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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Beastie Boys Ask Jury To Pin Monster For IP Infringement

By **Stewart Bishop**

Law360, New York (June 04, 2014, 10:25 PM ET) -- Hip-Hop icons the Beastie Boys on Wednesday made their final case to a federal jury in New York that energy drink maker Monster Energy Co. must pay up for its unlawful and "egregious" use of the band's songs in a promotional video in the wake of founding member Adam "MCA" Yauch's death in 2012.

In closing arguments, Beastie Boys' attorney Kevin Puvalowski of Sheppard Mullin Richter & Hampton LLP asked the jury to find Monster's copyright infringement, which is undisputed, to be willful rather than innocent, as there is no way that Monster could have realistically believed that it had the go-ahead to use five Beastie Boys tracks for a marketing video surrounding a company-sponsored snowboarding event.

Characterized by Monster as a "recap" of the event and by the band as a commercial, the four-minute video used the songs without a license and was posted on Monster's Facebook page, YouTube channel and official website for five weeks before the company took it down.

As Beastie Boys members Adam "Ad-Rock" Horovitz and Michael "Mike D" Diamond looked on from the gallery, Puvalowski took aim at Monster's argument that the infringement was the result of an "honest" miscommunication between a Monster Energy Canada employee, Nelson Phillips, and a disc jockey for the snowboarding event, Zach Sciacca, better known as Z-Trip, in which the DJ purportedly approved Monster's use of the video.

"There is no way Nelson Phillips believed he was receiving any approval for the music," Puvalowski told the jury. "If you're going to post videos yourself, it's incumbent that you make sure you're not stealing from anyone."

The band's attorney also urged the jury to find Monster liable for fraudulent inducement, saying by posting the video, Monster was putting forth the suggestion that the Beastie Boys were endorsing Monster, when they actually have a long-standing policy of not lending their name or songs to back commercial products.

The Beastie Boys **contend** the use of the band's songs is worth a combined \$2.5 million. The company should also pay the maximum \$150,000 penalty for willfully ripping off each of 10 copyrights, they say.

The four-minute video at issue, entitled "Ruckus In The Rockies," was produced by Phillips and composed of footage from a Monster snowboarding competition overlaid with a mix of five Beastie Boys songs. The mix was furnished by Z-Trip, who manned the snowboarding event and played a heavy rotation of Beastie Boys material there in tribute to the then-recent death of Yauch.

After the event, Phillips approached Z-Trip and asked him whether he had any material for

the company to use. Z-Trip directed the marketing manager to his website, which contained the mix of Beastie Boys songs, and said "take what you want," later approving the final video with the one-word email "dope!", according to court records.

After the band discovered the video and sued, Monster tried to pin the blame on Z-Trip, launching **an unsuccessful** third-party complaint for breach of contract and fraud.

Monster attorney S. Reid Kahn of Kane Kessler PC told the jury that Phillips simply made a mistake and the notion that Monster intended to mislead customers into thinking it was sponsored by the Beastie Boys runs contrary to common sense.

"They are trying to take the evidence and spin it into a tale of insidious corporate greed," he said.

Kahn further argued that while perhaps it wasn't very smart of Phillips to give the go-ahead for the video, that doesn't make him an intentional copyright infringer.

"Nelson Phillips had no reason not to trust Z-Trip when he said, 'Go, download that music from that website; it's OK," Kahn told the jury. "Z-Trip never said, 'I like the way I appear, but you need to contact the Beastie Boys to see if you can use this.'"

The Monster attorney also said that as soon as the energy drink company was made aware of the infringement, it took down the video at once and attempted to persuade third parties to do the same.

After the jury was sent to deliberate the case, U.S. District Judge Paul Engelmayer praised attorneys' performances in the case, telling the audience they all have been witness to "some fine lawyering."

"Clients on both sides of the room, you chose wisely," he said.

The band is represented by Kevin Puvalowski, Kenneth B. Anderson, Paul W. Garrity and Thomas Monahan of Sheppard Mullin Richter & Hampton LLP.

Monster is represented by S. Reid Kahn, Dana M. Susman and Tanya C. Pohl of Kane Kessler PC.

The case is Beastie Boys et al. v. Monster Energy Co., case number 1:12-cv-06065, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Andrew Scurria and Beth Winegarner. Editing by Philip Shea.

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