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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

MARMOSET, LLC,

Plaintiff,

v.

THE MUSIC BED, LLC,

Defendant.

Case No. 3:14-cv0431

**COMPLAINT FOR
TRADE DRESS INFRINGEMENT,
UNFAIR COMPETITION,
COPYRIGHT INFRINGEMENT**

DEMAND FOR JURY TRIAL

Plaintiff MARMOSET, LLC, for its Complaint against THE MUSIC BED, LLC, states and alleges as follows:

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NATURE OF THIS ACTION

1. This is an action for trade dress infringement, unfair competition, and copyright infringement under the laws of the United States (the Lanham Act, codified at 15 U.S.C. § 1051, *et seq.*, and the Copyright Act, codified at 17 U.S.C. § 501, *et seq.*), and the common law of trademark infringement, misappropriation, and unfair competition.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a), and 15 U.S.C. § 1121.

3. This Court has personal jurisdiction over Defendant because: (a) Defendant has substantial contacts in the State of Oregon related to the claims in this action, (b) Defendant engaged in the wrongful acts alleged herein in the State of Oregon, and/or (c) Defendant purposely directed its wrongful conduct at Plaintiff in the State of Oregon, knowing that the resulting harm likely would be suffered by Plaintiff in the State of Oregon.

4. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) and (c).

PARTIES

5. Plaintiff MARMOSET, LLC. (“Marmoset” or “Plaintiff”) is an Oregon limited liability company having its principal place of business in Portland, Oregon.

6. Marmoset is a specialized boutique music agency, providing original music compositions, music licensing, music supervision, and a wide array of other creative services for film, television, advertising, and other creative endeavors. Marmoset markets, offers, sells, and delivers its products and services through various channels, including through its website, MARMOSETMUSIC.COM (the “Marmoset Website”).

7. Defendant THE MUSIC BED, LLC (“The Music Bed” or “Defendant”) is a Texas limited liability company having its principal place of business in Fort Worth, Texas.

8. The Music Bed markets, offers, and sells music licensing and music composition services through various channels, including through its website, THEMUSICBED.COM (the “TMB Website”). The Music Bed is a direct competitor to Marmoset, and competes with Marmoset through the same channels.

9. Without authorization, The Music Bed has copied, reproduced, displayed, modified, transformed, adapted, and/or distributed copyrightable elements from the Marmoset Website, as described in greater detail below.

10. Separate and distinct from the copyrightable elements of the Marmoset Website, Marmoset owns protectable trade dress comprising the distinctive “look and feel” of the Marmoset Website, as described in greater detail below.

11. Marmoset’s trade dress serves to identify Marmoset as the source of high-quality original music compositions, music licensing, music supervision, and other creative services to the consuming public. Marmoset has invested substantial time, effort and financial resources developing and promoting its trade dress in connection with the promotion and delivery of its products and services. Marmoset’s trade dress has become an asset of substantial value as the public face of Marmoset and as a symbol of Marmoset’s quality products and services and its goodwill. Marmoset’s trade dress is inherently distinctive as applied to its products and services. In the alternative, Marmoset’s trade dress has acquired secondary meaning through Marmoset’s long-term, widespread, and continuous use of its trade dress in commerce.

12. Without authorization, The Music Bed has mimicked and used the distinctive “look and feel” of the Marmoset Website on the TMB Website.

FACTUAL ALLEGATIONS

The Marmoset Website

13. Founded in 2011 in Portland, Oregon, by two born-and-bred Oregon natives, Brian Hall and Ryan Wines, Marmoset has made a name for itself by producing and delivering handcrafted, indie-rock-influenced music to storytellers, filmmakers, and other creative professionals across numerous disciplines. In less than four years, Marmoset has transformed itself from a scrappy, pioneering start-up to an industry-leading, full-service music agency, with work featured in viral brand campaigns, award-winning films, and commercials aired during the Super Bowl and The Academy Awards. Recently highlighted in publications such as Fast Company, Billboard, and 1859 Oregon Magazine, Marmoset is widely recognized as connecting the independent music community to the global advertising and film worlds in ways that previously have not been achieved.

14. Marmoset represents approximately 350 artists and bands for music licensing and makes more than 10,000 songs and tracks available through the Marmoset Website's online music licensing platform. Marmoset also regularly works with dozens of independent composers to create original music scores for its customers and clients.

15. Marmoset created the Marmoset Website to communicate its unique identity and to more effectively promote and deliver its products and services to its customers and clients.

16. Because Marmoset's customers and clients work in digital media, and because nearly all of Marmoset's customers and clients are located outside of Marmoset's home town of Portland, Oregon, the Marmoset Website is where Marmoset interacts with its customers and clients. As a result, the Marmoset Website is the most significant representation and experience of the Marmoset brand, and Marmoset worked diligently to ensure that the Marmoset Website

reflected and embodied the company's character and personality, including its Pacific Northwest roots and indie music positioning. The Marmoset Website is the product of numerous distinct choices (with respect to font, colors, layout, design, photographs, video, etc.) all made to most precisely convey Marmoset's unique identity, products, and services.

17. The Marmoset Website bridges the traditional divide between musicians and filmmakers and other visual storytellers by embracing a story-driven, narrative approach and avoiding specialized music vernacular. For example, the new, innovative music search platform at the core of the Marmoset Website filters and presents Marmoset's hand-curated collection of independent music through the lens of storytellers—via story arc, emotional palette, and main characters. In short, in the Marmoset Website, Marmoset has created a common ground—a place where its customers and clients are able to find music presented in terms that they can instinctively understand.

18. Marmoset invested substantial resources (both of time and money) to the creation and development of the Marmoset Website. The Marmoset Website has received widespread attention, unsolicited recognition and numerous awards for its innovative and distinctive design and user experience. Such recognition and awards include a 2013 Web Visionary Award by Design Week Portland, Site of the Day by both CSS Design Awards and Awwwards.com, and Winner of the Day by CSSWinner, a global platform showcasing and awarding the best websites and promoting innovative web designers and agencies.

19. The Marmoset Website is available to anyone with an internet connection, and Marmoset sells and delivers its products and services via the Marmoset Website to customers and clients located throughout the United States. The Marmoset Website contains photographs,

video, graphics, and text created exclusively for Marmoset. Marmoset owns all rights, title, and interest in and to the Marmoset Website.

The Marmoset Website Trade Dress

20. The Marmoset Website exemplifies the business and values of Marmoset. The Marmoset Website is organic. It is indie. It exhibits a DIY ethic—a bit frayed around the edges, but full of texture and heart and an independent music feel. The Marmoset Website reflects Marmoset’s Pacific Northwest home and the wonderful and beautiful outdoors. And the Marmoset Website embodies Marmoset’s commitment to providing its customers and clients with the tools and resources that they need to tell their stories.

21. The Marmoset Website incorporates a trade dress comprising a distinct “look and feel” of elements. This trade dress includes the placement of photographs, colors, borders, frames, interactive elements, and overall mood, style, and impression. These elements are applied throughout the Marmoset Website in combination to create Marmoset’s trade dress. The Marmoset Website incorporates a distinctive visual design, graphic treatment, and familiar interface that has become readily identifiable by the consuming public as originating from Marmoset.

22. The distinctive and innovative “look and feel” of the Marmoset Website includes the following elements that together and in combination create an overall visual impression unique to Marmoset:

(a) A distinctive palette of colors and image/video filters featuring a clean, modern, and straightforward user interface highlighted by bright, vibrant colors set in an environment/backdrop of organic, outdoor tones and washed-out/high-texture filters;

(b) A home page display featuring a beautiful, full-screen motion picture incorporating a series of short, stylized, slow motion video vignettes of artists and musicians that seeks to quickly affirm to Marmoset’s customers and clients that they’ve landed in the right place by emphasizing Marmoset’s innovative, story-driven approach to music;

(c) An interface that prominently offers the new user two distinct choices—to browse music, or to explore original/custom music;

(d) A long scroll page that includes (i) a featured artists section with a single large image of a featured artist set immediately above five smaller images of select featured artists, with links to the artists’ work, (ii) a section offering a variety of playlists/mixtapes represented by images and descriptions that reflect the story-driven, narrative approach underlying the entire website, and (iii) a section highlighting examples of Marmoset’s work;

(e) The consistent placement and location of certain user options and the company’s logo on each and every page of the Marmoset Website, including (i) the consistent placement and location of the user login, user account registration, and user shopping cart options in the upper right corner of each page, (ii) the consistent placement and location of the Marmoset Radio music player at the bottom of each page, and (iii) the consistent placement and location of the Marmoset company logo in the upper left section of each page;

(f) Marmoset’s revolutionary music filtering and search interface that highlights concepts and language familiar to filmmakers and other visual storytellers, including Marmoset’s “Arc”, “Mood”, and “Energy” filters, in addition to the “Length”, “Genre”, “Vocals”, and “Instrument” filters; and

(g) The use of distinctive, original icons for everything, from the shopping cart icon to the download icon, rather than the common existing icons which are readily available for license on the internet.

The Marmoset Copyrights

23. Marmoset is the owner of U.S. Copyright Registration No. PA 1-882-560, for the work “Marmoset_Opening_Video_-_Brian from Side by Side (trailer)” (the “Marmoset Video Copyright”), a copy of which is attached hereto as Exhibit A.

24. Marmoset is also the owner of all right, title, and interest in and to the copyrightable elements of the Marmoset Website, including the photographs, video, and text, and their compilation and arrangement on the Marmoset Website, to the extent the same are copyrightable (the “Marmoset Website Copyright”).

The Music Bed’s Misappropriation and Infringement of Marmoset’s Trade Dress and Copyrights

25. The TMB Website mimics the “look and feel” of the Marmoset Website, utilizing strikingly and confusingly similar layouts and design elements, including the placement of photographs, colors, borders, frames, interactive elements, and overall mood, style, and impression:

(a) The TMB Website seeks to duplicate the Marmoset Website’s distinctive palette of colors and image/video filters;

(b) Like the Marmoset Website, the home page of the TMB Website features a full-screen motion picture incorporating a series of short, stylized, slow motion video vignettes of artists and musicians (overlaid with white text invoking a story-driven approach to music);

(c) Like the Marmoset Website, the TMB Website prominently offers users two distinct choices—to browse music, or to explore original/custom music—with the two options visually presented as side-by-side rectangular text boxes positioned in the center of the screen (the Marmoset Website identifies the choices as “Browse Music” and “Original Music”, and the TMB Website described the choices as “Browse Music” and “Create a Custom License”);

(d) Like the Marmoset Website, the TMB Website includes a featured artist section using a nearly full-page featured image of a highlighted artist (overlaid with white text identifying the artist and describing the artist’s music) set immediately above five smaller identically-sized images of select featured artists (including the highlighted artist), with links to the artists’ work;

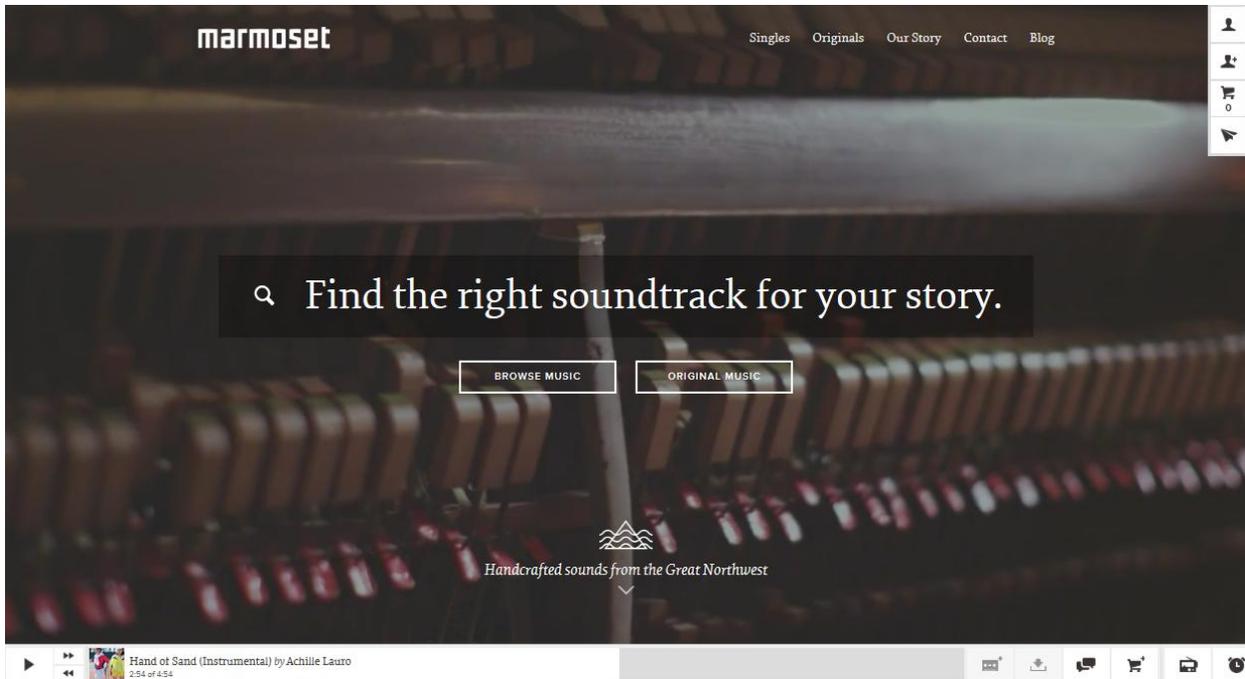
(e) Like the Marmoset Website, the TMB Website includes a section offering a variety of playlists represented by images and narrative descriptions;

(f) Like the Marmoset Website, the TMB Website places a music player at the bottom of the page, places the user login and user account registration options in the upper right corner of the page, and places its company logo in the upper left corner of the page;

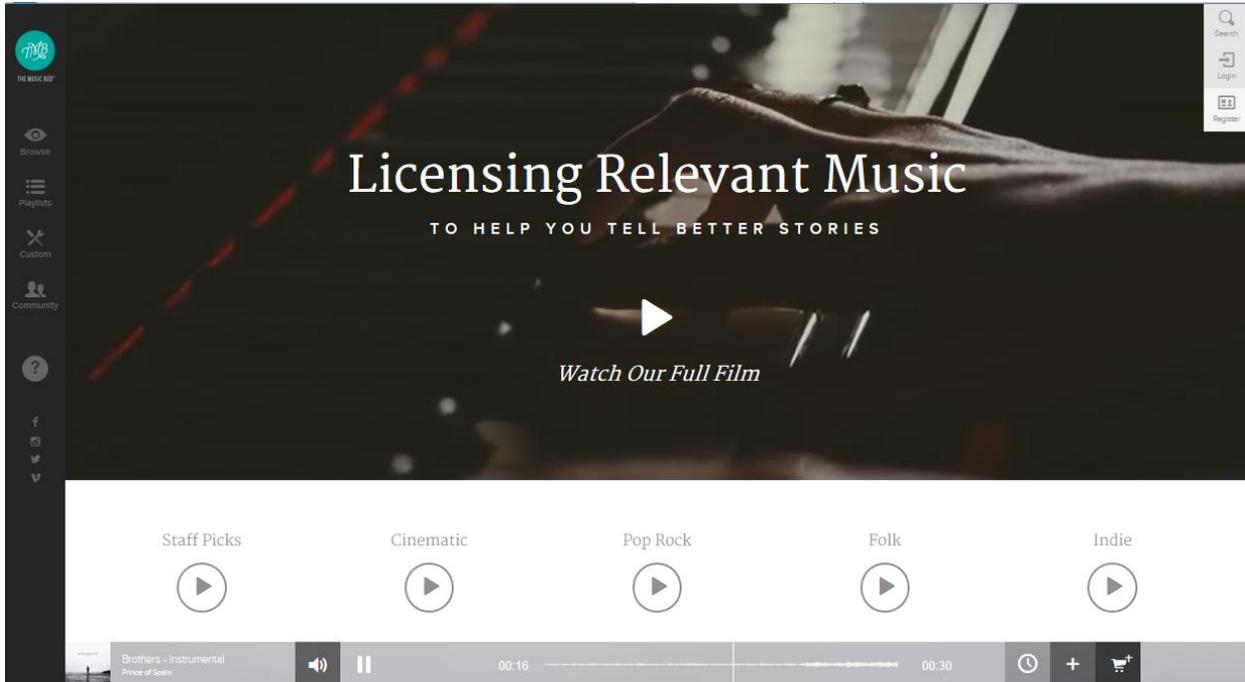
(g) The TMB Website includes a filter/search interface that uses terms that are very similar to those used by Marmoset on the Marmoset Website, including “Mood”, “Characteristics”, “Length”, “Genre”, “Vocals”, and “Instrument”; and

(h) The TMB Website uses numerous icons that are very similar to the distinctive, original icons created by Marmoset.

26. Below are screenshots showing examples of The Music Bed’s misappropriation and infringement of Marmoset’s protected and valuable intellectual property:

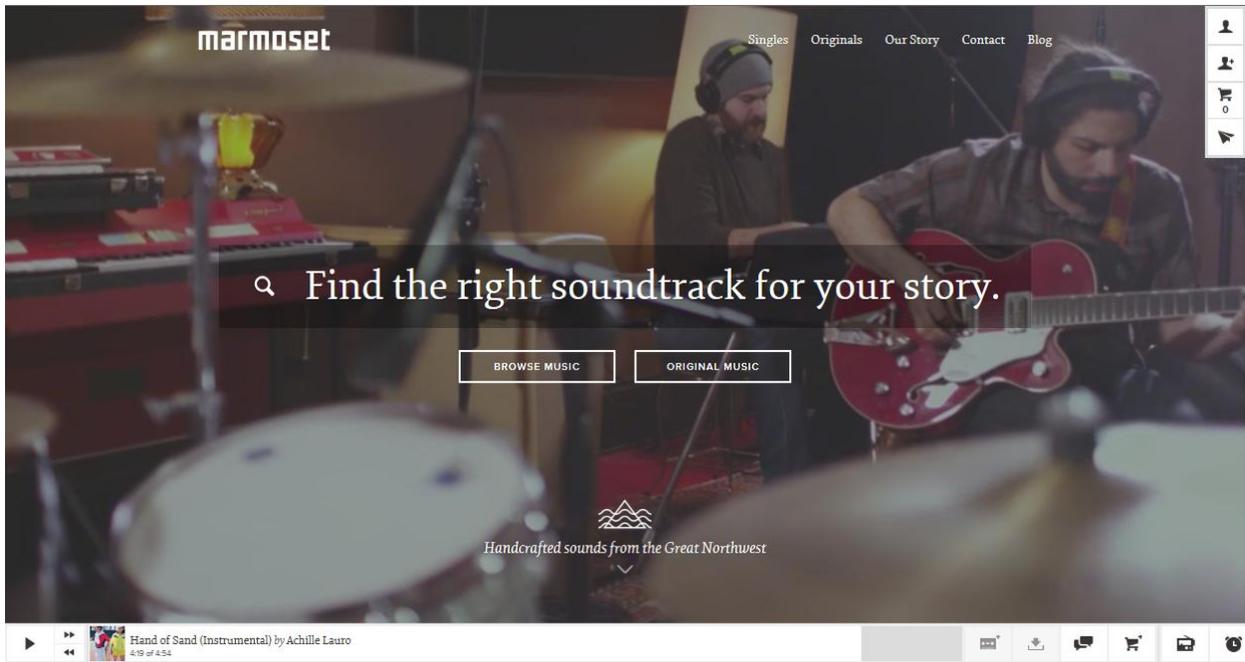


Marmoset Website.

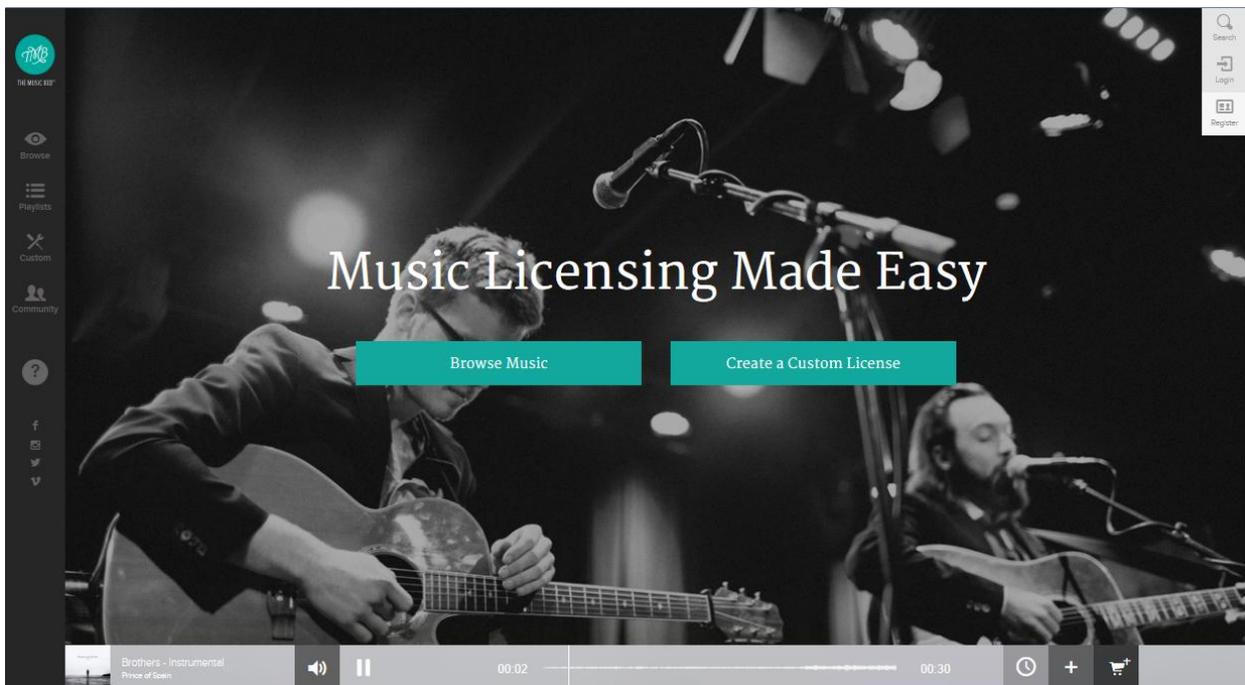


TMB Website.

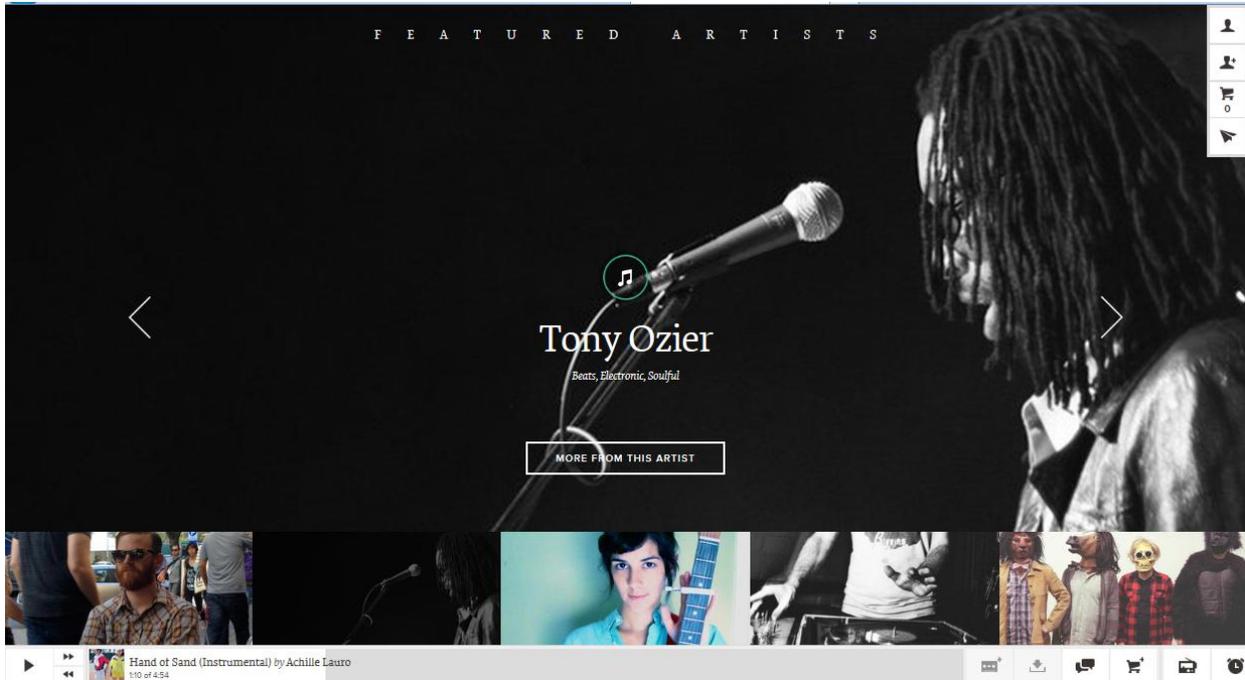
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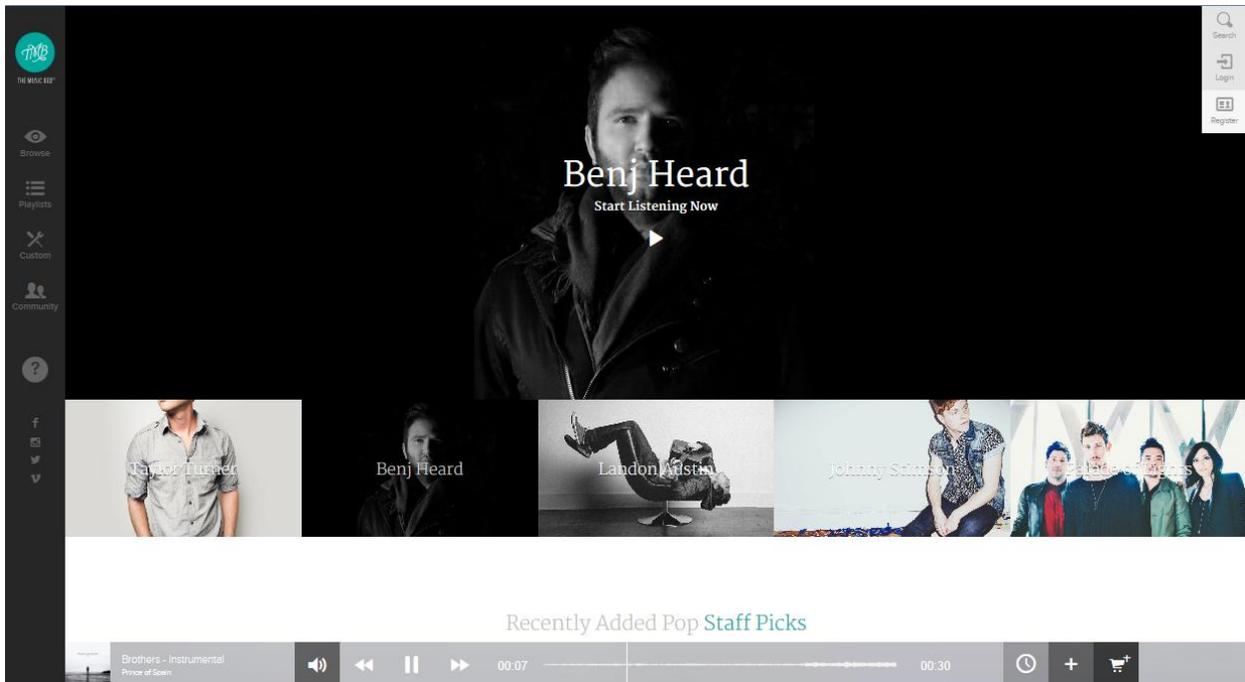
Marmoset Website.



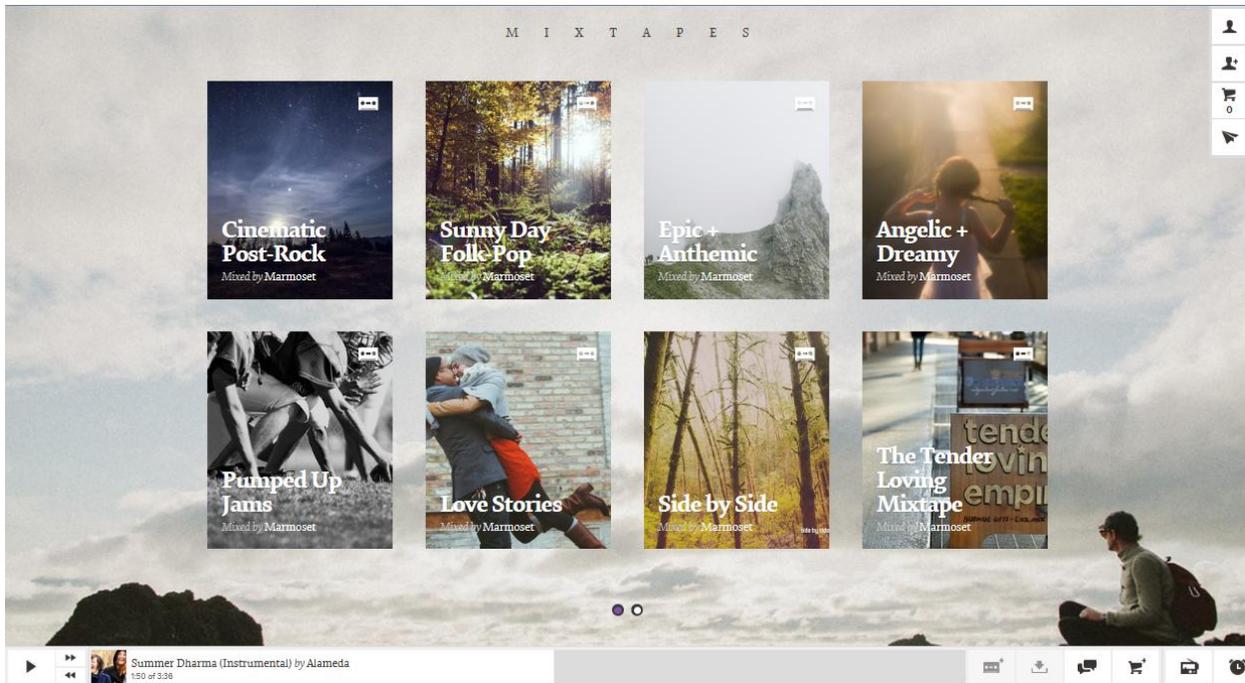
TMB Website.



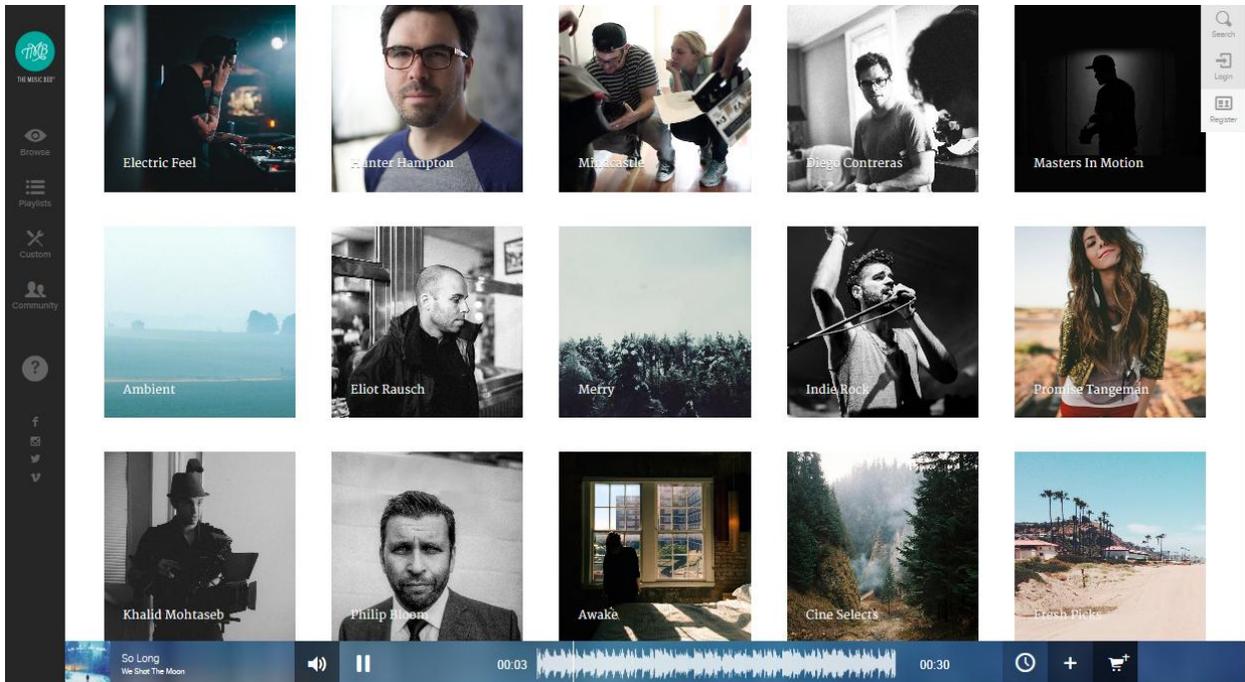
Marmoset Website.



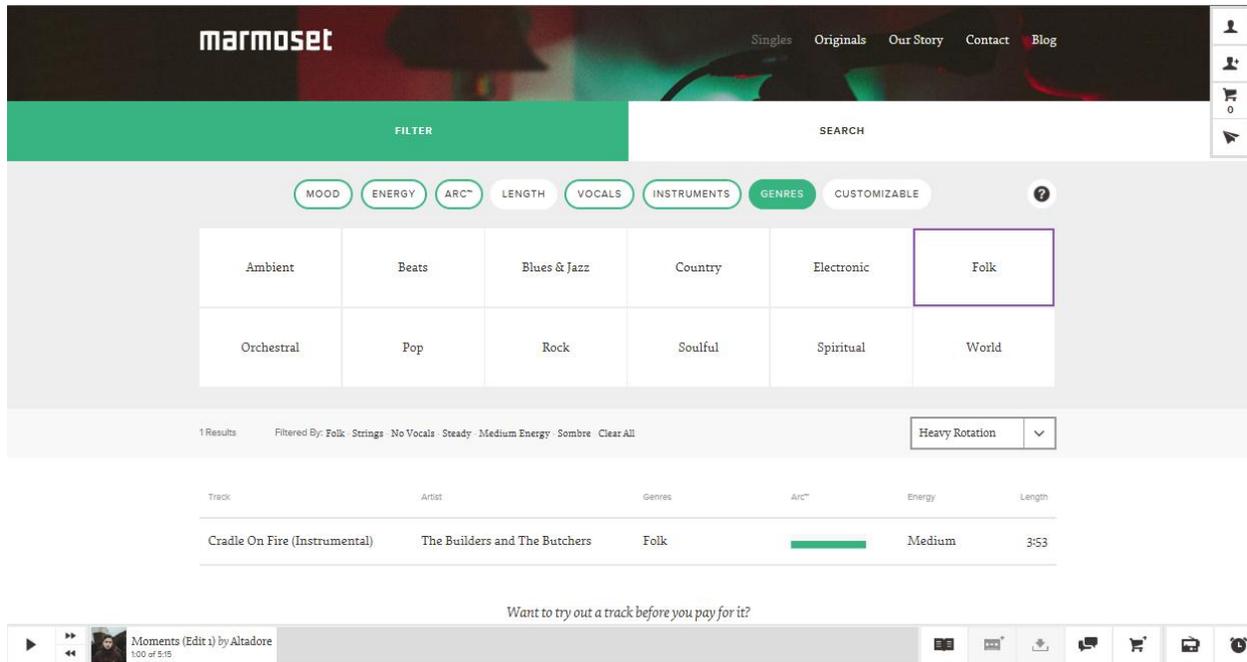
TMB Website.



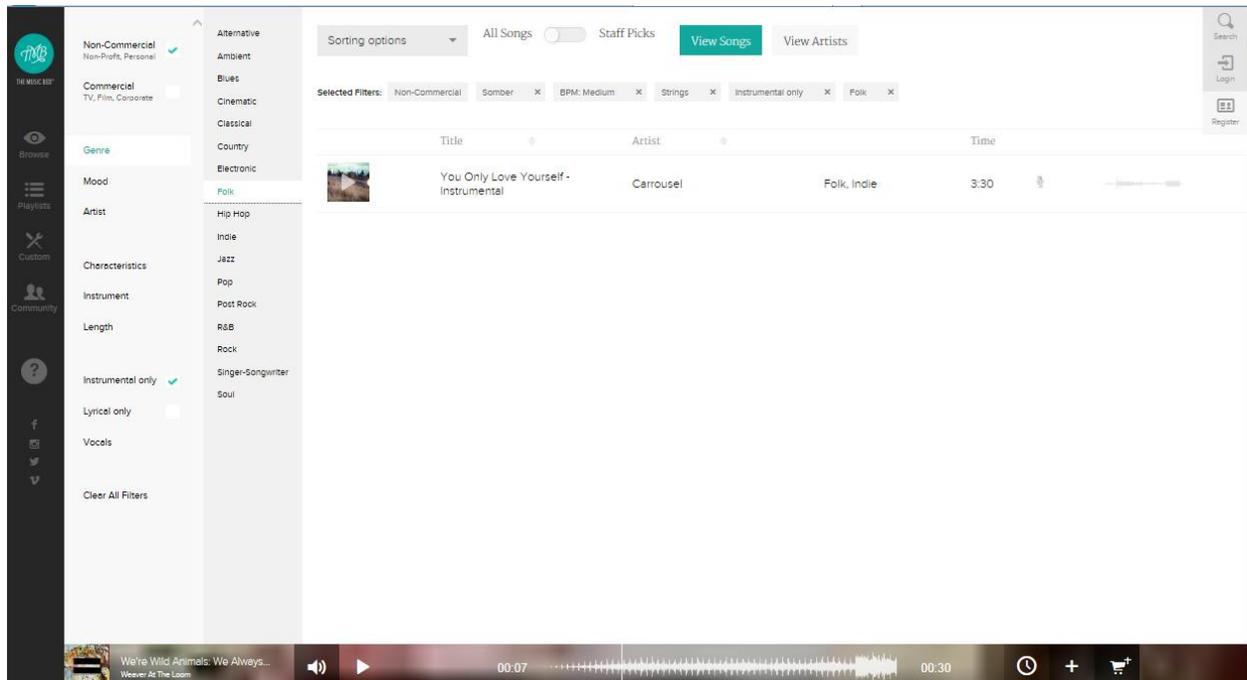
Marmoset Website.



TMB Website.



Marmoset Website.



TMB Website.

27. As described and shown above, the configuration of and overall impression created by the TMB Website is confusingly similar to the configuration of and overall impression created by the Marmoset Website.

28. Defendant's misappropriation and use of the Marmoset trade dress is intended to cause consumers to mistakenly believe that the products and services offered on the TMB Website are provided by or associated with Marmoset.

29. Furthermore, The Music Bed has misappropriated, copied, distributed, created derivative works of, emulated, and publicly displayed on the TMB Website, and made commercial use of, material that infringes the Marmoset Video Copyright and the Marmoset Website Copyright.

30. Marmoset has never authorized or otherwise granted any right to The Music Bed to make any use of the Marmoset trade dress or the Marmoset copyrights.

**PLAINTIFF'S FIRST CLAIM
(Trade Dress Infringement/Unfair Competition, 15 U.S.C. § 1125)**

31. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 30 of this Complaint as if fully set forth herein.

32. Marmoset markets, offers, sells, and delivers its products and services through the Marmoset Website.

33. Prior to Defendant's conduct that forms the basis for this Complaint, consumers had come to associate the distinctive "look and feel" of the Marmoset Website with Marmoset's products and services.

34. Through its promotional efforts, business conduct, and continuous use of the Marmoset Website and its associated trade dress, Marmoset has developed and maintained

clients throughout the United States, including in Oregon. Through its widespread and favorable acceptance and recognition by the consuming public, the “look and feel” of Marmoset’s website has become an asset of substantial value as a symbol of Marmoset, its high quality products and services, and its goodwill.

35. Accordingly, Marmoset has established valid and enforceable rights in the “look and feel” of the Marmoset Website, as described above.

36. Notwithstanding Marmoset’s preexisting valid and enforceable rights in the “look and feel” of the Marmoset Website, The Music Bed, without permission or approval, is using Marmoset’s trade dress on the TMB Website to offer and sell its products and services in the United States, including in Oregon.

37. As a result of The Music Bed’s unauthorized use of Marmoset’s trade dress, Marmoset and The Music Bed use (and have used) Marmoset’s trade dress in connection with related products and services.

38. Marmoset and The Music Bed offer (and have offered) their respective products and services to customers and clients and/or the relevant consumer base in the same geographical locations and through the same trade channels.

39. The Music Bed is a direct competitor of Marmoset.

40. The Music Bed’s unauthorized use of the “look and feel” of the Marmoset Website in connection with offering related and competing products and services is not authorized by Marmoset and is likely to cause consumer confusion and mistake, and to deceive consumers as to the source, origin, or affiliation of The Music Bed’s products and services.

41. Marmoset has a discernible interest in the “look and feel” of the Marmoset Website, and Marmoset has been, and continues to be, injured by The Music Bed’s unauthorized and unlawful use of Marmoset’s trade dress.

42. The Music Bed’s unauthorized use of the “look and feel” of the Marmoset Website in connection with related and competing products and services is causing confusion among purchasers and potential purchasers of Marmoset’s products and services.

43. The acts by The Music Bed described above constitute an infringement and misappropriation of Marmoset’s rights in and to the use of the “look and feel” of the Marmoset Website, with consequent damages to Marmoset and the business and goodwill associated with and symbolized by Marmoset’s trade dress, and, specifically, give rise to this claim under 15 U.S.C. § 1125.

44. The Music Bed’s acts of unfair competition have caused and are causing great and irreparable harm to Marmoset, Marmoset’s goodwill, and Marmoset’s rights in and to the “look and feel” of the Marmoset Website, in an amount which cannot be adequately determined at this time and, unless restrained, will cause further irreparable injury and damage, leaving Marmoset with no adequate remedy at law.

45. On information and belief, The Music Bed’s acts of infringement and misappropriation have been and are being committed with actual knowledge of Marmoset’s prior rights in the “look and feel” of the Marmoset Website, and are willful and in gross disregard of Marmoset’s rights.

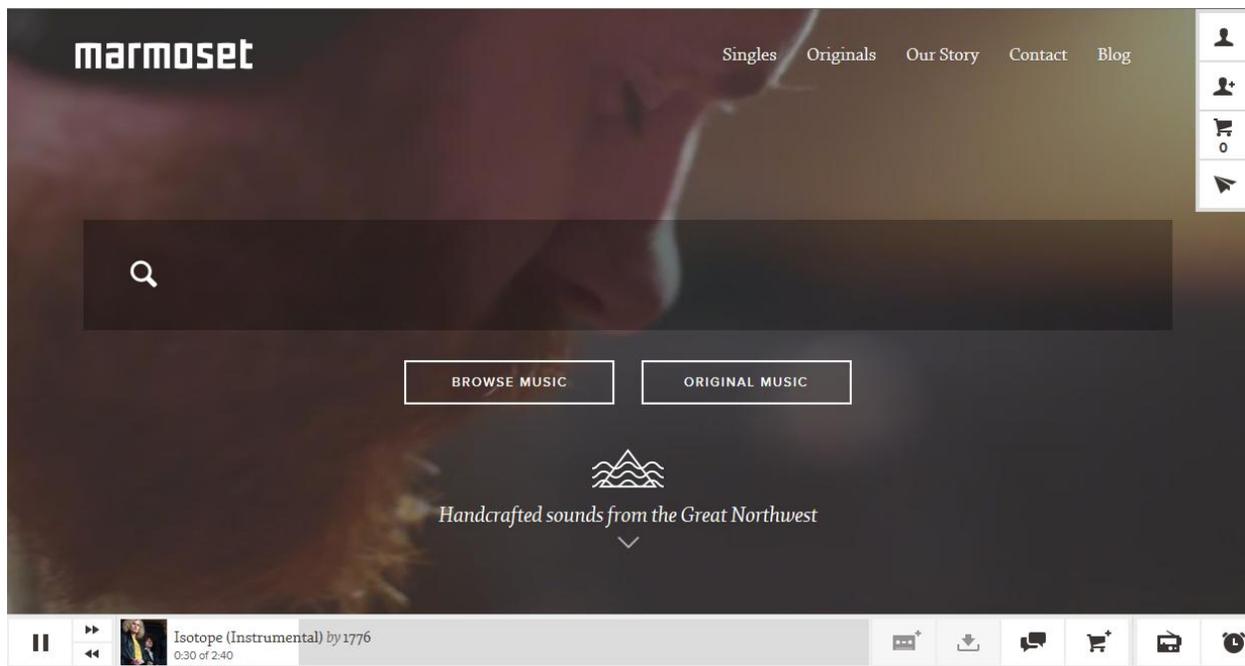
46. By reason of the foregoing, Marmoset is entitled to injunctive relief against The Music Bed, and anyone associated therewith, to restrain further acts of unfair competition and trade dress infringement, and to recover any damages proven to have been caused by reason of

The Music Bed’s aforesaid acts of unfair competition and trade dress infringement, and to recover enhanced damages based upon the willful, intentional, and/or grossly negligent activities of The Music Bed.

**PLAINTIFF’S SECOND CLAIM
(Copyright Infringement)**

47. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 46 of this Complaint as if fully set forth herein.

48. Marmoset holds a registered copyright in the work “Marmoset_Opening_Video_-_Brian from Side by Side (trailer)” (the “Marmoset Video”) presented on Marmoset Website, including, but not limited to, the portion of the video containing the right side profile of Marmoset’s co-founder and Creative Director, Brian Hall, as shown in the following screenshot from the Marmoset Website:

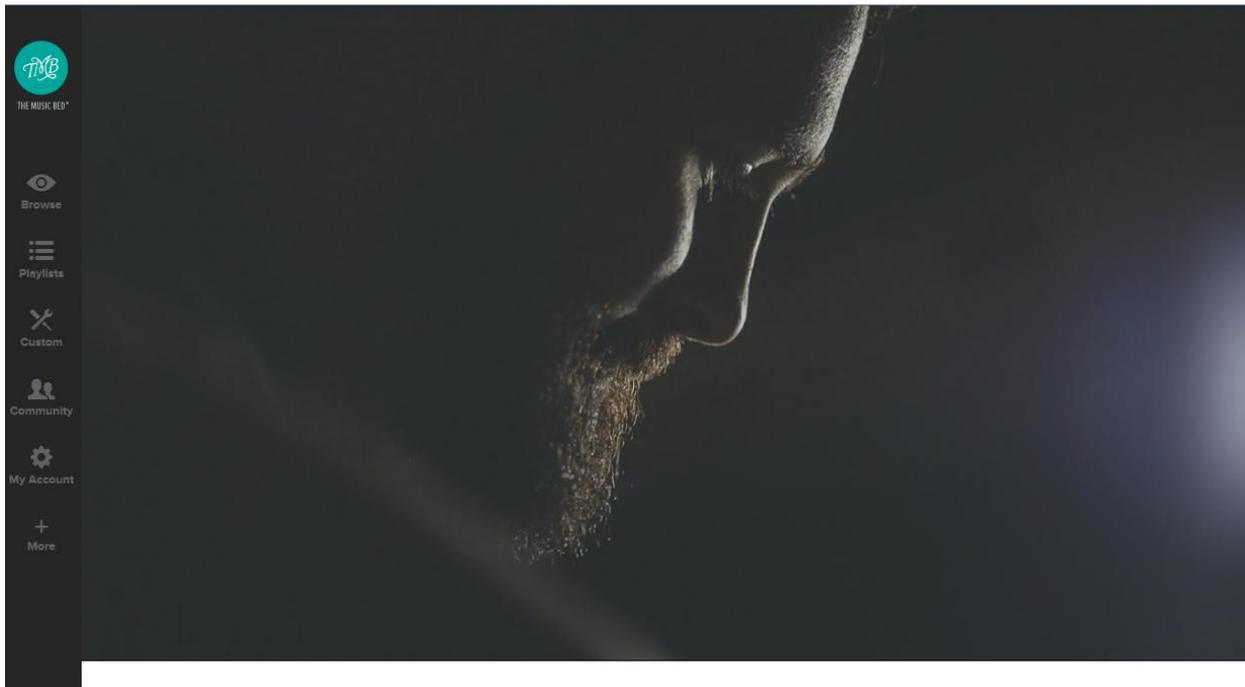


49. Marmoset is also the owner of all right, title, and interest in and to all other copyrightable elements of the Marmoset Website, including the photographs, video, and text, and

their compilation and arrangement on the Marmoset Website, to the extent the same are copyrightable.

50. Defendant had access to the Marmoset Website, including the Marmoset Video.

51. Defendant copied and/or created derivative works from the Marmoset Video, including, but not limited to, in connection with the video shown in the following screenshots from the TMB Website (the “TMB Duplicate Video”):



52. The TMB Duplicate Video and/or portions thereof, is substantially similar to the copyrighted Marmoset Video and/or portions thereof.

53. The Music Bed has infringed Marmoset’s copyrighted work in violation of 17 U.S.C. § 501 by reproducing, distributing, creating derivative works based upon, and publicly displaying works that were copied or caused to be copied from the Marmoset Video and that are substantially similar to that copyrighted work.

54. The Music Bed has acted, and is acting, without the permission, license, consent, or authorization of Marmoset.

55. The Music Bed's acts of copyright infringement have caused and are causing great and irreparable harm to Marmoset, Marmoset's goodwill, and Marmoset's rights in and to the Marmoset Video and the Marmoset Video Copyright, in an amount which cannot be adequately determined at this time and, unless restrained, will cause further irreparable injury and damage, leaving Marmoset with no adequate remedy at law.

56. On information and belief, The Music Bed's acts of copyright infringement have been and are being committed with actual knowledge of Marmoset's prior rights in the Marmoset Video, and are willful and in gross disregard of Marmoset's rights.

57. By reason of the foregoing, Marmoset is entitled to injunctive relief against The Music Bed, and anyone associated therewith, to restrain further acts of copyright infringement, and to recover any damages proven to have been caused by reason of The Music Bed's aforesaid acts of copyright infringement, and to recover enhanced damages based upon the willful, intentional, and/or grossly negligent activities of The Music Bed.

**PLAINTIFF'S THIRD CLAIM
(Common Law Trademark Infringement/Unfair Competition)**

58. Plaintiffs repeat and reallege each of the allegations contained in paragraphs 1 through 57 of this Complaint as if fully set forth herein.

59. On account of Marmoset's long and continuous use of the protected trade dress in the Marmoset Website, Marmoset has established common law trademark rights in the "look and feel" of the Marmoset Website.

60. The acts by The Music Bed described above constitute an infringement and

misappropriation of Marmoset's common law rights in and to the "look and feel" of the Marmoset Website, with consequent damages to Marmoset and the business and goodwill associated with and symbolized by Marmoset's trade dress, and, specifically, give rise to this action under the common law of trademarks and unfair competition.

61. The Music Bed's acts of infringement and misappropriation have caused and are causing great and irreparable harm to Marmoset, Marmoset's goodwill, and Marmoset's rights in and to the "look and feel" of the Marmoset Website, in an amount which cannot be adequately determined at this time and, unless restrained, will cause further irreparable injury and damage, leaving Marmoset with no adequate remedy at law.

62. On information and belief, The Music Bed's acts of infringement and misappropriation have been and are being committed with actual knowledge of Marmoset's prior rights in the "look and feel" of the Marmoset Website, and are willful and in gross disregard of Marmoset's rights.

63. By reason of the foregoing, Marmoset is entitled to injunctive relief against The Music Bed, and anyone associated therewith, to restrain further acts of infringement or unfair competition, and to recover any damages proven to have been caused by reason of The Music Bed's aforesaid acts of infringement and unfair competition, and to recover enhanced damages based upon the willful, intentional, and/or grossly negligent activities of The Music Bed.

PRAYER

WHEREFORE, Marmoset prays for the following relief:

A. A permanent nationwide injunction enjoining The Music Bed, its employees, agents, officers, directors, attorneys, representatives, successors, affiliates, subsidiaries and assigns, and all those in concert or participation with any of them, from:

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COPYRIGHT INFRINGEMENT

(1) imitating, copying, using, reproducing, registering, attempting to register, transmitting, and/or displaying a website which colorably imitates or is confusingly similar to the “look and feel” of the Marmoset Website;

(2) using any other false description or representation or any other thing calculated or likely to cause confusion, deception, or mistake in the marketplace with regard to Marmoset’s protectable trade dress in the “look and feel” of the Marmoset Website; and

(3) copying, distributing, publicly displaying, or creating derivative works based upon the Marmoset Video or any other copyrightable element of the Marmoset Website.

B. An award to Marmoset of damages to compensate for The Music Bed’s infringement and misappropriation in an amount to be proven at trial, including Marmoset’s actual damages and The Music Bed’s profits attributable to its infringement and misappropriation;

C. An order directing The Music Bed to remove from the TMB Website all materials that infringe Marmoset’s trade dress or copyrights;

D. An award of Marmoset’s attorneys’ fees, treble actual damages, and treble damages based upon an accounting of The Music Bed’s profits, including all statutory enhancements, other enhancements, and attorneys’ fees on account of the willful nature of The Music Bed’s acts as provided in 15 U.S.C. § 1117 and pursuant to 17 U.S.C. § 505;

E. An order directing The Music Bed to undertake corrective advertising in a form, manner, and frequency that is acceptable to Marmoset and the Court; and

F. Such other relief, in law or in equity, to which Marmoset may be entitled, or which this Court may deem just and proper.

JURY DEMAND

Pursuant to Federal Rules of Civil Procedure 38(b), Plaintiff hereby demands a trial by jury as to all issues so triable in this action.

DATED this 17th day of March, 2014.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

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Attorneys for Plaintiff

Registration Number
PA 1-882-560

**Effective date of
registration:**

March 12, 2014

Title _____

Title of Work: Marmoset_Opening_Video_-_Brian from Side by Side (trailer)

Completion/Publication _____

Year of Completion: 2013

Date of 1st Publication: July 8, 2013

Nation of 1st Publication: United States

Author _____

▪ **Author:** Stillmotion LLC

Author Created: entire motion picture

Work made for hire: Yes

Citizen of: United States

Domiciled in: United States

Anonymous: Yes

Copyright claimant _____

Copyright Claimant: Marmoset, LLC

2105 SE 7th Ave., Portland, OR, 97214, United States

Transfer Statement: By written agreement

Rights and Permissions _____

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Address: 806 S.W. BROADWAY, SUITE 600

PORTLAND, OR 97205 United States

Certification _____

Name: Charles F. Moore

Date: March 12, 2014

Applicant's Tracking Number: MAR14501

Correspondence: Yes

Registration #: PA0001882560

Service Request #: 1-1282854471

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