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## Band Name Protection: What's in a Name? Could Be Six Million Albums—Ask Pink Floyd

Terrence Rogers

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**Introduction: The Forming of a Band—Personnel Changes**

In November 1963, when friends and bandmates Mike Pinder and Ray Thomas of the Krew Cats returned home to Birmingham, England from having endured a stint of touring what they referred to as “the hell of the German Club scene,” they were faced with yet another dismal prospect: that of trying to find work amongst the approximately 250 rock-and-roll bands that were also looking for work at the same venues.<sup>1</sup> Pinder and Thomas thus went looking for some talent—for some personnel that could augment Pinder’s keyboard and vocal talent, and Thomas’s talents on the flute, saxophone, harmonica, and vocals as well.<sup>2</sup> What they discovered were the talents of Denny Laine, as

a lead vocalist and lead guitarist, Clint Warwick, as the requisite bass player, and Graeme Edge, as a drummer.<sup>3</sup> The key ingredients were now in place for what was perceived to be a supergroup, as these talents, when added to the abilities of Pinder on keyboards and Thomas on flute—both instruments then unique to a rock-and-roll band—made a package that seemed extraordinary.<sup>4</sup> Thus were born The Moody Blues, a band which launched an enormously successful career in the spring of 1964 that continues to this day, as The Moody Blues have recorded 16 original albums and multiple live and compilation albums, and have sold over 80 million copies of these recordings worldwide.<sup>5</sup> The group has recorded new music as recently as 2003,<sup>6</sup> and has toured as recently as 2007, to sold-out audiences in venues such as Radio City Music Hall in New York City.<sup>7</sup> As a result of all of this success, The Moody Blues are known as one of the best rock bands of all time, the band's success rooted as it is in the Classic Rock Era.

And yet, who are The Moody Blues who are recording and touring today? Justin Hayward is a lead singer and the lead guitarist; John Lodge is another lead singer and the bassist; and Graeme Edge is on drums.<sup>8</sup> Recognize these names? Well, at least Graeme Edge is there. But what happened to founding members Pinder and Thomas? Where are Laine and Warwick? Is this current version of the band a sham, pretending to be The Moody Blues because one member of the original group still shows up on tour? Such scenarios have been the subject of much litigation in recent times, as one or more members of a band—and sometimes even people who were never a member of a band when it released all of its recorded material that gained the band its notoriety—attempt to capitalize on the name of the band for monetary gain, by performing under the name of a

band made famous by others, or them along with others.<sup>9</sup> Yet no one could feasibly claim that this is the case regarding today's Moody Blues. Both Laine and Warwick are long gone, having departed in 1966, replaced in 1967 by Justin Hayward and John Lodge, the latter having played in a band known as El Riot and The Rebels with Pinder and Thomas in the early sixties.<sup>10</sup> Pinder left in 1978, replaced on keyboards for many years by Patrick Moraz, formerly of another Classic Rock band, Yes.<sup>11</sup> (Was Moraz ever a true Moody Blue? Stay tuned ...) Thomas left in 2002, leaving his flute parts to be performed by the flautist Norda Mullen, who joined other performers and session players, such as keyboardists and other musicians, to support the trio of people who call themselves The Moody Blues today in their 2003 and 2005 tours, and in the production of the album *December*.<sup>12</sup>

By any artistic and length-of-service measure, this trio of Edge, Hayward, and Lodge can lay legitimate claim to being a present day member of The Moody Blues. Edge, of course, has been with the band since its inception in 1964, and is the only remaining member among the founders.<sup>13</sup> He also contributed poetry that was recorded as spoken word by Pinder on many of the band's albums during the frenzied days of the late sixties and early seventies, when the band achieved much of its commercial success and sealed its status as a legendary band.<sup>14</sup> Hayward and Lodge took center stage immediately upon joining the band, helping to steer it from its original rhythm-and-blues roots into an often mystical mixture of hard rock and soft melody, with classical undertones backed by orchestral sounds, often collaborating as songwriters for the band while also writing their own songs separately, each singing lead on various songs on every Moody Blues

album.<sup>15</sup> Clearly, Edge, Hayward, and Lodge make legitimate claims to being able to perform together under the name The Moody Blues. Under these facts, no one could challenge their use of the name ... unless, of course, the challenge came from one of the group's managers, or one of the group's recording companies, or Laine, or Pinder, or Warwick ...

Consider also The Beatles. Arguably the most famous and influential rock band in history and in the world, The Beatles, who broke up as a band in 1970, still have all of their original recorded material in distribution, and continue to release compilations of their work that sells to generations of music fans new and old.<sup>16</sup> According to the Recording Industry Association of America, The Beatles are the only musical act in history that has achieved five so-called Diamond albums, or albums that have sold at least 10 million copies in the U.S. alone.<sup>17</sup> Ever since they broke onto the worldwide scene by traveling to the United States to appear on The Ed Sullivan Show on February 9, 1964, they have been known to the world as John, Paul, George, and Ringo. But were The Beatles always John, Paul, George, and Ringo? No. Before Ringo Starr joined John Lennon, Paul McCartney, and George Harrison as the group's drummer in 1962, The Beatles drummer was Pete Best, and the group already had one deceased member, bassist Stuart Sutcliffe.<sup>18</sup> The ultimate composition of the band was the version that emerged from obscurity to worldwide fame, and, during the band's continuous run as a recording phenomenon and artistic force from 1962 until 1970, the band never changed composition.<sup>19</sup> However, prior to the arrival of Starr to replace Best, who was fired by Lennon, McCartney, and Harrison, the group did perform and record songs under the

name The Beatles while Best was the drummer, and some live albums from their tours of Germany are in issue today, as are studio recordings of songs such as *Ain't She Sweet* and *Cry for a Shadow*.<sup>20</sup> In addition some recordings made by an English singer named Tony Sheridan in 1961 included The Beatles as a backing band, and these can still be found in one compilation or another on the shelves of records stores today.<sup>21</sup> What royalties, then, does Pete Best get for having participated in all of these recordings? What payment did he get upon his termination as a band member? Under what right held by the other band members was he terminated, allowing John, Paul and George to add Ringo to the band, and continue on as The Beatles? What share did Best get of the future success of The Beatles, after his departure, given that he helped shape the group's image and, in Best's case, its popularity with the fans who followed the band in those early days, especially the girls?<sup>22</sup> What about the estate of Stuart Sutcliffe?

As for The Moody Blues, what royalties and payouts were given to Warwick and Laine when they left the band, having played on the first number one hit that the group ever recorded, *Go Now*, a song on which Laine sang lead? Do Laine and the estate of Clint Warwick, who died in 2004,<sup>23</sup> still receive royalties on the sales of this song, and on the reissue of the early albums that were released when they were still members of the band? What kind of royalties are paid to Pinder, who was an influential songwriter, singer, and musician for the band, contributing not only some of the band's notable songs such as *Melancholy Man*, *Dawn Is a Feeling*, and *Om*, but also co-writing much of the group's original material with Laine before Laine's departure, and also mastering the use of the Mellotron, an instrument that produced the sounds of an orchestra and became an

hallmark of The Moody Blues sound?<sup>24</sup> And what about Moraz, who toured as a keyboard player with The Moody Blues starting with the 1978 tour to support the release of the album *Octave*, on which Pinder served as keyboardist before departing the band, and who also toured and recorded with the band through the release of the album *Keys of the Kingdom* in 1991?<sup>25</sup> Based on his contributions to the live touring of The Moody Blues, an important tool for promoting any group's album sales, and on his contributions as a musician on four albums of original material released by the group from 1981 to 1991,<sup>26</sup> what royalty arrangement does Moraz have? What final payout did he get on departing the band in 1991?

### **The Song May Change, But the Name Remains the Same:**

#### **The Battle of The Blues**

These are the questions that some legally savvy band members and their attorneys routinely resolve today, as part of a partnership agreement or other binding agreement that establishes a band as a legal entity doing business under a certain name.<sup>27</sup> Often, however, band members are not legally savvy, and in fact don't even hire an attorney of their own when starting a band, leaving any legal issues such as writing recording contracts, when they arise, to the attorneys of others, such as their recording company.<sup>28</sup> During the times of the beginnings of groups such as The Moody Blues and The Beatles, it's certain that some contract existed that created each band as a legal entity in one form or another, such as a partnership or a corporation, and certainly as the success of these bands grew to the magnitudes described above they would have become more

sophisticated in their business and legal affairs,<sup>29</sup> but it's equally likely that all of the aforementioned issues concerning the departures and arrivals of the various band members were not stipulated in those initial contracts on the creation of these bands. Even in cases in which an attempt has been made to define all issues regarding the departure band members and the arrival of new ones, issues can still arise, due to the interpretation of the conditions of an agreement, and the unique set of facts which take place in any given situation.

In the case of The Moody Blues, for example, the band and Moraz had different ideas as to whether or not Moraz was ever legally a member of The Moody Blues, or was merely hired by the band to perform as a keyboardist.<sup>30</sup> After performing and recording with the group for 13 years, he was informed by the band that his services were no longer required, just prior to a summer tour in 1991, being undertaken for the purpose of promoting the album *Keys of the Kingdom*, on which Moraz played.<sup>31</sup> According to Moraz, The Moody Blues simply didn't want to share the group's financial gain with him anymore.<sup>32</sup> Reports indicated, however, that he had been fired for some unflattering remarks about the band that he had made in an interview with *Keyboard* magazine, while discussing some complaints that he had about his role in the band.<sup>33</sup> He eventually filed a breach of contract suit against Edge, Hayward, Thomas, and Lodge, claiming that he was a legal member of the band, but a judge ruled that he had merely been a "hired hand."<sup>34</sup> The fact that he was ruled to have never legally been a member of the band<sup>35</sup> was ironic, as his presence in the band during his first three years of touring and recording with it was a prime factor in another piece of litigation—that of Pinder's 1981

legal action to prevent the remaining members of The Moody Blues, at that time Edge, Hayward, Lodge, and Thomas, from releasing the album *Long Distance Voyager* under the name The Moody Blues, three years after Pinder's voluntary departure from the group.<sup>36</sup>

In *Pinder v. Decca Record Co. Ltd. & Another*, Pinder filed a motion to restrain Decca from releasing a product under the name The Moody Blues on which he did not work or perform.<sup>37</sup> Underlying Pinder's claim was his argued importance to the band, as noted by the testimony of Anthony Clarke, the group's longstanding record producer, who characterized Pinder as having been as important to The Moody Blues as John Lennon was to The Beatles, and that Pinder was the one who came up with the idea to name the group The Moody Blues.<sup>38</sup> The defendants in turn argued that Pinder had played a diminishing role in the affairs of the band, and that he was not responsible for coming up with the name of the band.<sup>39</sup> The defendant further argued that Pinder's gradual loss of interest in performing as a member of the band was the principal reason why The Moody Blues disbanded in 1974, and the judge held that the evidence showed that Edge, Hayward, Lodge, and Thomas were the primary forces behind the group's reformation in 1978.<sup>40</sup> In fact, the judge noted that Pinder contributed only one of the songs on the album, entitled *Octave*, that was completed in March of 1978 after the reforming of the band in the spring of 1977.<sup>41</sup> The band had generally operated according to a general formula that each member write two songs per album,<sup>42</sup> and Pinder had been contributing exactly two songs on every album, prior to the completion of *Octave*.<sup>43</sup> The

judge also noted that while Pinder did not take part in the publicity tour supporting Octave, the other members of the band all spent their summers promoting the album.<sup>44</sup>

The balance of the case centered on the conflicting evidence presented by Pinder and Hayward. First, Hayward claimed that Pinder had represented to him on multiple occasions, when pressed for an answer, that he had, in fact, left the group. Pinder, to the contrary, claimed that after he was informed by Hayward that he, Edge, Lodge, and Thomas, along with Patrick Moraz, who had been recruited to replace Pinder for touring purposes to support the Octave album, had begun recording a new album in early 1980, he came to England in July of that year in order to participate in the creation of that new album.<sup>45</sup> Pinder claimed to have understood that he'd continue to record with the group, even if he was not going to tour with it.<sup>46</sup> As a result of Pinder's view of his status with the band, he requested to be paid a share of the advance that Decca had paid to the band for producing the album.<sup>47</sup> Hayward claimed that, in a telephone conversation with Pinder in February of 1980, Pinder stated that he was badly in need of money.<sup>48</sup>

The judge in the Chancery Division based his ruling on an analysis of the facts presented, and on a review of the service agreement that was entered into by Pinder, Edge, Hayward, Lodge, and Thomas with Decca, through an intermediary, on the group's reformation.<sup>49</sup> Dated May 1, 1977, the service contract established the group anew, as a recording artist for the purpose of creating albums under the name The Moody Blues for Decca.<sup>50</sup> One potentially decisive factor was that the service contract called for a band member to have to serve written notice in order to terminate the agreement, and the facts showed that Pinder did not do so in this case, implying that he was still legally a member

of The Moody Blues.<sup>51</sup> However, the judge noted that significant publicity, as evidenced by numerous press reports, indicated that, in reality, the group was no longer constituted as it had been in 1978, and that Moraz had been recruited to replace Pinder, and had toured with Edge, Hayward, Lodge, and Thomas under the name The Moody Blues already.<sup>52</sup> According to the judge, these facts could lead to the conclusion that the terms in question could be repudiated.<sup>53</sup> The contract did give the parties the right to be able to control recordings made under the name The Moody Blues, such that the five named members of the group, and the record producer Clarke, could not “consent to the use of the name [The] Moody Blues ... by or for anyone other than the company and its licensees.”<sup>54</sup> Also, a key provision in the contract stated that, in the event of retirement by any one of the band members, Decca and the remaining bandmates had the right to complete the obligations of the agreement with or without a substitute.<sup>55</sup>

One of Pinder’s claims was that the quintet comprised of his four bandmates and Moraz, along with Decca, were “passing off” or misrepresenting that the quintet was The Moody Blues.<sup>56</sup> The defendant Decca argued that no misrepresentation of the magnitude necessary to sustain the group as a masquerade of the former composition of The Moody Blues existed, because of the fact, claimed by the defendant, that Pinder effectively ceased being a member of the group in 1978.<sup>57</sup> Therefore, no masquerade was necessary or possible. Decca also argued that, per certain language in the service agreement, Pinder had effectively retired from the band, enabling Decca and the remaining members of the band to select a substitute for him, if they chose to do so.<sup>58</sup>

Pinder also claimed that his reputation would suffer if the new album, which had already sold over 50,000 copies at the time of Pinder's litigation against The Moody Blues, continued to be allowed to be sold.<sup>59</sup> Clark, the record producer, testified as to the quality of the album *Long Distance Voyager*, stating that it was not of the standard normally associated with an album by The Moody Blues by the general public.<sup>60</sup> In addition, Pinder claimed that he would be damaged if the record was allowed to continue to be sold because he would no longer be associated with The Moody Blues as a result.<sup>61</sup> He further claimed that, without his participation specifically, the musical and creative quality of the album, which his participation would have otherwise insured, was absent.<sup>62</sup> The judge did not agree with any of these arguments.

The judge also concluded that the inside sleeve of the new album made it "abundantly clear that the five Moody Blues include Patrick Moraz" and not Pinder.<sup>63</sup> Also abundantly clear to the judge was that Pinder had given up taking any active part in the group's activities, and that Moraz had taken over for him.<sup>64</sup> Based in part on the perceived high cost associated with withdrawing the album from the market, which would also lead to the cancellation of the promotional tour surrounding the album, and based in part on the judge's reading and interpretation of the service contract that reformed the band, the judge refused to grant Pinder the injunction that he sought against the release of *Long Distance Voyager* by Edge, Hayward, Lodge, Thomas, and Moraz under the name The Moody Blues.<sup>65</sup>

### **Infighting Amongst the Band: What Does the Contract Say?**

Moraz may have fared better in his subsequent case against Edge, Hayward, Lodge, and Thomas, when he found himself trying to prove that he was a legal member of The Moody Blues, if he had been able to rely on Judge Gibson, who issued the ruling in *Pinder*, as a witness, given the judge's constant references to Moraz as being a member of the band in his opinion on that litigation.<sup>66</sup> Undoubtedly Moraz tried to use Gibson's opinion to support his case, but his case likely turned on the contract he had signed when he "joined" The Moody Blues. In *Pinder*, however, Judge Gibson did not rule on an issue that related to Moraz's legal status in the group, but instead whether or not Pinder had retired from The Moody Blues.<sup>67</sup> The fact that someone else had taken over his role supported the idea that Pinder had, in fact, retired from the group.<sup>68</sup> Another issue that was not at play in Moraz's subsequent litigation against the four enduring band members, but which was a focal point of *Pinder*, was the question of who owned the rights to the name The Moody Blues.<sup>69</sup>

Clearly, nothing in the service contract that reestablished The Moody Blues after the group's three-year hiatus from the music world gave Pinder the exclusive right to the use of the name The Moody Blues, nor to prevent the name from being used by the remaining members of the band if he left the group.<sup>70</sup> Instead, rights were clearly spelled out on the agreement to allow the company that was formed on reforming the band, consisting of the band members, and the record company, Decca, to retain the right to use the name and to select a new member on the departure of an existing member, like Pinder.<sup>71</sup> Thus, in order to win his case, Pinder was forced to rely on claims as to

damages that he would suffer, and that his importance to the band was so great that the release of an album without him would essentially amount to defrauding the public, and he lost.<sup>72</sup> The prospect of proving these matters would be generally difficult for any band member of any band when making such claims—even for a front man like Jim Morrison of The Doors, who was the only lead voice of that group, and who wrote much of the band’s material, and who himself was nearly entirely responsible for the band’s image—without specific, contractual language on which to rely. Pinder, however, had almost no chance, due to some unique factors inherent in The Moody Blues as a group.

Although Pinder was a lead singer and a songwriter, who contributed many renowned songs to the band’s long list, The Moody Blues were perhaps the only rock band in history which contained five members who wrote songs, with four of those acting as the lead singer for their own songs, all with demonstrated talent. (The Beatles had four members who could sing lead, and three main songwriters—although Ringo Starr did get a songwriting credit with *Don’t Pass Me By*, on the album *The Beatles*, also known as *The White Album*, and with *Octopus’s Garden*, on the album *Abbey Road*, and later wrote some songs for his solo work<sup>73</sup>—and all five members of The Beach Boys sang lead on various songs, but the main task of songwriting in The Beach Boys generally fell to Brian Wilson, with considerable support from Mike Love).<sup>74</sup> In such a scenario, it was nearly impossible for Pinder to establish himself as the lone, or even main, creative driving force of the band.

If, based on Pinder’s status as a founding member of the band in 1964, along with his contributions to the band in its first ten years of existence, he had been able to secure

a “key member” status under the service contract which governed the re-establishment of the band in 1977, he may have fared much better in his lawsuit versus his other bandmates and Decca. After all, not only did his record producer liken his role to that of Lennon’s of The Beatles, but at least one reporter, Michael Sangiacomo of *The Plain Dealer*, wrote of Pinder on December 2, 1991, that he was the base and poetic soul of The Moody Blues, and that with him gone, the band could no longer put out the philosophically deep numbers that he used to write.<sup>75</sup> The band generally did state that he was an influence that was missed after he left the group,<sup>76</sup> and Hayward in particular stated in 1991, ten years after Pinder’s lawsuit failed, that Pinder was “the biggest influence in the band,” and that the power base of the group shifted when he left.<sup>77</sup> If Pinder had indeed been able to have himself declared a “key member” of The Moody Blues on its reestablishment in 1977, although this status may have led to ego-based clashes with other band members, his departure from the band could have been viewed as a breach of the contract that formed the band by the whole group.<sup>78</sup> In such a case the company formed on the establishment of the band as a legal entity could exercise its options, which can include all of the options that worked against Pinder in his lawsuit, but, if negotiated differently, could also mean that Pinder alone would retain rights to the name of the band, and the company could simply elect to reorganize the remaining members as a new group, or elect to disband the group completely, given that the band is not the one originally signed to the contract.<sup>79</sup> Generally, though, a key member cannot leave the band and sign his or her own agreement with another record company, as the key member status generally comes with a commitment to stay on with the same

recording company as a solo artist, whereas non-key members can generally sign with any record company if a key member leaves the group.<sup>80</sup> In Pinder's case, however, so much acrimony had probably built up between him and the record company, Decca, that his signing of a new contract as a solo artist did not surface as an issue at trial.<sup>81</sup>

In after-the-fact hindsight, Judge Gibson's ruling in *Pinder v. Decca* turned out to be the correct one, as Pinder didn't issue a full-length album of his own until 1995's *Among the Stars*, whereas *Long Distance Voyager* by The Moody Blues turned out to be the group's first number one selling album in the U.S., and also reached number five in the U.K.<sup>82</sup> While Pinder was arguably a significantly key member of The Moody Blues from 1964 through 1978, he was clearly no longer one by 1981.

The Moody Blues serve as a prime example of what can be at stake in the legal protection of a band's name. Had Pinder won his lawsuit and kept Edge, Hayward, Lodge, Thomas, and Moraz from releasing their record under the name The Moody Blues, it's highly unlikely, despite the well-received critical reception of the album, that it would have reached number one in the United States, or sold anywhere near the number of copies it sold. The recognition of the name, and the desire by fans of The Moody Blues and collectors of their music and memorabilia to acquire anything new that comes from the band, are all factors which in all likelihood contributed to the strength of the demand for a new album from the group. The fact that the album did contain two hit singles, and that it was a good album, even by the high standard already set by The Moody Blues, also contributed to the album's commercial success. However, if the album had been released under a simple listing of the last names of one or more of the band members, or under

some other band name entirely, sales probably would have fallen somewhere in the midpoint between those of a newcomer to the marketplace and what they actually were. Thus, the defense put on by Decca in *Pinder v. Decca*, reinforced as it was by the testimony of various members of the band, was critical to the success of Long Distance Voyager. In addition, the existence of the service contract that reestablished the band in 1977, and the fact that it addressed the very issues that were at the heart of the case, were key factors that influenced Judge Gibson's decision in the case, thus securing a sound commercial future for The Moody Blues that continues to this day.

### **Pink Floyd v. Pink Floyd**

*Pinder v. Decca* was not only a prime example of the value of a band name, but it was also a precursor to what turned out to be “one of the most bitter feuds in musical history,” begun in 1986, when Roger Waters of Pink Floyd launched a lawsuit to block his former bandmates David Gilmour, Nick Mason, and Rick Wright from continuing on as Pink Floyd<sup>83</sup> after Waters left the group a year earlier.<sup>84</sup> Notwithstanding The Moody Blues case, which was apparently motivated by the combination of a desperate need for money and perhaps a significant bit of ego on the part of an important and influential former band member, the Pink Floyd case represented the first time that a band's name was fought over as though it was a brand name,<sup>85</sup> and a substantial financial gain was at stake—much more than what proved to be at stake in The Moody Blues case, and undoubtedly much more than any of the members of Pink Floyd could have envisioned, on either side of the dispute as it was developing.

On October 31, 1986, Waters initiated High Court proceedings in London, England for the purpose of not only dissolving the group partnership, but also declaring that the group no longer existed.<sup>86</sup> Two chief factors led to the Pink Floyd dispute coming about, and to the subsequent legal action taken by Waters. First of all, for various reasons, Waters essentially thought of himself and himself only as being synonymous with the band and the name Pink Floyd.<sup>87</sup> Secondly, he didn't think that the other three band members who comprised the band during the eighteen years preceding the dispute could possibly carry on under the name Pink Floyd under any viable scenario or viewpoint.<sup>88</sup> Gilmour immediately made it clear that he, Mason, and Wright would carry on with Waters, undeterred by his lawsuit, with Gilmour's team issuing a statement saying, "Naturally, we will miss Roger's artistic input. However, we will continue to work together, as in the past ... and we would prefer to be judged by the public on the strength of the forthcoming Pink Floyd album."<sup>89</sup> In a less diplomatic statement made during an interview, Gilmour was quoted as telling a Sunday Times reporter, "No one else has claimed that Pink Floyd was entirely them. Anybody who does is extremely arrogant."<sup>90</sup>

The Pink Floyd legal dispute arguably had more at stake, and more complex dynamics, than any other band name protection battle before or since, by far. Before examining the dispute and how it developed, a brief history of the band known as Pink Floyd, and a summary of its accomplishments, is illuminating.

Pink Floyd came into being in 1966, first known as The Tea Set, then changing its name to The Pink Floyd Sound, and finally, simply Pink Floyd, in honor of two blues

musicians named Pink Anderson and Floyd Council. On its founding, the Tea Set included a jazz-oriented guitarist named Bob Klose, and a lead singer named Chris Dennis, each of whom departed the band early on. The name Pink Floyd was selected by Roger Barrett, known to all as Syd Barrett, who arrived on the scene as lead guitarist and lead vocalist, replacing both Klose and Dennis, and who quickly came to be the undisputed leader of the band, eventually becoming widely known as its founder. The other founding members of the band were Nick Mason, as drummer, Rick Wright, who played keyboards and provided backing vocals, and Roger Waters, who provided backing vocals and first played guitar before moving to the bass to make way for Syd Barrett.<sup>91</sup>

In October of 1966, Barrett, Mason, Waters and Wright formed a six-way partnership with their two managers, Andrew King and Peter Jenner. Barrett immediately began writing his own songs, which proved to be mixture of psychedelic rock and Barrett's own whimsical brand of humor, further cementing his leadership of the band to the point where he could legitimately call it his own, for all practical purposes. As further evidence of his dominance over and stewardship of the band, when its first album, entitled *The Piper at the Gates of Dawn*, was released in August of 1967, Barrett had songwriting credits on nine of the eleven songs on the album, with the other band members collaborating on the remaining two.<sup>92</sup> The album was a substantial success, rising to number six on the charts in the U.K., with a good critical reception. In the months prior to the release of *Piper*, Pink Floyd had released two singles, one entitled *Arnold Layne*, and another entitled *See Emily Play*, each of which was penned by Barrett, and which reached the the twentieth and the sixth spots on the charts, respectively. The

band was off to an excellent start with Barrett as its front man. Soon after the achievement of the success of the first album, which brought with it the increased demands of touring, Barrett's mental health spiraled severely downward, this condition eventually being attributed to an inherent mental illness that was exacerbated by the use of LSD, to the point where he could no longer perform with the band live. At this point, in January of 1968, Gilmour was brought into the band, at first as merely a substitute for Barrett's role as lead guitarist and lead singer, with the hope being that Barrett would still be able to write songs. Eventually the other members of the band gave up on this idea, and in April of 1968, Barrett, no longer contributing anything to the band's activities, was formally removed from the band. Of note at this point is the fact that both King and Jenner also chose to leave the partnership, effectively dissolving it, in order to be able to manage Barrett, such was their conviction that Barrett was the leader of the band, its only significant talent, and that, in essence, without Barrett, the band had no prospects for success.<sup>93</sup>

Gilmour, Mason, Waters, and Wright then teamed up with a new manager, Steven O'Rourke, and continued on under the name Pink Floyd, releasing a follow-up album in 1968 called *A Saucerful of Secrets*, which included one song written by Barrett prior to his departure, and ten songs written by various members of the band.<sup>94</sup> This became the modus operandi of the band over the next few years, as it released several albums of modest or limited commercial success, until it released an album entitled *Meddle*, which showed significant promise and paved the way for the production and release of one of the greatest and most commercially successful rock albums of all time, *Dark Side of the*

Moon. By the release of *Meddle*, Roger Waters had begun to emerge as the artistic force behind the band, after several years of collective floundering, to the point where Waters wrote the entire album, and almost all of the band's other watershed albums that followed *Dark Side*, such as *Wish You Were Here* (generally considered to be a tribute to the departed leader and founder Syd Barrett) and *The Wall*.<sup>95</sup>

To date, *Dark Side of the Moon* has sold over 40 million copies worldwide, and holds the record for the longest uninterrupted stint on the *Billboard* 200 chart, an astounding twelve years. To date, Pink Floyd has sold over 200 million albums copies worldwide, on its way to becoming one of the world's most commercially successful and influential rock bands of all time. Using figures compiled several years after release, the album *Wish You Were Here*, released in 1975, contributed sales of approximately 10 million copies, and *The Wall*, released in 1979, contributed approximately 17 million copies sold. Even the mediocre *Animals*, released in 1977 and generally not critically well-received, sold about 6 million copies, possibly an indication, in hindsight, of the value of the Pink Floyd name.<sup>96</sup>

Under the light of this enormous success, all achieved while Waters spearheaded the creative direction of the group and exerted increasing dominance over its artistic affairs (to the point where the last Pink Floyd album, entitled *The Final Cut*, noted on its cover that it was written by Roger Waters, and performed by Pink Floyd),<sup>97</sup> Waters's 1986 claims that the band had no viability without his participation, and thus Gilmour, Waters, and Wright should not be able to continue under the name Pink Floyd, seemed plausible. Without question, Waters had as legitimate claim to being synonymous with

the name of his band as anyone could, rivaled by only a few, such as Jim Morrison of The Doors, but certainly by no other rock artist in terms of overall commercial success. And while the issue could still be debated in terms of the concept of the whole being much greater than the sum of its parts, and while Gilmour could feasibly lay legitimate claim to having provided an overall balance to the group, through his vocals and guitar work—further bolstering his right to continue with Mason and Wright as Pink Floyd by citing the fact that they and Waters did so after Barrett departed—in the end, as is usually the case in legal disputes, the matter of the governing contract came into play. Waters, without even so much as a partnership agreement that had been confirmed in writing,<sup>98</sup> quickly found that he had little legal ground on which to base his action against the remaining members of Pink Floyd. After two years of fighting, more than a year of the battle taking place in the courtroom or through legal channels, Waters was left to settle his case with Gilmour and company, in exchange for the concession that he would be released from his contract with manager O'Rourke, who had sued Waters for back royalties with respect to his solo work.<sup>99</sup> Gilmour, Mason and Wright went on to release two more albums without Waters, *A Momentary Lapse of Reason* in 1987, and *The Division Bell* in 1994, each of which sold ... (can we have a drum roll please ...) 6 million copies.<sup>100</sup> How many copies of *A Momentary Lapse of Reason* would Gilmour, Mason, and Wright have sold without the name Pink Floyd attached to it? Each of these albums was supported by a tour in which Gilmour, Mason, and Wright performed as Pink Floyd. Ironically, due to a key decision to make Gilmour's voice be the main voice of Pink Floyd during the making of *Dark Side of the Moon*, the man whose enormous inner

drive and creative talents led the way to the landmark achievements of the band was completely expendable in the context of the live performance of the band's great log of work, as Waters could simply be replaced by a hired bass player to no noticeable effect.

### **The Moral of the Story: Protect, Protect, Protect**

The lesson to be learned from all of the above is: anyone who is planning to start a band and who has visions of the kind of success achieved by The Moody Blues and Pink Floyd, delusions of grandeur though they may be, is well-advised to clarify in a written contract all relevant issues as to what happens to the chosen band name upon the departure of one or more members. Perhaps the only scenario which could illuminate this point any more dramatically would be one in which Paul McCartney and Ringo Starr decide to get together and record and tour under the name The Beatles, in an effort to capitalize on the success of that band, estimated by its own record company in 1985 to have sold over 1 billion album copies worldwide. In that unlikely eventuality, Paul and Ringo, in the absence of a contract enabling them to do so, and in anticipation of facing mighty legal challenges from Olivia Harrison and Yoko Ono, the widows of the departed George Harrison and John Lennon, may want to reconsider, even if they were planning to bring Pete Best along with them.

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- <sup>1</sup> THE MOODY BLUES, THE SINGLES+, Liner Notes at 2, (BR Music 2000) and <http://www.toadmail.com/~notten/FAQ-3-03.htm> (last visited May 7, 2007) (noting also that during this period of time, Thomas was working as a toolmaker, and Pinder had a job at a factory that produced Mellotrons, an instrument that could effectuate the sounds of an orchestra, and which would become a hallmark of the sound of a later composition of The Moody Blues).
- <sup>2</sup> THE MOODY BLUES, THE SINGLES+, Liner Notes at 2, (BR Music 2000).
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.* (noting that Pinder's and Thomas's intention was to form a so-called supergroup).
- <sup>5</sup> THE MOODY BLUES, THE SINGLES+, Liner Notes at 2, (BR Music 2000) and <http://www.toadmail.com/~notten/FAQ-3-01.htm> (last visited May 7, 2007) (citing the liner notes inserted into the packaging for the compilation entitled GOLD, released in March of 2005, for the figure of number of album copies sold).
- <sup>6</sup> <http://www.toadmail.com/~notten/FAQ-3-021.htm> (last visited May 7, 2007) (noting that the album entitled DECEMBER, released in 2003, was the first Christmas album released by the group, and included six cover versions of songs and five original compositions, all produced by Justin Hayward and John Lodge).
- <sup>7</sup> [http://www.moodies-magazine.com/~notten/on\\_tour7.htm](http://www.moodies-magazine.com/~notten/on_tour7.htm) (last visited May 7, 2007) (noting that the group's 2007 summer tour included 32 dates and locations throughout North America, including Canada, and that a December tour of England included another 12 dates and locations).
- <sup>8</sup> <http://www.toadmail.com/~notten/FAQ-3-03.htm> (last visited May 7, 2007) (noting that trio of Edge, Hayward, and Thomas are supported by various musicians and vocalists who are "hired" by the band to perform their services, including those Norda Mullen, who played Thomas's flute parts during the band's 2003 tour after Thomas left The Moody Blues, and who also played on two tracks of the album *December*).
- <sup>9</sup> Bob Egelko, *Paul Kantner Sued for Using 'Starship' name; Band's Ex-Manager Says Trademark Is Being Infringed on*, S. F. CHRONICLE, March 23, 2007, at B3 (noting that Jefferson Starship vocalist Grace Slick joined the suit, which accused the guitarist and former Jefferson Starship member Paul Kantner of illegally using the band's name in promotional contracts and concerts, in violation of a 1985 settlement agreement signed one year after Kantner left the group, and noting also that Kantner's existing band sometimes includes the participation of Jefferson Airplane's co-founder and vocalist Marty Balin).
- <sup>10</sup> THE MOODY BLUES, THE SINGLES+, Liner Notes at 2, (BR Music 2000) and <http://www.toadmail.com/~notten/FAQ-3-03.htm> (last visited May 7, 2007) (noting that Hayward had worked briefly as a sales rep for a building supplies company when his resume caught the eyes of Edge, Pinder, and Thomas, which had been given to them by Eric Burden of The Animals, and that Lodge had recently completed studies in metallurgy at Birmingham Tech University when he was reunited with Pinder and Thomas, having previously played with them as El Riot and the Rebels).
- <sup>11</sup> THE MOODY BLUES, THE SINGLES+, Liner Notes at 3, (BR Music 2000) and <http://www.toadmail.com/~notten/FAQ-3-03.htm> (last visited May 7, 2007) (noting that Moraz had broken into the rock scene by replacing Rick Wakeman on Yes, appearing on only one album by Yes, entitled *Relayer*, before being selected to play keyboards for The Moody Blues during the group's 1978 in support of the album *Octave*, on which Mike Pinder played keyboards before departing the band after the recording sessions).
- <sup>12</sup> THE MOODY BLUES, THE SINGLES+, Liner Notes at 2, (BR Music 2000) and <http://www.toadmail.com/~notten/FAQ-3-03.htm> (last visited May 7, 2007) (noting that Mullen also provided backing vocals and additional guitar work for the 2003 tour).
- <sup>13</sup> <http://www.toadmail.com/~notten/FAQ-3-03.htm> (last visited May 7, 2007) (noting that Edge was working as a draughtsman prior to becoming a member of The Moody Blues, and that he pioneered the use of electronic drums).
- <sup>14</sup> <http://www.toadmail.com/~notten/FAQ-5-01.htm> (last visited May 7, 2007) (noting that, other than in a handful of instances on records, Edge generally only recited his own poetry in concerts).
- <sup>15</sup> See, generally, <http://www.toadmail.com/~notten/FAQ-3-03.htm> (last visited May 7, 2007) and THE MOODY BLUES, THE SINGLES+, Liner Notes at 2, (BR Music 2000) (noting that, although the group did not play with an orchestra on its first album after Hayward and Lodge joined the group, *Days of Future Passed*, the London Festival Orchestra did interpose musical tracks between those laid down by The Moody Blues

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on the album, and that, enabled by Pinder's use of the mellotron, this would become the model approach taken by the band for its next six albums).

<sup>16</sup> [http://www.en.wikipedia.org/wiki/The\\_Beatles](http://www.en.wikipedia.org/wiki/The_Beatles) (last visited May 9, 2007) (noting that Rolling Stone magazine placed the band at number one in its 2004 list of the "100 Greatest Artists of All Time.").

<sup>17</sup> <http://www.riaa.com/new%5Cnewsletter%5Cpress1999%5C111099.asp> (last visited May 10, 2007) (noting that those albums are: Abbey Road, Sgt. Pepper's Lonely Hearts Club Band, The Beatles (also known as The White Album)—"the three best-selling albums of the 1960s"—and two compilations released in 1973: The Beatles 1962-1966, and The Beatles: 1967-1970).

<sup>18</sup> See, generally, BOB SPITZ, *THE BEATLES* (2005).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> [http://www.en.wikipedia.org/wiki/The\\_Beatles](http://www.en.wikipedia.org/wiki/The_Beatles) (last visited May 9, 2007) (noting that in early 1962, the magazine Cashbox referred to one of those songs, My Bonnie, as the debut of a "new rock and roll team, Tony Sheridan and The Beatles.").

<sup>22</sup> See, generally, BOB SPITZ, *THE BEATLES* (2005) (noting that, at Starr's first appearance with The Beatles as the group's drummer, fans engaged in a public outcry over Best's departure, chanting "We want Pete!") *Id.* at 347.

<sup>23</sup> <http://www.toadmail.com/~notten/FAQ-3-03.htm> (last visited May 7, 2007) (noting that Warwick's real name was Albert Eccles, and that he became a carpenter in Birmingham after leaving the group, and did not resurface on The Moody Blues scene until he began meeting with fans during concerts at the Royal Albert Hall in May of 2000, and that he released a single entitled My Life, the Waltz, in March 14, 2002).

<sup>24</sup> See, generally, THE MOODY BLUES, *THE SINGLES+*, Liner Notes, (BR Music 2000) and [http://www.moodies-magazine.com/~notten/on\\_tour7.htm](http://www.moodies-magazine.com/~notten/on_tour7.htm) (last visited May 7, 2007).

<sup>25</sup> See, generally, [http://www.moodies-magazine.com/~notten/on\\_tour7.htm](http://www.moodies-magazine.com/~notten/on_tour7.htm) (last visited May 7, 2007).

<sup>26</sup> *Id.*

<sup>27</sup> See, generally, DONALD A. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS*, 307-326 (2003) and MARK HALLORAN, ESQ., *THE MUSICIAN'S BUSINESS AND LEGAL GUIDE*, 2-33 (2001).

<sup>28</sup> Robert R. Carter, jr., J.D., Lectures in Entertainment Law Class, St. Mary's University School of Law, January 22, 2007, February 26, 2007, March 5, 2007, and April 9, 2007.

<sup>29</sup> *Id.*

<sup>30</sup> EDWARD WINCENTSEN, *THE MOODY BLUES COMPANION* at 85 (2001).

<sup>31</sup> Jim Abbott, *Life After the Moody Blues Upbeat; Keyboardist Patrick Moraz Plays On*, ORLANDO SENTINEL, September 30, 1991, at Calendar 12 (noting that Moraz was devastated at the announcement of his termination, and lamented the fact that he hadn't been told about it until the 1991 summer tour was about to start, leaving him with no time to make alternate plans).

<sup>32</sup> *Id.* (quoting Moraz as saying about the members of the band, "They're greedy and they'll all make more money."). *Id.*

<sup>33</sup> [http://www.en.wikipedia.org/wiki/Moody\\_Blues](http://www.en.wikipedia.org/wiki/Moody_Blues) (last visited May 9, 2007) (noting that Bias Boshell and Paul Bliss were brought in to play the remaining tracks not yet recorded for the album Keys of the Kingdom after Moraz was fired).

<sup>34</sup> EDWARD WINCENTSEN, *THE MOODY BLUES COMPANION* at 85 (2001).

<sup>35</sup> <http://www.toadmail.com/~notten/FAQ-3-03.htm> (last visited May 7, 2007).

<sup>36</sup> *Pinder v. Decca Record Co. Ltd. and Another*, Chancery Division, 15 May 1981 (noting that Decca Record Company Limited was originally the sole defendant in the case).

<sup>37</sup> *Id.* (acknowledging that the plaintiff Pinder was one of the founding members of The Moody Blues, but that the evidence in the case revealed a dispute as to the importance of the plaintiff's role in the group).

<sup>38</sup> *Id.* (noting that the analogy to Lennon and The Beatles was denied by the defendants).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (noting that Pinder reluctantly joined the others in reuniting, but did so on the stipulation that the group's next album would be recorded in California).

<sup>41</sup> *Id.* at 2.

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<sup>42</sup> EDWARD WINCENTSEN, *THE MOODY BLUES COMPANION* at 31 (2001) (noting that the band did not abandon this formula until Pinder left the group, at which point Hayward and Lodge filled the gap left by Pinder and wrote more songs per album).

<sup>43</sup> [http://www.en.wikipedia.org/wiki/Moody\\_Blues](http://www.en.wikipedia.org/wiki/Moody_Blues) (last visited May 8, 2007) (indicating that Hayward often wrote or co-write several songs on every album).

<sup>44</sup> *Pinder v. Decca Record Co. Ltd. and Another*, Chancery Division, 2, 15 May 1981 (noting that it was during this period of time that Hayward claimed to have been told by Pinder that he had, indeed, departed the group).

<sup>45</sup> *Id.*

<sup>46</sup> [http://www.en.wikipedia.org/wiki/Moody\\_Blues](http://www.en.wikipedia.org/wiki/Moody_Blues) (last visited May 8, 2007) (noting that Moraz was retained as the band's permanent keyboardist as it was about to produce the new album).

<sup>47</sup> *Pinder v. Decca Record Co. Ltd. and Another*, Chancery Division, 2, 15 May 1981 (noting that Pinder as plaintiff filed two actions simultaneously, this one in the Chancery Division to obtain the injunction to prevent the release of the new album, and to obtain damages, and another one in the Queen's Bench Division, claiming a share of the advance paid by Decca to the group).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (noting that the service agreement was dated May 1, 1977, and was actually between the members of the band and a service company named Talencora, the other defendant in the case, which had an agreement to supply three albums made by The Moody Blues to Decca, one each for three years, starting with the album released in 1978, *Octave*, on which Pinder played, and to which he contributed one song written by him).

<sup>50</sup> *Id.* (noting that the contract called for three additional albums to be produced at a rate of one per year after the first album was produced).

<sup>51</sup> *Id.* at 2-4.

<sup>52</sup> *Id.* at 2.

<sup>53</sup> *Id.* at 4.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 3.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2-3.

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1-4.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> <http://www.stevesbeatles.com/songs/default.asp?sort=songwriter> (last visited May 10, 2007).

<sup>74</sup> <http://www.lyrics.com/album.php?artistid=171> (last visited May 10, 2007).

<sup>75</sup> EDWARD WINCENTSEN, *THE MOODY BLUES COMPANION* at 29 (2001).

<sup>76</sup> *Id.* at 81 (noting that Pinder himself stated that the band likely missed his overall arrangements, concepts, and direction).

<sup>77</sup> *Id.* at 29 (recognizing also Pinder's use of the Mellotron as an influence, and that Hayward loved Pinder's voice and his rhythm).

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- <sup>78</sup> DONALD A. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS*, 307-308 (2003) (noting that, ordinarily, the breach of a recording contract by one member of a group is equivalent to a breach of the contract by all members, meaning that if one member no longer wants to record with the others, the contract is breached).
- <sup>79</sup> *Id.* (noting that, if a key member is established in the contract, the other members of the band would be best served to only allow the key member's departure to trigger a right in the company to terminate the remaining band members).
- <sup>80</sup> *Id.* at 308 (noting that it isn't always good to be designated as a key member).
- <sup>81</sup> *Pinder v. Decca Record Co. Ltd. and Another*, Chancery Division, 1-4, 15 May 1981.
- <sup>82</sup> [http://www.en.wikipedia.org/wiki/Moody\\_Blues](http://www.en.wikipedia.org/wiki/Moody_Blues) (last visited May 10, 2007) (noting that, without Pinder, the use of the Mellotron had given way to a less symphonic, more modern approach).
- <sup>83</sup> Caroline Davies, *Procol Harum and the Scales of Justice, Court Battle over Who Wrote the Organ Solo in Whiter Shade of Pale*, *THE DAILY TELEGRAPH*, November 14, 2006, at A5.
- <sup>84</sup> NICHOLAS SCHAFFNER, *SAUCERFUL OF SECRETS: THE PINK FLOYD ODYSSEY*, 282 (1991) (noting that Waters officially confirmed his departure from the band in a letter to record companies CBS and EMI).
- <sup>85</sup> Caroline Davies, *Procol Harum and the Scales of Justice, Court Battle over Who Wrote the Organ Solo in Whiter Shade of Pale*, *THE DAILY TELEGRAPH*, November 14, 2006, at A5.
- <sup>86</sup> NICHOLAS SCHAFFNER, *SAUCERFUL OF SECRETS: THE PINK FLOYD ODYSSEY*, 292 (1991) (noting that Waters argued that it was "only realistic and honest to admit that the group has in practical terms disbanded and should be allowed to retire gracefully from the music scene.").
- <sup>87</sup> NICHOLAS SCHAFFNER, *SAUCERFUL OF SECRETS: THE PINK FLOYD ODYSSEY*, 263-264, 277 (1991) (noting that Waters couldn't understand why, when he went out on a tour in 1985 to promote his first solo album in 1985, *The Pros and Cons of Hitchhiking*, ticket sales were slow), and David Sly, *Pink Floyd, An Identity Crisis*, *THE ADVERTISER*, October 1, 1987, at 1 (noting that Waters declared that, without his involvement, Pink Floyd ceases to exist).
- <sup>88</sup> NICHOLAS SCHAFFNER, *SAUCERFUL OF SECRETS: THE PINK FLOYD ODYSSEY*, 264 (1991) (noting that, according to Gilmour, when he informed Waters before he left the band that the remaining members of the band would carry on without him, Waters simply laughed and said, "You'll never fucking do it.").
- <sup>89</sup> NICHOLAS SCHAFFNER, *SAUCERFUL OF SECRETS: THE PINK FLOYD ODYSSEY*, 293 (1991) (noting that Gilmour also stated, "We are surprised Roger thinks the band is 'a spent force creatively' as he's had no involvement in the current project.").
- <sup>90</sup> NICHOLAS SCHAFFNER, *SAUCERFUL OF SECRETS: THE PINK FLOYD ODYSSEY*, 293 (1991) (noting that Gilmour also was quoted as saying, "Roger is a dog in the manger and I'm going to fight him.").
- <sup>91</sup> [http://www.en.wikipedia.org/wiki/Pink\\_Floyd](http://www.en.wikipedia.org/wiki/Pink_Floyd) (last visited May 10, 2007).
- <sup>92</sup> PINK FLOYD, *THE PIPER AT THE GATES OF DAWN*, liner notes, (EMI, 1967).
- <sup>93</sup> *Id.*
- <sup>94</sup> PINK FLOYD, *A SAUCERFUL OF SECRETS*, liner notes, (EMI, 1968).
- <sup>95</sup> *Id.*
- <sup>96</sup> *Id.*
- <sup>97</sup> PINK FLOYD, *THE FINAL CUT*, cover, (EMI, 1983).
- <sup>98</sup> NICHOLAS SCHAFFNER, *SAUCERFUL OF SECRETS: THE PINK FLOYD ODYSSEY*, 293 (1991).
- <sup>99</sup> NICK MASON, *INSIDE OUT: A PERSONAL HISTORY OF PINK FLOYD*, 294 (2005).
- <sup>100</sup> [http://www.en.wikipedia.org/wiki/Pink\\_Floyd](http://www.en.wikipedia.org/wiki/Pink_Floyd) (last visited May 10, 2007).