cir. 2010), *citing*, *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796, 801 (9th Cir. 2002).

....

A defendant is not liable under the Lanhan Act for a nominative fair use which includes use of the plaintiff's mark to describe or identify the plaintiff's product where the defendant's ultimate goal is to describe or identify his own product and that it is not necessary for the defendant to affirmatively announce that its product or service is not sponsored by the plaintiff to find that the defendant did not falsely suggest that he was sponsored or endorsed by the trademark holder and that, "A defendant's use is nominative where he or she used plaintiff's [mark] to describe or identify the plaintiff's product, even if the defendant's ultimate goal is to describe or identify his or her own product," and "[w]here use of the trade dress or mark is grounded in the defendant's desire to refer to the plaintiff's product as a point of reference for defendant's own work, a use is nominative." *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 809-11 (9th Cir. 2003).

"[A] defendant who raises the nominative fair use issue need only show that it uses the mark to refer to the plaintiff's trademarked goods or services. The burden then reverts to the plaintiff to show a likelihood of confusion under the nominative fair use analysis." J. Thomas McCarty wrote in 3 J. Thomas McCarthy, *McCarthy On Trademarks And Unfair Competition* § 23.11 (4th ed. 2006 & Supp. 2012),

This Court has the power to determine from its examination of the pleadings whether there has been a nominative fair use as a matter of law and, if so, dismiss Slep-Tone's Complaint.

Slep-Tone is in the business of marketing CDs, a physical product, not putting on karaoke shows, a service not covered by its trademark registration. When a copy of a Sound Choice karaoke disc track is played at a karaoke show, the Sound Choice mark is not displayed to identify the defendant's karaoke services but to identify the origin of the track. Sound Choice is



correctly identified as the origin of the track when the Sound Choice trademark is displayed. Neither the KJ nor the venue are alleged to have falsely suggested they were sponsored or endorsed by Sound Choice. The defendants are not alleged to have displayed the Sound Choice mark more than necessary. Any display of the Sound Choice mark is purely incidental to the playing of the computer copy and merely identifies Sound Choice as the creator of the karaoke disc from which the copy was made.

The KJ's ultimate goal is to identify himself as the one who puts on a show which brings people into the venue. Slep-Tone has not alleged the KJ is using the Sound Choice mark to identify his or her services. The Sound Choice mark is only used to identify the origin of the track. There can be no likelihood of confusion in this regard as neither the KJ nor the venue are alleged to have identified themselves as the creator of the product. Slep-Tone has not alleged the KJ or the venue have falsely suggested they were sponsored or endorsed by Sound Choice or Slep-Tone.

Neither the KJ nor the venue had any affirmative duty to announce Slep-Tone or Sound Choice *did not* sponsor and *did not* endorse their karaoke show. At best, the defendants' reference to Sound Choice's karaoke discs was as a point of reference for the purpose of giving the karaoke singer a choice of song and arrangement. Any display of the Sound Choice mark is a nominative fair use as a matter of law and, therefore, neither the KJ nor the venue are liable for displaying the Sound Choice mark.

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**There is no claim for unfair competition since the standard is the same as for trademark infringement.**

“When trademark and unfair competition claims are based on the same [alleged] infringing conduct, court apply the same analysis to both claims.” *Taho Co., Ltd. v. William Morrow and Company, Inc.*, 33 F.Supp.2d 1206, 1210 (C.D. Cal. 1998), *citing, E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, FN 2 (9th Cir. 1992). “The Ninth Circuit has held that the tests for Federal Trademark Infringement under Title 15 U.S.C. § 1114, False Designation of Origin under Title 15 U.S.C. § 1125 and unfair competition involving trademarks, are the same.” *Visa Intern. Service Ass’n v. Visa Hotel Group, Inc.*, 561 F.Supp. 984, 989 (D. Nev. 1983).

If Slep-Tone has no trademark infringement claim, then it has no unfair competition claim.

**CONCLUSION**

In conclusion, Slep-Tone’s [and Piracy Recovery’s] Complaint should be dismissed in its entirety.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

By \_\_\_\_\_  
(your name)  
(your address)  
(city, state zip)  
Phone: (your phone number)  
Fax: (your fax number, if any)  
Email: (your email address, if any)  
*Defendant in proper person*

.....

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2012, I mailed a true and correct copy of the foregoing MOTION TO DISMISS via first class mail, postage prepaid, in a sealed envelope, by depositing same in a receptacle marked for mailing with the United States Postal Service and addressed to the following:

(list and mail out a copy to the plaintiff's attorney and to all the defendants (or their attorneys) who have appeared in the case)

By \_\_\_\_\_  
(your name)  
(your address)  
(city, state zip)  
Phone: (your phone number)  
Fax: (your fax number, if any)  
Email: (your email address, if any)  
*Defendant in proper person*