

No. 09-2571

**United States Court Of Appeals
For the First Circuit**

SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING; STEELE RECORDZ

Plaintiffs – Appellants

v.

TURNER BROADCASTING SYSTEM, INC.; TIME WARNER, INC.; JON BONGIOVI, individually and d/b/a Bon Jovi Publishing; RICHARD SAMBORA, individually and d/b/a Aggressive Music; WILLIAM FALCONE, individually and d/b/a Pretty Blue Songs; FOX BROADCASTING CO.; MAJOR LEAGUE BASEBALL PROPERTIES, INC.; MLB PRODUCTIONS, A&E; A&E/AETV; BON JOVI; AEG LIVE, LLC; MARK SHIMMEL MUSIC; VECTOR MANAGEMENT; AGGRESSIVE MUSIC, a/k/a Sony ATV Tunes; BON JOVI PUBLISHING; UNIVERSAL MUSIC PUBLISHING GROUP; UNIVERSAL POLYGRAM INTERNATIONAL PUBLISHING, INC., PRETTY BLUE SONGS; SONY ATV TUNES; KOBALT MUSIC PUBLISHING AMERICA, INC.; BOSTON RED SOX

Defendants – Appellees

THE AMERICAN SOCIETY OF COMPOSERS; FOX TELEVISION STATIONS, INC.; ISLAND RECORDS, a/k/a Island Def Jam Records; BIGGER PICTURE CINEMA CO.,

Defendants

**APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**BRIEF OF APPELLANTS SAMUEL BARTLEY STEELE; BART STEELE
PUBLISHING; STEELE RECORDZ**

Christopher A.D. Hunt
The Hunt Law Firm LLC
10 Heron Lane
Hopedale, MA 01747
(508) 966-7300

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, appellants Samuel Bartley Steele, Bart Steele Publishing and Steele Recordz state that Bart Steele Publishing and Steele Recordz are unincorporated businesses wholly owned by Samuel Bartley Steele. No corporation owns stock in Bart Steele Publishing or Steele Recordz.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

This copyright infringement case involves well-established copyright and civil procedure principles. However, the facts to which these principles must be applied involve the use of cutting-edge digital media “tools” used in the alleged infringement. Oral argument – with the judicious use of multimedia exhibits – will help clarify how such long-standing principles should be applied to the use of computers and sophisticated software to create – or infringe upon – a digital work of authorship.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Massachusetts had original jurisdiction over this copyright infringement pursuant to the copyright statute, 17 U.S.C. § 101 et seq. and 28 U.S.C. §1338(a). Appellants asserted additional claims – pursuant to M.G.L. c. 93A, and the Lanham Act – which the district court dismissed on April 3, 2009, leaving only appellants’ copyright claims.

The First Circuit Court of Appeals has jurisdiction over this appeal based on the district court’s final judgment, dismissing appellants’ copyright claims as a matter of law on August 19, 2009 and disposing of all parties’ claims. On August 28, 2009, appellants timely filed a motion for reconsideration or to amend the judgment (“motion”). The district court denied appellants’ motion on October 13, 2009. Appellants timely filed a Notice of Appeal on November 6, 2009.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court's *sua sponte* limitation of discovery to substantial similarity, against the agreement of the litigants, unfairly prejudice Steele's ability to discovery and fairly present his claims falling outside the narrow confines of substantial similarity?
2. Was the district court's dismissal as a matter of law of Steele's claim of infringement by exact duplication - without consideration of his claim, or any findings or rulings on his claim – a violation of Steele's right to trial by jury?
3. Did the district court misapply copyright law by ruling that Steele's "synchronization rights" were not violated because intervals of time are not subject to copyright protection?
4. Was the district court's disregard of a dozen unchallenged affidavits and undisputed statistical evidence in Steele's favor an error in dismissing Steele's claim on the basis of lack of substantial similarity?

STATEMENT OF THE CASE

Nature of the Case

This is a copyright infringement case.

Course of Proceedings

Appellants Samuel Bartley Steele and his two unincorporated businesses, Bart Steele Publishing and Steele Recordz (“Steele”), filed this lawsuit, *pro se*, on October 8, 2008 in the U.S. District Court in Boston. Steele alleged copyright infringement, M.G.L. c. 93A, and Lanham Act violations against defendants. On April 3, 2009 the district court (Gorton, J.) dismissed Steele’s claims against several defendants entirely and dismissed all but Steele’s copyright claims against the remaining defendants.

In the district court’s April 3, 2009 order it also ordered that discovery would be limited to 60 days and only as to the issue of “substantial similarity” between the works at issue. On August 19, 2009 the district court allowed all remaining defendants’ motions for summary judgment as to Steele’s copyright claims, terminating all parties’ claims in the district court. Steele’s motion to reconsider or amend the district court’s judgment was denied and Steele filed a notice of appeal on November 6, 2009.

Disposition Below

The district court limited discovery on Steele's copyright claims to the issue of "substantial similarity" at the outset of the case; initial disclosures were also waived at the request of defendants. Steele asserted claims arising from the advertising industry's practice of "temp tracking," specifically that defendants used his musical work as a template to create an audiovisual advertisement.

Steele alleged infringement of his exclusive rights to reproduce his work, create derivatives from his work, and to synchronize his work to video. The district court's discovery order, which limited the issue before the court to substantial similarity, impaired Steele's ability to discover and prove his infringement claims.

The district court failed to address Steele's claims that did not hinge on a substantial similarity analysis and allowed defendants' motions for summary judgment as to all of Steele's copyright claims. Steele asserts the district court erred in failing to properly address his claims at the outset and disregarding those claims at summary judgment, depriving Steele of his Constitutional right to a jury trial. Steele further asserts that the district court misapplied the law and disregarded summary judgment standards in its substantial similarity analysis. Steele appeals the district court's order dismissing his copyright claims as a matter of law.

STATEMENT OF FACTS

I. The Steele Song

In September 2004, Samuel Bartley Steele (“Steele”), a songwriter, musician, and Red Sox fan wrote and recorded a 2:38:90-long country-rock “baseball playoff anthem” to support the Red Sox as they headed for the playoffs, which he titled “(Man I Really) Love This Team” (“Steele’s Song” or “Song”). App-1.

Steele’s Song was just one of fifteen million American musical works about the hometown baseball team with the title expression “I Love This.” App-606. Steele’s work is one of only five out of the same fifteen million musical works featuring the Red Sox and country-rock music. App-793.

In October 2004, Steele and his friends began performing the song outside Fenway Park and soon the bars around Fenway Park (e.g., Cask n’ Flagon, Boston Beer Works) were holding sing-alongs to it. App-24.

Steele’s Song gained popularity as the Red Sox played October baseball, getting airplay on local radio and television stations where Steele performed his Song live, including on Channels 5 and 7 and on sports talk radio station WEEI 850 AM. App-24-25. Steele’s Song also spread rapidly on the internet: www.fenwaynation.com posted Steele’s Song and during the fall of 2004, the site regularly received more than

180,000 daily visits.¹ App-25. Steele's Song was also posted at www.mvn.com (the largest independent sports website in the country), and other websites. App-25. In October 2005, Steele performed the Song on Chelsea Community Television as part of a hurricane Katrina relief effort. App-25.

In June 2006 Steele registered his Song with the Library of Congress and received copyright certificate PAu003052330, dated June 30, 2006 ("Steele PA Copyright"). App-26.

In 2007 Bon Jovi released its "phonorecording" (album) "Lost Highway". App-27. Lost Highway included a 4:38-long "musical work" called "I Love This Town."² App-65. A 2:38:90-long version of "I Love This Town" provided the "soundtrack" (along with some baseball sounds - e.g., bats hitting balls.) to MLB's Audiovisual.³ App-65.

¹ Steele's Song is still posted and can be listened to here:

http://www.fenwaynation.com/LOVE_THIS_TEAM.html

² "Musical work" and "phonorecording" refer to the terms as used and defined by the copyright statute, as legally distinct and separate from music and sounds that accompany visual images, i.e., a "soundtrack." See 17 U.S.C. §§ 102, 106; also § 101 (definition of "phonorecords" expressly excludes sounds "accompanying a motion picture or other audiovisual work").

³ "Soundtrack" refers to "accompanying sounds" joined with a "series of related images" as part of an "audiovisual work" or "motion picture," as defined under the copyright statute. See 17 U.S.C. § 101.

II. The MLB Audiovisual

In July 2006, appellees MLB, TBS, and Fox announced a seven-year deal whereby baseball playoffs would be broadcast exclusively on cable television beginning in 2007. App-26. To promote this new arrangement, MLB produced the 2:38:90-long audiovisual advertisement at issue ("MLB Audiovisual"), which included a 2:38:90-long version of "I Love This Town" as part of its soundtrack. App-26-27, 65.

A company called "MLB Advanced Media" ("MLBAM") owns the copyright to the MLB Audiovisual; unfortunately, as detailed in the next section, MLB submitted an altered or otherwise inaccurate copy of its Audiovisual with its summary judgment papers, which no longer shows the MLBAM copyright notice at the end.⁴ The actual MLB Audiovisual (with the MLBAM copyright notice at the end) can be seen by clicking on this link to MLB's website:

http://mlb.mlb.com/media/player/mp_tpl_3_1.jsp?w_id=595113&w=/2007/open/commercial/082707_tbs_bonjovi_ps_promo_400.wmv&pid=gen_video&vid=1&mid=200708272173402&cid=mlb&fid=gen_video400&v=2

a. The Altered MLB Audiovisual

MLB filed with the district court an altered or otherwise incorrect - and materially different - version of the MLB Audiovisual (the "Altered Audiovisual").

⁴The record, therefore, does not contain a copy of the actual MLB Audiovisual.

App-68, 511.⁵ The Altered Audiovisual has 12 seconds of "dead air" in the beginning and does not have the final seconds showing the MLBAM copyright notice, "© 2007 MLBAM". App-68, 511. The Altered Audiovisual is 2:46-long; not 2:38:90-long like both the actual MLB Audiovisual and Steele's Song. App-515.⁶

III. The District Court's *Sua Sponte* Discovery Limitation

On March 24, 2009, Steele, *pro se*, and MLB filed their Joint Statement Pursuant to Rules 26(f) and Local Rule 16.1(d) ("Joint Statement"). App-366. Steele and MLB agreed to a phased discovery schedule. App-369-371.

On March 31, 2009 the district court stated "what I am inclined to do is to permit the plaintiff to have a limited amount of discovery on specifically that issue, that is, do substantial similarity of the composition and the alleged copyright infringing song... before we get into the more extensive discovery that would be called for in this case gets beyond the summary judgment point of view." App-394 (emphasis supplied). Neither side had requested such a limited discovery period. App-369-370.

⁵ The CD Exhibit with the Altered Audiovisual is attached to App-511.

⁶ The MLB Audiovisual with Steele's Song substituted for the original soundtrack, is on a CD at App-515.

The district court specifically forbade discovery on “who had access to Steele's copyrighted work or when or who was responsible for the creation of the allegedly infringing works.” App-386.

On April 3, 2009 the district court issued its discovery order, allowing 60 days for discovery relevant to the “issue of substantial similarity.” App-387. Implicit in the district court's order was the waiver of Rule 26(a) mandatory disclosure requirements, which MLB had requested (Steele had opposed waiver). App-367.

IV. Steele’s Infringement Claims

Steele claimed, among other things, that MLB infringed his exclusive right to “reproduce his Song” pursuant to 17 U.S.C. § 106(1). App-27, 32, 156, 307-308, 591, 594, 785, 787, 792. Steele also claimed that the MLB Audiovisual infringed his synchronization rights. App-27-32. Steele alleged that MLB infringed his exclusive rights by using his Song as a “temp track.” App-27-32, 591-592.

a. “Temp Tracking” Defined

Audiovisual commercial editors typically edit their video to music, often in the form of “an original score, a drumbeat, or a temp track.” App-711. “Temp tracking,” is the practice - widespread in the advertising industry - whereby a copyrighted “for

the purpose of editing [video footage] and presenting a prospective [audiovisual] commercial to the client.” App-700.

After editing video to a temp track, an audiovisual commercial's producer will later attempt to select “final” music to replace the unlicensed temp track. App-713-714.⁷ Finding suitable replacement music can be “pretty hard:” “[g]enerally, [video] editors have two to three weeks alone with the creative team and the producer in the [editing] suite, and they cut to [the temp track]” and “[t]hey find something that has a nice pattern, so that all the cuts line up to it; the payoff, the shot, it’s perfect. Now try to replace that. It’s pretty hard.” App-713-714⁸

Because temp tracking presents copyright infringement issues, advertisers and their musicologists work to downplay their use of temp tracks. App-703-707.

Some musicologists, like MLB’s expert in the district court, Anthony Ricigliano, do “commercial applications,” that is, “clearing” an audiovisual commercial’s soundtrack by opining on whether the “final” soundtrack infringes any copyrighted music, i.e., the temp track to which the commercial's video was cut.

⁷ A more legible copy is available here:

<http://www.boardsmag.com/articles/magazine/20060501/pale.html>

⁸ To replace a temp track with different music, the new music must have the same tempo as the temp track to which the video was originally edited or the new music must – if possible – be “beat-matched” to follow the video’s edits. App-715-720.

App-701. According to Ricigliano “[copyright infringement] is a much bigger problem than most people know.” App-710-711.

Ricigliano also advises his temp track-using clients on defending against copyright claims, for example advising his clients to use more than one temp track where possible: “There is a big difference between one and five temp tracks... More than one piece of music makes the final track more defensible,” and recommending that circulation of temp tracks be limited. App-701.

V. Steele's Facts Submitted in Opposition to Summary Judgment

Steele's facts at summary judgment included: (1) Evidence of MLB access to his Song; (2) Empirical evidence of actual copying (and substantial similarity) in a sworn Chronology Review (“Chronology Review”); (3) Testimonial evidence of actual copying (and substantial similarity) in the form of fourteen (14) sworn affidavits from both lay witnesses and experts.

a. MLB Access to Steele’s Song

In late October 2004, Steele’s friend, Irene Bar, spoke to Jay Rourke of the Red Sox organization, who said he felt the Red Sox would love Steele’s Song, and asked Ms. Bar to e-mail it to him. App-697. Barr e-mailed Steele’s Song to Rourke at jrouke@redsox.com. App-697.

In their 2008-filed Answer, the Red Sox admitted that Jay Rourke received Bar's 2004 e-mail with the Steele Song attached. App-424.

Also in the fall of 2004, Steele's roommate, who worked inside Fenway Park, handed out CDs with the Steele Song to several Red Sox executives inside Fenway Park. App-24. Steele also gave out thousands of CDs containing Steele's Song and lyric sheets to fans outside the park and to Red Sox officials entering the executive Fenway Park entrance on Brookline Avenue. App-24.

Steele mailed CDs and lyric sheets of his Song, in the fall of 2004, to Red Sox players Johnny Damon, Bronson Arroyo, Kevin Millar, and team captain Jason Varitek; to Red Sox owner John Henry; to Red Sox General Manager Theo Epstein; and to New England Sports Network's long time Red Sox television announcer Jerry Remy. App-25.

Steele also sent his Song and its lyric sheets throughout 2005 and 2006 to not only the Red Sox, but also to Major League Baseball. Steele enclosed in his correspondence alternative lyrics for a variation of his Song, entitled "(Man I Really) Love This Town" ("Team" replaced with "Town"). App-25. Two witnesses observed Steele sending recordings, lyric sheets, and correspondence about his baseball marketing concept to the Red Sox and MLB. App-697-698.

i. MLB Proffered no Facts Disputing Access

MLB offered no facts disputing access, asserting only that it was irrelevant, stating in its motion to dismiss papers that there was no infringement "regardless of whether copying is assumed for the purposes of this motion." App-51.

ii. The District Court's Ruling on Access

The district court did not address access in its summary judgment decision, which focused solely on whether the Steele Song and MLB Audiovisual were "substantially similar." App-771-781.

b. The Chronology Review: Empirical Similarities⁹

Among other things, the Chronology Review determined that Steele's Song and the MLB Audiovisual are the exact same length (2:38:90 to 'fade' ending) and that 96% of the MLB Audiovisual's video images closely or perfectly match the Steele Songs tempo and 'beat.' App-645-666; 789-790. Selected excerpts of the Chronology Review are listed below and can be verified by viewing the CD at App-515 or clicking on the following link:

<http://vids.myspace.com/index.cfm?fuseaction=vids.individual&videoid=100539192>

⁹ What follows are excerpts. The Chronology Review and Steele's other filings, including his Motion to Reconsider, list numerous other similarities, as well as their exact occurrence in the Steele Song and MLB Audiovisual, each of which is 2:38-long. See App-645-666, 787-790.

Several additional – but by no means all - similarities are listed below (for the court’s convenience, the location of each similarity, i.e., the minute and second “mark” where each similarity occurs during playback is noted in parentheses):

(1) When Steele sings (of the Boston Red Sox) “our hometown team is series-bound” the MLB Audiovisual shows Red Sox player Manny Rodriguez jumping off the bench and hugging a teammate (00:11:80, i.e., at 11.8 seconds into the video);

(2) At the exact moment Steele sings “[word] is out [on Yawkey way]” the MLB Audiovisual shows Red Sox fans crowded on Yawkey Way (00:18:00);

(3) Immediately following (3), above, at the exact second Steele actually vocalizes "Yawkey way," the MLB Audiovisual shows a close-up of the Yawkey Way street sign (00:18:80);

(4) When Steele sings “boys in red have come to play,” the MLB Audiovisual shows red-clad Atlanta Braves fans cheering (00:22:40);

(5) When Steele sings “the Tigers, Rangers, [and the Jays],” the MLB Audiovisual shows a Detroit Tigers ballplayer rounding the bases (00:40:60);

(6) When Steele sings “get up off your seats,” the MLB Audiovisual shows fans off their seats – standing and cheering (00:55:20);

- (7) When Steele sings “Man I Really Love This Team,” the MLB Audiovisual shows Red Sox ballplayers (00:59:10);
- (8) At 01:01:20, the MLB Audiovisual shows, for 1.6 seconds, Mr. Bongiovi gesturing precisely in-time with the Steele’s Song’s tempo and beat;
- (9) At each of the three exact seconds that Steele sings “got” (as in “you’ve *got* to stay tough”), the MLB Audiovisual shows fans and players “high-fiving” in perfect time with Steele’s “got” (beginning 01:04:30, for 5.2 seconds);
- (10) Contemporaneous with, (9), above, when Steele sings “You’ve got to stay tough,” the MLB Audiovisual features players doing high-fives, shoulder bumping, and chest thumping (01:06:05);
- (11) During Steele’s guitar solo, the MLB Audiovisual shows two quick diving catches perfectly timed to Steele’s repeated guitar motif; (01:33:00);
- (12) At 01:43:30, for 5.5-seconds, Steele’s guitar solo is matched by the MLB Audiovisual’s frame cuts, or cue points;
- (13) As Steele sings “spirit far and near,” the MLB Audiovisual shows a baseball far and near – a sweeping pan of a home run at Fenway Park (02:02:40), which is immediately followed by...

(14) Steele singing “those Fenway fans begin to cheer,” as the MLB Audiovisual shows Fenway fans cheering (02:07:20).

App-645-666; 789-790.

Finally, the Steele Song and MLB Audiovisual are also, obviously, both about baseball. Both are also predominantly about the Red Sox: Steele’s Song is about the Red Sox (and their home town, Boston), while the MLB Audiovisual features more Red Sox visuals than any other team; specifically, Red Sox imagery appeared in 22% of the video sequences – a plurality and more than the combined total of the 12 least-featured teams (out of 21 total), and almost three times more often than TBS’s hometown team, the Atlanta Braves. App-693, 650-666; 790. TBS, which televised only the National League Championship Series (Fox had the American League), never broadcast a single Red Sox game.

i. MLB's Attempted "Dispute" of Chronology Review Facts at Summary Judgment

MLB submitted no chronology of its own, nor did it dispute the data, methodology, or foundation of the Chronology Review. App-449, 732. MLB specifically "disputed" only similarity (5), above, pointing out that “the visual of the Tigers player actually lines up more closely with the lyric “Rangers” than with “Tigers.” App-471.

MLB stated that any chronological similarities between the Steele Song and MLB Audiovisual were “coincidental... and [the Steele Song] is almost totally not in sync with the visuals in [the MLB Audiovisual],” App-554, and that “since... [there is no] clear substantive synchronization [with the MLB Audiovisual], there is no suggestion that it was used as a reference to create the [MLB Audiovisual].” App-554-555 (quoting Ricigliano's report).

ii. The District Court's Analysis of the Chronology Review

The district court acknowledged that “the Steele Song does appear to match some of the images in the [MLB Audiovisual],” but concluded that the similarities revealed in the Chronology Review were “inevitable” and “unsurprising.” App-777-778.

c. Steele's Affidavits: 14 “Ordinary Observers” and Experts¹⁰

Steele's submitted fourteen (14) sworn affidavits in opposition to summary judgment. App-636-699. The 14 affidavits provided the district court with first-hand accounts of, for example, several affiants' confusion upon first seeing the MLB Audiovisual, believing that Steele had sold his Song to TBS or MLB. Shawn Coyle,

¹⁰ Steele actually submitted a total of eighteen (18) statements in opposition to summary judgment (17 fact statements and one expert report); however, only the fourteen of the seventeen that were sworn-to are discussed here.

upon seeing the MLB Audiovisual in October 2007 "immediately thought Bart had sold his song to them... I told [Steele] I had heard his song [on TV] and asked him how much they paid him for it." App-692. On October 4, 2007, Chadbyrne Dickens saw the MLB Audiovisual and immediately thought "wow, I can't believe it! Its [Steele's] song! He didn't tell me. He must have sold his song to Bon Jovi for big bucks, good for him!" App-685.

The affiants further observed strong similarities between the Steele Song and the MLB Audiovisual. App-636-699. Several are film, advertising, and music professionals or experts, some with first-hand experience in temp tracking, who observed strong evidence of temp track usage. App-612, 636, 640, 645, 648, 667, 676, 677-678, 679, 685.

Steele also hired a certified musicologist, Dr. Alexander Stewart, who stated that Steele's "[a]ccess case [is] quite strong because of 'temp track' and other history."¹¹ App-640.

¹¹ Dr. Stewart's preliminary report concluded that Steele's case was "not strong musicologically." App-640. Steele is not challenging the district court's strictly musical conclusions on appeal.

i. MLB's Facts Disputing Two of Steele's 14 Affidavits

In support of its summary judgment papers, MLB submitted one report – the aforementioned report by musicologist Anthony Ricigliano – and no affidavits.¹²

App-549-573.

MLB nonetheless attempted to dispute portions of two of Steele's 14 affidavits: First, MLB questioned Jonathan Yasuda's sworn musicological report only insofar as he is not a certified musicologist. App-737. Second, MLB stated that affiant Eric Whitman's affidavit was "conclusory" and had "no basis in reality or fact," but specifically disputed only one of Whitman's facts: that the actual soundtrack, i.e., the Bon Jovi soundtrack, to the MLB Audiovisual was an "awkward fit at best," at least compared to the version with the Steele Song as the soundtrack. App-759. MLB asserted Whitman's conclusions were "inconsistent" with the "undisputed evidence" in the summary judgment record. App-759.

MLB did not offer facts in opposition to, or otherwise challenge the 12 remaining affiants' statements, other than arguing that each and every one of Steele's 14 "ordinary observer" affidavits came from persons with "personal connections" to

¹² The district court misspoke when it stated it had "reviewed the... affidavits submitted by both sides." App-773.

Steele, and therefore the affidavits were "not in any way relevant or admissible." App-757.

ii. The District Court's Analysis of Steele's 14 Affidavits

The district court disregarded all of Steele's affiants stating they were "all [Steele's] personal friends or acquaintances" that did not apply the "pertinent legal standards" and that their testimony was "inadmissible lay opinion" and "not appropriate for consideration." App-779-780.¹³

d. ASCAP Weighs In

Steele contacted the American Society of Composers, Authors, and Producers ("ASCAP"), of which he is a member (as are appellees Bongiovi, Sambora, and Falcon), for assistance, pre-suit, in resolving his claims. App-28. During a teleconference Steele had with ASCAP, two repertory department personnel told Steele that they found it "very hard to believe that [the Bon Jovi Song] was [an] independent creation on their part with the whole baseball thing and video." App-28.

¹³ The district court's assertion that all the affiants were Steele's "friends or acquaintances" was apparently an assumption because the record shows otherwise. In any event, alleged bias goes to weight, not admissibility.

SUMMARY OF ARGUMENT

The district court cut the legs out from Steele, a *pro se* litigant, with its discovery ruling, limiting Steele to discovering and arguing only substantial similarity. Steele's claims of infringing reproduction and synch rights violation were not contingent upon a substantial similarity analysis. Direct evidence of actual copying – digital duplication – was, and is, readily available. Such discovery would have determined the merits of Steele's claim very quickly.

Instead, Steele was forced to discover and argue within the confines of a restrictive substantial similarity analysis using only circumstantial evidence of musicological similarity. This procedural straitjacket not only limited Steele's discovery, but also what the district court would even consider. As a result, the district court failed to address Steele's strongest claims – other than to take Steele's right to a jury from him.

Finally, even within its own substantial similarity analysis, the district court disregarded overwhelming factual evidence, including 14 sworn statements and undisputed statistical evidence, resulting in a fatally flawed analysis and the improper dismissal of Steele's case.

ARGUMENT

I. Introduction: Standard of Review; Copyright Elements Versus Evidence

The district court's entry of summary judgment is reviewed *de novo*. See T-Peg v. Vermont Timber, 459 F.3d 97, 111 (1st Cir. 2006).

The elements of a copyright claim are: (1) ownership of a valid copyright and (2) copying of original constituent elements of the copyrighted work. See Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62, 66 (1st Cir. 2009).

Substantial similarity, the sole issue in the district court, is not an element of a copyright claim, it is a method of showing copying as a factual matter through circumstantial evidence. See T-Peg at 111. Showing actual copying through circumstantial evidence is only mandated – or necessary, for that matter - “in the absence of direct evidence of copying.” Id.

Though rarely addressed by the courts – or litigants, for that matter – “direct evidence” of copying often does exist, particularly where the actual act of copying may have been “witnessed or recorded.” See Grubb v. KMS Patriots, 88 F.3d 1, 4 (1st Cir. 1996). This is particularly true in the digital age, when most works of authorship are created and stored digitally, that is, detailed information about the works' creation is “recorded” in binary form on computers.

Here, both were digital works, created on and stored in computers, thereby providing easily accessible direct evidence of infringing “cutting and pasting,” i.e., duplication – or of independent creation. It was legal error to simply assume the nonexistence of “direct evidence” – particularly when analyzing digital works of identical length - without comment or inquiry at the very outset of this digital copyright case.

Nonetheless, Steele – given no choice - offered dozens of material facts, virtually all undisputed, showing substantial similarity at summary judgment. The district court erred both in its stringent discovery ruling and in its misapplication of the law and disregard of the facts in its summary judgment analysis.

II. The "Works" at Issue at Summary Judgment

Three works were at issue at summary judgment: (1) the 2:38:90-long Steele Song, (2) the 2:38:90-long MLB Audiovisual, and (3) the 4:38-long Bon Jovi song “I Love This Town” (“Bon Jovi Song”). Each of the three works falls under one – and only one – of two copyright categories: (1) “phonorecordings” (or “musical works”),

17 U.S.C. §§ 101, 102(a) (2), or (2) “audiovisuals” (or “motion pictures”), 17 U.S.C. §§ 101, 102(a)(6).¹⁴

The MLB Audiovisual is an “audiovisual work,” that is, a “series of related images” and “accompanying sounds,” known as a “soundtrack.” See 17 U.S.C. §101. The Steele Song is a “musical work,” that is, music or sounds, “other than those accompanying a motion picture or other audiovisual work.” See 17 U.S.C. § 101 (defining “phonorecording”) (emphasis supplied); 17 U.S.C. §§ 102(a)(2), 102(a)(6).

The district court, therefore, had before it two discrete claims: (1) infringement of the Steele Song by the MLB Audiovisual and (2) infringement of the Steele Song by the Bon Jovi Song.

III. The Scope of Steele's Appeal

Steele appeals the district court’s ruling as to Steele's claim of infringement of his 2:38:90-long Song by the 2:38:90-long MLB Audiovisual.¹⁵ App-777-781. The

¹⁴ For clarity, “phonorecordings” and “musical works” are hereinafter referred to, collectively, as “musical works;” “audiovisuals” and “motion pictures” are referred to, collectively, as “audiovisual works.”

¹⁵ Steele does not explicitly waive his claims against Bon Jovi because any finding of infringement by the MLB Audiovisual necessitates – or at least leaves room for – a finding of contributory infringement by Bon Jovi insofar as it performed the music to the MLB Audiovisual soundtrack.

narrowing of the issues in this regard will serve to highlight - and hopefully avoid repetition of - the confusion that permeated the district court's analysis.

Steele's position was, and is, that the similarities between the MLB Audiovisual and Steele's Song provide strong circumstantial evidence of copying (in the form of exact duplication), and violation of his "synch rights." App-591-593

IV. The District Court's Confusion About the Works at Summary Judgment

The district court incorrectly defined the MLB Audiovisual as "a song by the popular band Bon Jovi entitled "I Love This Town"... along with baseball video footage." App-767. The district court erred several more times, stating, for example, that the MLB Audiovisual "features the Bon Jovi song along with baseball video footage..." App-777. The MLB Audiovisual did not, as a matter of law, "feature" a Bon Jovi "song." See 17 U.S.C. § 101. The only Bon Jovi "song" in this case was the 4:38-long musical work called "I Love This Town," from the phonorecording "Lost Highway."

The district court failed to recognize that the 2:38:90-long soundtrack to the MLB Audiovisual was different – legally (and factually – it appears on no album and is two minutes shorter) – from the 4:38-long Bon Jovi Song. In comparing the MLB

Audiovisual to Steele's Song, the district court erroneously analyzed the MLB Audiovisual as if it were two different works, a "musical work" and "images." instead of a single statutorily defined audiovisual work. See 17 U.S.C. § 101.

a. The Prejudice to Steele From the Court's Confusion

Steele was prejudiced in several ways:

First, the district court failed to address Steele's claim of illegal reproduction pursuant to §106(1). The district court's narrow focus on substantial similarity at the outset and resulting confusion over the works at issue blinded it to Steele's most basic claim: that his Song had been illegally reproduced by exact duplication, which requires no substantial similarity analysis. See Sections VI and VII, below.

Second, the district court misapplied the law to Steele's synch right claim, analyzing it in terms of originality and substantial similarity, which are irrelevant to Steele's synch right - his exclusive right to put his Song to video, an extension of his exclusive right to reproduce pursuant to 17 U.S.C. §106(1). See Sections VIII and IX, below.

Third, even in the narrow context of the court-mandated substantial similarity analysis, the district court's improper separation of soundtrack from video blinded it

to numerous facts showing substantial similarity between the MLB Audiovisual as a whole to Steele's Song. See X, below.

The confusion and resulting prejudice to Steele could have easily been avoided. The district court's order disallowing discovery on access and copying prevented Steele from effectively pursuing his claim of – or even discovering evidence of - infringement by reproduction or synch rights violations. The district court's analyses of these claims – to extent it did any - was superficial, at best, because it did not consider any evidence that did not fit into the rubric of “substantial similarity.” See Section XI, below.

V. MLB's Altered Audiovisual, Misstatements and Misrepresentations, Led the District Court's Analysis Astray¹⁶

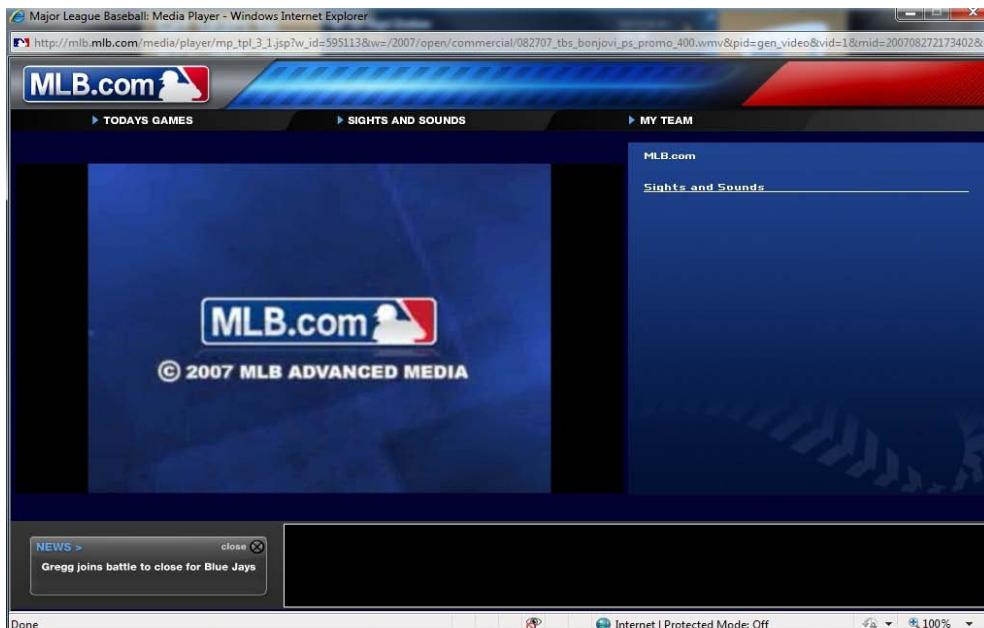
MLB filed misleading evidence and made inaccurate factual and legal statements in the district court. The district court's errors likely resulted from adopting – oft-times verbatim – the flawed arguments set forth by MLB.

¹⁶ MLB's evidence and statements in the district court are relevant insofar as they were relied upon heavily by the district court at summary judgment.

a. MLB's Altered Audiovisual

MLB attached to its summary judgment papers (and, earlier, to its motion to dismiss papers) a supposedly "true and correct" copy of the MLB Audiovisual that was, in fact, materially different from the actual MLB Audiovisual. App-511.

The Altered Audiovisual was materially different from the actual MLB Audiovisual in at least two ways: First, the copyright notice at the end of the MLB Audiovisual (seen below) did not appear on the Unpublished Audiovisual submitted to the district court. App-511.¹⁷



¹⁷ To see the actual MLB Audiovisual, including the copyright notice, see: http://mlb.mlb.com/media/player/mp_tpl_3_1.jsp?w_id=595113&w=/2007/open/commercial/082707_tbs_bonjovi_ps_promo_400.wmv&pid=gen_video&vid=1&mid=200708272173402&cid=mlb&fid=gen_video400&v=2

This omission - intentional or not - buttressed MLB's other efforts, in its papers and at argument, to blur the statutory distinction between "musical" and "audiovisual" works, which then directly contributed to the district court's flawed summary judgment analysis. In fact, the district court's summary judgment opinion closely followed the flawed analysis urged by MLB in its motion to dismiss and motion for summary judgment, which improperly divided and subdivided the works into nearly-identical subheadings: "Music Comparison;" "Lyrics Comparison;" and a last section on the MLB Audiovisual (called "Turner Promo" in district court). App-51-55 (Motion to Dismiss); App-465-472 (Motion for Summary Judgment); App-773-778 (District Court's Summary Judgment Opinion).

The MLBAM copyright notice of the MLB Audiovisual, which, by definition, includes the Bon Jovi soundtrack, clearly showed the legal unity of copyrighted audiovisual works. See 17 U.S.C. § 101. Unity of authorship and legal indivisibility of the MLB Audiovisual, however, were inconsistent with the analytical framework MLB invented for the district court. MLB focused on separate comparisons between (1) the MLB Audiovisual's video and the Steele Song's "lyrics," and (2) the MLB Audiovisual's soundtrack with the Steele Song's music. App-51-55. The absence of

the copyright notice also kept from the district court the major role of MLBAM – who was not a defendant - in the creation of the MLB Audiovisual.

Second, on playback the Altered Audiovisual does not start until twelve seconds of "dead air" have passed, whereas the actual MLB Audiovisual begins immediately. Id. The Altered Audiovisual, accordingly, is 2:46 long, unlike the Steele Song and MLB Audiovisual, each of which is 2:38:90 long. App-511, 515. This longer version appeared to support MLB's incorrect assertions that the MLB Audiovisual and Steele Song don't start at the same time and don't line up. App-55-56.

b. MLB's Misstatement of Facts and Law to the District Court

MLB misrepresented crucial facts, misstated applicable law, and otherwise pushed a misguided legal analysis on the district court from the outset of the district court proceedings, with MLB's first substantive papers – their motions to dismiss. App-40-58. While there are too many instances to list here of MLB misstatements in its attempt to misdirect the district court in its analysis - which was largely successful - but the following examples are illustrative:

MLB asserted, in its Memorandum in Support of its Motion to Dismiss that the MLB Audiovisual combined baseball images with "a song entitled 'I Love This Town' by Bon Jovi," App-46. This is false. "I Love This Town" is a 4:38 musical

work. App-269-270. The 2:38:90 soundtrack to the MLB Audiovisual was never on "Lost Highway" or any other album, is materially different from "I Love This Town," and MLBAM is the registered copyright owner, not Bon Jovi. App-511.

MLB further stated that there is "no case law or statutory support whatsoever for Steele's position that the allegation of "temp tracking" constitutes copyright infringement even when the final musical expression is not substantially similar to the alleged infringed work." App- 738 (emphasis original). This is false: the right to reproduce a musical work is exclusive to the copyright owner, as is the right to put the musical work to visuals, i.e., Steele's "synch right," regardless of whether the synchronized audiovisual work is later altered (by, for example, replacing the audio) to disguise its genesis. See Situation Mgmt Systems, Inc. v. ASP Consulting, LLC 560 F.3d 53, 59 (1st Cir. 2009) ("the overwhelming thrust of authority upholds liability even under circumstances in which the use of the copyrighted work is of minimal consequence").

MLB also claimed, falsely, in its Memorandum in Support of its Motion to Dismiss (and several other places) that "[t]here is not a single reference to baseball" in the Bon Jovi "song." App-53. This is directly contradicted by MLB own earlier public statements, including its admission that the Bon Jovi "song" "includes a 'Say

Hey' reference to Willie Mays."¹⁸ Unfortunately, despite Steele repeatedly pointing out this falsehood, MLB continued to repeat it and, ultimately, so did the district court. App-775.

The misrepresentation served MLB's purpose: to create the illusion that the MLB Audiovisual is two "works," a Bon Jovi "song" and baseball "images," and to therefore apply the substantial similarity test to each separately, instead of to the MLB Audiovisual as a whole, which is precisely what the district court ultimately did. App-770-781.

VI. Proving Infringement of Reproduction and Synch Rights

As many copyright cases have stated, in one form or another, "[a]bsent direct evidence of copyright infringement, a plaintiff must prove 'substantial similarity' between the copyrighted and contested materials." See Int'l Assoc. Machinists v. Winship Green Nursing Center., 103 F.2d 196, 203 n. 6 (1st Cir. 1996). See also Johnson v. Gordon 409 F.3d 12, 18 (1st Cir. 2005) (to "fill the void" created by the "seldom" available "direct proof of actual copying," plaintiff may show evidence of

¹⁸ MLB reported in August 2007, "Bon Jovi and TBS are friendly faces...[t]he band that has now crossed generations greets you with a baseball video that even includes a "Say Hey" reference to Willie Mays." App-786-787.

"access" to the copyrighted work and "that a sufficient degree of similarity exists between" the two works at issue).

Accordingly, circumstantial evidence of "substantial similarity" is not the only - or even preferred - method of proving "reproduction." See Id. Based on common-sense evidentiary principles, direct evidence of reproduction provides stronger proof of infringement than circumstantial evidence of "substantial similarities." See Id.

Moreover, "direct evidence" of reproduction renders the "substantial similarity" analysis moot because the copy is identical to the infringed work. See Int.'l Assoc. Machinists, 103 F.2d at 203 n. 6

VII. **"Exclusive Right" to Reproduce Pursuant to 17 U.S.C. §106(1)**

A copyright holder has "the exclusive right[]... to reproduce the copyrighted work in copies or phonorecords." See 17 U.S.C. § 106(1); Johnson 409 F.3d at 17 ("owner of a valid copyright in a musical work enjoys exclusive rights to reproduce [the work]...").

Any act by an alleged infringer "inconsistent with [the copyright holder's] exclusive rights constitutes infringement." See Alvarez Guedes v. Marcano Martinez, 131 F.Supp.2d 272, 276 (D. Puerto Rico 2001) (radio station's broadcast of

copyrighted sound recording not violation of exclusive right to distribution; “pivotal offense” was “unlawful copying of the sound recording”).

“Infringement takes place when any one of the [§ 106] rights is violated: where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction. The references to 'copies or phonorecords,' although in the plural, are intended here and throughout the bill to include the singular (1 U.S.C. §1).” See House Report No. 94-1476, pp. 61-62, Section 106: Exclusive Rights in Copyrighted Works.

The house summarized infringement of the exclusive right to reproduce as follows: “A copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation.” See Id.

The final use to which the infringing reproduction is put, if any, is irrelevant. See Situation Mgmt 560 F.3d at 59 (“the overwhelming thrust of authority upholds liability even under circumstances in which the use of the copyrighted work is of minimal consequence”)

VIII. The District Court Failed to Address MLB’s Violation of Steele’s “Exclusive” Right to Reproduce the Steele Song

If, as the undisputed facts show, MLB reproduced Steele Song without his permission, then MLB's action was infringement as surely as it is infringement when

"a printer reproduces copies without selling them." See House Report No. 94-1476, pp. 61-62, Section 106: Exclusive Rights in Copyrighted Works. MLB "infringed [Steele's Song] by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation." See Id.

Steele's main argument on this issue, however, starts from a more basic premise: despite Steele's pleas, the district court failed to address in any manner Steele's §106(2) claim of infringement by reproduction or duplication. App-766-781. Therefore the district court's fundamental error in this regard was not what it said in its summary judgment decision, but what it did not say: whether there were sufficient facts to reach a jury on the issue of reproduction by duplication. App-766-781.

Such an ruling - "by implication" - poses serious questions to this Court, including whether dismissing such a claim at summary judgment without any discussion, analysis, or findings can ever be proper, given Steele's Seventh Amendment right to a jury trial. The harm to Steele arising from the district court's "blind eye" to his §106(2) claim is straightforward: Steele did not get a fair hearing - or any hearing - on that claim.

The district court "locked out" Steele's §106(2) claim when it issued its erroneous discovery ruling limiting discovery - and therefore the issue before it - to

"substantial similarity." App-387. This specifically precluded Steele from discovering and proving his claim of illegal reproduction (by disallowing discovery on access and "creation of the [MLB Audiovisual]." App-387.

In spite of the district court's substantial similarity limitation on discovery, however, strong - and undisputed - factual evidence of MLB's duplication of Steele's Song was abundant in the district court at summary judgment. See Section V, above.

Fourteen witnesses observed that the MLB Audiovisual and Steele Song were extremely similar, or even one and the same. See Section V, above. The district court's outright dismissal of their testimony was plain error. See Coquico, 562 F.3d at 70 ("strong proof that an ordinary observer would overlook any differences" came from "seasoned vendor" who confused infringing toy for copyrighted toy, warranting conclusion that claimant had "high probability of prevailing on the substantial similarity issue")

The district court claimed to have "viewed the entire record in the light most hospitable to [Steele] and "indulged all reasonable inferences in [Steele's] favor," but nonetheless ruled, implicitly at least, that "no reasonable juror" could find that MLB ever duplicated his Song. App-771. This was an error of law.

Moreover, the district court's strict limitation of the issue to "substantial similarity," at the very outset of the case, unfairly forced Steele to work within this second-best framework.

A "substantial similarity"-only analysis might be appropriate in cases where the infringement results from plagiarism. See Johnson, 409 F.3d at 18 ("[p]lagiarists rarely work in the open and direct proof of actual copying is seldom available").

Steele, however, claimed duplication, for use as a temp track. App-151, 783-784. Steele's claim - and his burden at summary judgment - hinged not on substantial similarity of the final works, but on whether his Song had been duplicated. See House Report No. 94-1476, pp. 61-62, Section 106: Exclusive Rights in Copyrighted Works. Steele's arguments fell on deaf ears because of the district court's improper limitation of the issue to whether MLB plagiarized, Steele's Song.

The district court's failure in this regard was a legal error subject to *de novo* review by this Court. It was also plain error and grounds in and of itself for reversing the district court's order dismissing Steele's §106(2) claim.

a. Relief Requested

The obvious remedy is to reverse the district court's summary judgment order and remand the case for discovery on Steele's reproduction/duplication. App-369.

Steele respectfully requests the above remedy, but only in the alternative. The more appropriate remedy, based on the undisputed factual record before the district court - and this Court - warrants entry of judgment as a matter of law for Steele on his claim that MLB reproduced, or duplicated exactly, Steele's Song in its entirety or substantial portions thereof, in violation of Steele's exclusive right to reproduce his Song. See § 106(2).

IX. Synchronization Rights: An Extension of Copyright Owner's §106(1)'s "Exclusive Right" to Reproduce

The exclusive right of a musical copyright owner to put their music to picture is an extension of the owner's exclusive right to "reproduce the copyrighted work." See ABKCO Music, Inc., 96 F.3d 62 (2d Cir. 1996) n.4, citing 17 U.S.C. § 106(1).

A synch right as the right "to record a copyrighted song in synchronization with [a] film or videotape, and is obtained separately from the right to perform the music," App-780, citing Broad Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 33 n.23 (1979) (Stevens, J., dissenting). A "synch right" – the right to put another's copyrighted musical work in "timed-relation" to visual images – is an "additional right that a user must acquire" to legally create an audiovisual incorporating another's music. App-780, (citing ABKCO, 96 F.3d at 62 n.4).

“Synchronization,” as a legal term means any reproduction of music “in the soundtrack of an audiovisual work.” Agee v. Paramount Comm., 59 F.3d 317, 322 (2nd Cir. 1995). As the Agee court explained “commercial entities...may not reproduce sound recordings on soundtracks of audiovisual works, whether or not the reproduction involves synchronization.”¹⁹ Id. (emphasis supplied).

The final use (or non-use) of the synch right-infringing audiovisual has no bearing on establishing infringement. See Situation Mgmt, 560 F.3d at 59.

X. The District Court Misapplied the Law and Disregarded Undisputed Material Facts in its Dismissal of Steele’s Claim of Infringement by Violation of Steele’s Exclusive “Sync Rights”

The district court at summary judgment improperly dismissed Steele's claim that the MLB Audiovisual infringed Steele’s “synch rights” through MLB's duplication and use of Steele’s Song as a “temp track.” App-780-781.

Steele's exclusive right to put his Song to picture is simply an extension of Steele's exclusive right to “reproduce [his Song].” See ABKCO, 96 F.3d at 62 n.4, citing 17 U.S.C. § 106(1).

¹⁹ The Agee court was explaining a “synch rights” violation does not require the audio and visual elements to have been “synchronized” in the non-legal colloquial sense; in other words, the video frame cuts do not have to line up with the audio's tempo and beats to constitute a “synch rights” infringement (though we have such “synchronization” here, which is evidence of - but not a necessary *element* of - a synch right violation.

Accordingly, Steele's facts and law cited in support of his claim of infringement by reproduction, Section V, above, are equally applicable in a synch rights analysis. The only additional question for the district court was - and for this Court is - whether MLB created an audiovisual incorporating Steele's Song. App-780 (citing ABKCO, 96 F.3d at 62 n.4).

The most significant facts showing that MLB put Steele's song to video, come from comparing the Steele Song with the MLB Audiovisual, as detailed in Section V, above. Steele does not, of course, have to prove actual synchronization between his Song's tempo, lyrics, or guitar solo and the Audiovisual's images and edits. See Agee at 322. The facts of synchronization, however, strengthen Steele's claim that MLB, at one time or another, put Steele's Song to video.

“[MLB] infringed [Steele's Song] at the moment it put portions of his recording on tape to make a segment of [the MLB Audiovisual].” Agee, 59 F.3d at 324 (emphasis added).

Unlike Steele's §106(1) reproduction claim, the district court did address Steele's claim of infringement of his synch rights. App-780-781. However, after accurately summarizing synch rights law, the district court's legal analysis as applied to

Steele immediately ignored the very law it had just cited and ventured into the unknown. App-780-781.

The district court acknowledged - for the first time - Steele's expert's finding that 96% of the MLB Commercial's video sequences were "synchronized to the Steele [Work's] quarter-note beat," but immediately concluded that "*intervals of time are not original expression protectable under federal copyright law*" and, therefore, "no reasonable juror could conclude that the [MLB Audiovisual] violates plaintiff's synch rights. App-780-781.

Instead of determining whether Steele's facts, analyzed in the context of synch rights law and the summary judgment standard, the district court set up and knocked down a straw man by concluding - quite correctly - that "intervals of time" are not protectable expressions. Steele never claimed ownership of intervals of time. Steele proffered the 96% statistic as strong circumstantial evidence that MLB reproduced his work and put it to video in violation of his synch rights.

a. Relief Requested

Steele reiterates the requested relief for violation of his §106(1) right to reproduce, given that synch rights are merely an extension thereof. Accordingly, reversal and remand for discovery on Steele's synch rights claim is appropriate.

Again, however, based on the undisputed factual record before the district court Steele requests entry of judgment as a matter of law for Steele on his claim that MLB violated his synch rights by duplicating exactly Steele's Song in its entirety or substantial portions thereof, and put Steele's Song to video in violation of Steele's exclusive synch rights. See Agee 59 F.3d at 322.

As with Steele's §106(1) reproduction claim, the ultimate use or non-use of Steele's Song in the MLB Audiovisual as published is irrelevant and has no bearing on establishing infringement. See 2 M.B. Nimmer, Nimmer on Copyrights, § 8.02[C] at 8-25 – 26 (1982).

XI. The District Court Misapplied the Law and Disregarded Material Facts in its “Substantial Similarity” Analysis of Steele’s Derivative Rights Infringement Claim

Even if this Court finds no error in the district court’s (1) failure to address Steele’s §106(1) exclusive right to reproduce, (2) failure to apply the proper legal analysis to Steele’s synch rights, and (3) narrowing of discovery – and therefore the scope of his claim - to circumstantial evidence of substantial similarity, the district court’s reasoning on substantial similarity was nonetheless fatally flawed.

Steele “possesses exclusive rights to prepare not only exact ‘copies’ of the work but also ‘derivative works’ based upon it.” See Coquico, 562 F.3d at 66. A musical

work can be “recast, transformed, or adapted” into an infringing derivative audiovisual work. 17 U.S.C. § 101. See “A person who trespasses upon any of these exclusive rights may be held liable for copyright infringement.” Coquico, 562 F.3d at 66.

a. The MLB Audiovisual – A Single Work

The MLB Audiovisual contains “a series of related images” (baseball, Bon Jovi, TBS) and “accompanying sounds” (“Bon Jovi Soundtrack”). 17 U.S.C. § 101. It is a discrete work of authorship. Id. § 102(a)(6). Any substantial similarity test must compare Steele’s original expression as a whole to MLB’s expression in the audiovisual, - the united expression of Bon Jovi’s soundtrack with baseball visuals as a “whole.” See Johnson 409 F.3d at 18.

b. Steele’s Derivative Rights

i. Originality

Appellate review of the originality of Steele’s Song’s constituent elements is *de novo*. See Coquico, 562 F.3d at 68.

To merit copyright protection a work must be independently created and possess a modicum of creativity. See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991). “[T]he requisite level of creativity is extremely low; even a

slight amount will suffice.” Id. Those alleging infringement must provide “facts of originality, of intellectual production, of thought, and conception.” Id. at 347.

The unique selection, coordination and arrangement of unprotectable elements can form a protected expression. Id. at 349. An author’s “creative choices...including the works’ overall arrangement and structure, are subject to copyright protection.”

See Situation Mgmt. 560 F.3d at 61. See also 4 Nimmer on Copyright § 13.03 [A] [1]-[2] (1995) (defining comprehensive nonliteral similarity...where the fundamental essence or structure of one work is duplicated in another”).

ii. Unlawful Copying by Derivation

To prove infringement, a party must first show “probative similarity,” i.e., copying of original expression as a factual matter.²⁰ Johnson, 409 F.3d at 18.

“Second, the [copyright] holder must show that the copying was so egregious as to render the allegedly infringing and infringed works substantially similar.” Coquico, 562 F.3d at 66.

²⁰ Departing from First Circuit precedent the district court bypassed the probative similarity analysis and limited proceedings to the issue of substantial similarity, restricting discovery of probative similarity, including access and creation of the MLB Audiovisual.

Works are substantially similar if an ordinary observer would overlook their differences and regard their aesthetic appeal the same. See Concrete Machine Co. v. Classic Lawn Ornaments, 843 F.2d 600, 607 (1st Cir. 1988). The ultimate comparison of the works at issue should be oriented towards the works' intended audience. See Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 734 (4th Cir. 1990).

“If the works in issue are directed to a particular audience, then the ‘spontaneous and immediate’ reaction of that audience is determinative.” 3 M. Nimmer & D. Nimmer, Nimmer on Copyright Sec. 13.03[E], at 13-62.4 n. 202 (1989).

iii. Filtering Unprotectable Elements

In determining substantial similarity a court must first dissect the copyrighted work to separate original, protected expression from those elements not copyrightable. Johnson, 409 F.3d at 19

Where an idea permits a limited number of expressions, a plaintiff may need to show ‘near identity’ between the works at issue. *Id.* at 606. However, “as a work embodies more in the way of particularized expression, it moves further away from [merger of idea and expression] and receives broader copyright protection.” *Id.* at 607.

In a similar manner, “scènes à faire denies copyright protection to elements of a work that are, for all practical purposes, indispensable, or at least customary, in the treatment of a given subject matter.” Coquico, 562 F.3d at 68.

XII. Infringement of Derivative Rights

a. Steele’s Facts of Originality

The district court, showed a strong bias towards a strictly musicological analysis, even as to the MLB Audiovisual. The district court mistook the Bon Jovi Soundtrack for a ‘song’ and devoted most of its discussion to substantial similarity in musicological terms. App-781. Comparison of Steele’s work to the 2:38:90-long Bon Jovi Soundtrack, however, is not determinative of substantial similarity. The work at issue is the MLB Audiovisual as a whole, not its soundtrack. Johnson, 409 F.3d at 18.

The district court’s improper focus on - and deference to – a non-existing 2:38:90 Bon Jovi “song,” divorced from the MLB Audiovisual, created a fictional barrier between the MLB Audiovisual’s soundtrack and the subject of baseball. For example, the district court stated that that the “Bon Jovi song” is not “about baseball.” App-775. The district court’s statement is incorrect (MLB has stated publicly that “this song captures the essence of the game” and it “even includes a ‘Say Hey’ reference to Willie Mays”). App-786-787. More importantly, it is irrelevant because

the issue is not whether the Bon Jovi Soundtrack is about baseball, but whether the MLB Audiovisual, as a whole, is about baseball and, more to the point, whether it is substantially similar to Steele's Song within the milieu of baseball.

b. Heart of Steele: Steele's Song Only One of 15 Million to Musically Declare "I Love This Team/Town"

It is well established that "as a work embodies more in the way of particularized expression, it moves further away from [merger of idea and expression] and receives broader copyright protection." Concrete Mach., 843 F.2d at 607. Moreover, the "qualitative nature of the taking" must be considered when examining infringement. Harper & Row v. Nation Enterprises, 471 U.S. 539, 564-66 (1985) (unlawful taking of a work's most powerful parts).

The Steele Song and MLB Audiovisual have nearly identical titles and choral refrains, i.e., "I Love This__[Team/Town]". App-596, 795. In baseball, the expression "I Love This__" is not clichéd, customary, or part of baseball's lexicon; it is incredibly rare. App-794-795 (The Dickson Baseball Dictionary contains no references to "I Love This__").

In fact, the Steele Song stands alone as the single work out of fifteen million American musical works to combine the subject of baseball with the lyrics "I Love This__." App-606.

A work's essence and structure are subject to copyright protection. See Situation Mgmt., F.3d at 61. For each work here, the title phrase "I Love This Team/Town" delivers the hook, heart and chorus. App_636, 639. Their expressions define the essence of each piece (Steele Song: "Boston Rocks!...I really love this team!" App-501; TBS Vice President Craig Barry: "[F]ans love their hometown as much as they love the baseball team that represents them and that is the essence of the piece." App-646.

There are additional similarities in the structure of each works' narratives, particularly in each works essence or heart, the choral hook – "I Love This__". For each, the "I Love This__" hook appears at the seventh rhyme of the first stanza. App-621; both hooks share an identical melodic rhythm (expressed as 1/2 note, 1/2 note, whole note) App-621; both hooks have identical scansion, or textual rhythm (stressed and unstressed syllables) App-635; and at two of three choruses, both Steele's hook appears close to or exactly when the object of his affection – the Red Sox are shown in the MLB Audiovisual (at 00:30:10 - 00:35:50 and 00:59:10 - 1:01:20). App-650-651, 515.

MLB's Audiovisual followed Steele's Song as only second of fifteen million works to similarly combine its most potent phrase – "I Love This__" with baseball –

both of which are “features over which it exercised discretion.” Concrete Mach., 843 F.2d at 607.

However, the district court disregarded these similarities because it mistakenly believed “the Bon Jovi song is about a town and ‘without the video, there would be no connection to baseball.’” App-776. Nevertheless, there is a video, the Bon Jovi Soundtrack is part of it, and based on statutory definitions, the district court’s conclusion was a simple non-sequitur.

Furthermore, the district court dismissed the title phrase “I Love This__” as an unprotectable “common expression...too common to be copyrightable.” App-775. The district court looked at Steele’s title phrase and choral refrain in a vacuum, ignoring context. But without context, most expressions are largely unprotectable. By the district court’s logic, virtually all of the lyrics ever written would be unprotectable since, devoid of context, most lyrics contain words or expressions that are “common.” Just as a taxi is common on the streets of New York, it is not common sitting atop Mt. Kilimanjaro. That is why it is the expression as a whole that determines substantial similarity, not words or phrases plucked therefrom.

Steele's selections above show well more than a modicum of intellectual labor, originality, and discretion otherwise 'mandated' by the 'idea of a playoff baseball song.' See Concrete Mach., 843 F.2d at 607.

Finally, as "I Love This__" is the "dramatic focal point" at the "heart" of Steele's Song and the MLB Audiovisual, the "qualitative nature of the taking" must be weighed in looking at MLB similar "heart." Harper & Row, 471 U.S. at 564-566 (unlawful taking of a work's most powerful parts).

c. **Cowboy Up: Steele Song One of Only Five of 15 Million to Join Country-Rock and Red Sox**

The Recording Industry Association of America's lists 50 musical genres from which Steele could have expressed the 'idea of baseball.' App-792. He (and MLB) selected country-rock. There are also a nearly unlimited number of instruments (or sounds) available to create a baseball song, from which Steele (and MLB) selected guitar, bass, piano, drums. App-637, 640.

Steele's country-rock Song about the Red Sox distinguished him as one of only five of fifteen million musical works to have paired the Red Sox with the country-rock genre. App-791-793. The district court failed to address the Steele Song's "idiosyncratic...combination" of Red Sox and country-rock. Coquico, 562 F.3d at 69.

As any local knows, country music in Boston is hardly “garden-variety” or “firmly rooted in tradition and so commonplace that [it] has come to be expected as a matter of course.” See Atari Games Corp. v. Oman, 979 F.2d 242, 245 (D.C. Cir. 1992). Country music is nearly non-existent on Boston radio: of the 50 AM and FM radio stations in greater Boston, only one offers a country format. App-792. In 2004 the program director of this solitary station said, “[C]learly we have a bit of a limited ceiling [on ratings]... we worry about cowboy hats.” App-792.

Regarding Steele’s selection of the Red Sox – in 2004 - Steele shared the common legacy of eternal disappointment of most Sox fans, not having won a World Series in 86 years. (April 3 Order at 1.) Steele’s rather prophetic selection of the Red Sox for a World Series anthem—even before the team had made the playoffs - App-24 - was hardly a “mechanical or routine...time-honored tradition,” nor “practically inevitable.” Feist, 499 U.S. at 363. Hindsight should not blind us to the fact that the Red Sox – though good, often times excellent – over the 86-year drought, were hard to believe in come October, given their penchant for “choking,” especially when facing their arch-nemesis Yankees, who looked just as good or better in 2004, but without the baggage.

Turning to the MLB Audiovisual, it also featured the Red Sox, devoting a 22.3% plurality of images to the American League Sox. App-645, 676-677, 515. A curious selection considering the MLB Audiovisual's sole purpose was to promote the 2007 National League Championship Series on TBS. App-145. MLB simply had nothing to say about its interesting selection of the Red Sox. App-56.

As to Steele's country-rock selection, MLB made a similarly "unique" choice of musical expression. MLB selected Bon Jovi who, after 25 years of rock albums, released the 'country-tinged LP Lost Highway.' App-793.

From a selection of 50 musical genres, 30 baseball teams, and unlimited choral hooks, MLB selected (1) a band who broke a 25 year-tradition of rock to record a 2:38-long country-rock soundtrack for a National League advertisement featuring, (2) the American League Red Sox; and, (3) they called it "I Love This__."

Notably, the popularity of the other four of fifteen million works featuring the Red Sox and country-rock is nil and they are effectively invisible cohorts to Steele. App-793. These four songs, therefore, are unable to provide a reference for clichés and commonness in the "field" of country-rock Red Sox playoff baseball anthems (if there is such a thing). Steele's original and creative selections brought him into a

virtually unoccupied field. That is, until 2007 when MLB happened to walk on to the field with its own “coincidental” selections.

The above selections, which twice leave Steele and MLB in very lean company, “possess more than a de minimis quantum of creativity.” Feist, 499 U.S. at 362.

d. Two-Timing: MLB Audiovisual Clocks Identical Length 2:38:90, Tempo and Meter

“Dimensions, when combined with [protected] elements, are protectable.” Coquico, 562 F.3d at 69. The district court’s most glaring omission at summary judgment was its failure to mention the works’ shared duration, identical at 2:38:90.²¹ App-662-663. Steele’s selected dimensions are not of size and volume (as in Coquico), but of duration, tempo and meter. For each dimension, Steele’s selections were “subject to diverse expression” and, accordingly, worthy of consideration in analyzing overall arrangement. Concrete Mach., 843 F.2d at 609.

Regarding duration, Steele’s brevity at 2:38:90 seconds was not an “inevitable concomitant of an effort to produce a [baseball anthem].” Coquico, 562 F.3d at 69. Nor was MLB’s selection of the identical duration. To credit MLB’s denials requires that this similarity, as well as the many others, was a mere coincidence.

²¹ At 02:38:90, both the Steele Song and MLB AV commence their ‘fade-out’ ending.

In addition, the ‘fade-out’ style ending commencing in both works at precisely 2:38:90 was an artistic and discretionary choice impacting aesthetics. Three Boys Music v. Michael Bolton, 212 F.3d 477, 482 (9th Cir. 2000) (substantial similarity upheld by fade ending and four other unprotectable elements.). Steele’s selection and arrangement of a ‘fade-out’ ending at precisely 2:38:90 is a fact of originality. Id. MLB’s identical duration and ending style is not.

Steele’s tempo also was not mandated by his Song’s subject. MLB, in its visual ‘frame-cutting,’ shares an incredible 96% of Steele’s tempo. App-645. That it was not 100% suggests the editing was not an automated task, but the result of Mr. Langefel’s careful selection, arrangement, and editing – to the sound of Steele’s Song as a temp track - of 149 of the 155 images in the MLB Audiovisual to match Steele’s ‘beat.’²² App-715-720.

Steele’s selection of 4/4 as his Song’s “meter,” given the limited number of viable meters, is entitled to limited protection and Steele – on this element, at least - “may have to show ‘near identity’ between the works at issue.” Concrete Mach., 843 F.2d at 606. Nonetheless, even as to meter, ‘near identity’ is satisfied: Steele and

²² The district court’s only remark on the 96% frame-cut synchronization was that “intervals of time are not original expression protectable under federal copyright law.” App-780-781. Steele, of course, never claimed otherwise.

MLB both employ a 4/4 meter. App-551. The totality of the undisputed facts of ‘dimension,’ including identical duration, fade ending, 96% tempo, and identical meter weigh heavily towards substantial similarity.

As a carpenter’s reputation is built on his or her hands and not their hammer, so too a songwriter is known for songs, not tempos. Time is a stock in the musical trade, as unprotectable – in and of itself - as a fiddler’s string. Put the horsehair to that string, however, and expression arises, and with it copyrights. Steele has never laid claim to time or Yawkey Way or baseball, but to his highly original expression thereof, i.e., his orchestration of a unique musical narrative.

e. Steele Essence & Structure: Love Your Team, Love Your Town

The district court compared the lyrics of the Steele Song and MLB Audiovisual without reference to their overall narrative and dramatic structure; in other words, as bare words, adrift from their musical – or audiovisual advertising - context. App-778. Lyrics embody the combined expression or “essence” of Steele’s Song and, to a lesser extent, the MLB Audiovisual, given the dominant role of its imagery (which just happen to match a good portion of Steele’s lyrics); Lyrics provide the “overall arrangement and structure” and are part of the holistic expression and substantial similarity analysis. Situation Mgmt., 560 F.3d at 61.

i. Opening Verse

Both works' narratives begin with street fanfare outside a stadium, eventually leading to the celebration within. App-646. Both works' lyrics begin with nine-syllable lines, App-620, which end with the identical lyrics "goin' round" – at the exact same time: 00:09:10 – 00:10:80). App-650-652, 515.

Both works' first verse-choruses: (1) have identical rhyme structures App-620, during which both Steele's introductory lyrics and the MLB Audiovisual first images (2) overwhelmingly feature the Red Sox (App-646) and (3) express similar melodic rhythm: "1/8, 1/4, 1/8" seven times throughout and "1/2, 1/2, whole" once App-623.

Both works' (1) again invoke Red Sox imagery (00:11:80 – 00:13:50), App-650-652, in their second lines, (2) share similar scansion in their third lines (App-624), and, also in their third lines, (3) invoke imagery of fanfare on Yawkey Way (00:18:00 - 00:18:80) (App-650-652) concluding line three with, in Steele's Song, the lyric "Yawkey Way" and, with the MLB Audiovisual, an image of the Yawkey Way street sign (00:18:80-00:19:80) (App-650). In line four both works invoke celebrating "in red" (00:22:40 -00:24:70). App-650-652.

ii. Chorus

See above, "Heart of Steele."

iii. Second Verse

Here both works' focus noticeably shifts from the Red Sox to their competitors (App-646); both use similar 'descending' transitions to introduce verse two (00:35:50 – 00:36:00) (App-650-652); both feature Detroit Tigers at similar moments (00:40:60 – 00:43:00). App-654-656.

iv. Bridge

The third lines of both works share identical "7/5/6" syllabic structure (App-622), both employ "anaphora" (repetition) using the same word ("you") (App-621). They also both use exact rhythmic anaphora (three 'high-five' images match Steele's thrice-sung "got"). App-656.

Both works feature simultaneous "stay tough" imagery (1:07:50 – 1:09:00) (App-656), and have similar lyrics ("come on...here we go") at similar points (final two phrases) (App-637). Finally, Steele's narrative antiphony (call-and-response) (App-621.) and single reference to a ballplayer's trademark phrase (App-638), are elsewhere found in the MLB Audiovisual.

The above compositional chronology is more than a 'laundry list' of vague similarities. It is identical elements at identical times, the very anatomy of a creative work. MLB joined Steele in the "countless artistic decisions, whether deliberately or

intuitively made, concerning the precise...juxtaposition of features...and adornment.”

Coquico, 562 F.3d at 69.

Moreover in Coquico this circuit recognized copyright in original placement of elements. Id. (placement of flag on toy frog’s underbelly is protectable). Steele’s placement of lyrics and rhetoric at the bridge, for instance, bears originality as drama.

In an otherwise cheerful song, the tone at the bridge decidedly changes: Steele as a Sox fan must reckon with a legacy of empty hope. Contemplating another heartbreak, Steele rises and prompts his fellows, “You gotta keep believing” (App-655.) (1:04:30 – 1:05:90); then with force he chides, “You gotta stay tough.” (1:06:50 – 1:09:00). App-655. True to dramatic form, by the end of the bridge the crowd is inspired and rises to a hopeful cry: Here we go!

The placement of the MLB visuals both flatters and mocks the Steele Song for its sheer precision. The imagery of hand-slapping and chest-thumping—repeatedly and perfectly synchronized to Steele’s “get tough” sermon—is the very essence of a derivative work ‘recast, transformed, or adapted’ from the original.

The court broadly excluded the similarities above as “common rhyme scheme [and] structure” within a musicological analysis. App-776. The court did not mention or address Steele’s facts of original narrative or placement.

f. Obviously Mere Coincidence: MLB's Creative Alibi

The district court implicitly found the MLB Audiovisual to be an independent creation, despite abundant evidence to the contrary. The district court allowed that the works “appear to match,” but dismissed all their similarities as “inevitable” and “unsurprising.” App-778-79. The district court’s language paraphrased that of MLB, which had argued the similarities were “not surprising,” App-57, and “obviously mere coincidences,” App-471.

MLB’s early access to Steele’s Song and subsequent creation an audiovisual of (1) identical length, (2) near-identical title, (3) dozens of identical or near-identical narrative and compositional elements, and (4) perfectly synchronized chronological structure - to the tenth of a second - provided sufficient facts to overcome summary judgment as to substantial similarity.

The district court assumed independent creation on MLB’s part, leading it to conclude – with circular logic - that the works’ statistical and thematic similarities must have been “coincidences.” The district court’s false premise – MLB created their Audiovisual independently – *assumed the conclusion to* (or at least rendered moot) the district court’s own inquiry: are they substantially similar.

g. Yahoos on Yawkey: Improper Exclusion by Scènes à Faire

The scènes à faire doctrine denies copyright protection to common or customary elements within a given genre. Coquico, 562 F.3d at 68. The district court applied the doctrine liberally, excluding “most, if not all, of the similarities [between the works]” App-775.

The district court erred in applying the most “fundamental axiom of copyright law:” distinguishing unprotected ideas from protected expression. Feist, 499 U.S. at 344-45. The district court’s improper filtering of “Yawkey Way” was the district court’s most glaring error in this regard. App-778.

To be sure, the idea of “Yawkey Way” is not a protected element in a song about the Red Sox. Steele’s expression of Yawkey Way, however – the growl of a homegrown rocker in a decidedly non-local country-style song - however, is decidedly unique expression thereof. Steele’s idiosyncratic combination of “Yawkey Way” put to country music is like a Texas hoe-down on that street; as unlikely as the sudden appearance of spurs in “Southie.”

Singing “Yawkey Way” in a Red Sox song, moreover, does not call for the street’s particular use or placement within the song’s narrative. Steele could have

invoked Yawkey Way as part of a post-game celebration in the streets; as the epicenter of ticketless die-hards and their counterpart scalpers prowling the pregame streets.

Yawkey Way is also not required to appear in the third line of a Red Sox playoff anthem. Nor must it be iterated with specific textual rhythm at precisely 00:18:80 for exactly one second. The district court's application of *scènes à faire* to "Yawkey Way" was divorced from context and, therefore, from legal reality.

Certainly the expression "U.S.A." is *scènes à faire*. Does it follow that a song – or audiovisual – called "Bored in the U.S.A.," for example, cannot be found substantially similar to Springsteen's work – simply because Springsteen's work prominently (and repeatedly) features a *scènes à faire* element? What if Born/Bored also share numerous lyrical, narrative, and structural elements?

But because the court had previously isolated and dissected musical elements on musicological merits, App-773-74, "Yawkey Way" and other lyrics were excluded on their most superficial textual and literal level. Steele's claim arises from combined operation of music, lyric, narrative, and structure, the very of intellectual labor and creative synergy which transform idea into expression.

The court's improper basis for dissection was Steele's perceived "reference" or "use" of Yawkey Way. App-778. Steele seeks judgment not on 'use' or 'reference' but

on *expression*. Authors do not receive copyright for what they take, but for what they give. Steele was afforded free use of idea, fact, and public domain; he was expected then in good faith to expend creative capital and leave his mark distinctly from those who preceded him, to enjoy copyright protection.

h. Ordinary Observers / Intended Audience

The district court misrepresented and mischaracterized Steele's witnesses as "ordinary listeners." App-779-80. Steele had rightly presented affidavits from "ordinary observers" of the MLB Audiovisual. App-685-99. Using an incorrect 'listener' standard, the court excluded evidence as "inadmissible...[not] 'helpful' to the factfinder." App-780. To the contrary as ordinary observers, specifically baseball fans reacting to the MLB Audiovisual, they are 'helpful' as members of Steele's intended audience.

"If the works in issue are directed to a particular audience, then the 'spontaneous and immediate' reaction of that audience is determinative." 3 M. Nimmer & D. Nimmer, Nimmer on Copyright Sec. 13.03[E], at 13-62.4 n. 202 (1989). See also Dawson, 905 F.2d 731.

Steele's intended audience was targeted by the Steele Song, a "baseball playoff anthem...marketable for MLB both nationally and internationally." App-25. In

2007, three years after first hearing the Steele Song, his intended audience while viewing the MLB Audiovisual “regard[ed] their aesthetic appeal as the same.” Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487. The Steele Song’s intended audience testified to their spontaneous and immediate reaction upon seeing and hearing the MLB Audiovisual: “I heard the MLB/TBS/Bon Jovi song and immediately thought Bart had sold his song to them.” (App-692.); “I watched closely...I was thinking, “wow, I can’t believe it! It’s Bart’s song!!” (App-685.); “[T]he tune Bon Jovi was singing on TV commercials and promoting baseball sounded a lot like the song that Bart had written.” App-696.

XIII. The District Court Abused its Discretion by Misapplying the Law When it Limiting Discovery *Sua Sponte* to Expert Musicological Opinion of “Substantial Similarity,”

a. The Parties' Proposed Discovery Schedule

On March 24, 2009, the *pro se* Steele and MLB's counsel filed their Joint Statement Pursuant to Rules 26(f) and Local Rule 16.1(d) (“Joint Statement”). App-366. Steele and MLB agreed to a phased discovery schedule, beginning with a four month “phase one” discovery relating to liability. App-366.

b. The District Court's Discovery Order

The district court disregarded the parties' agreed-to discovery schedule and *sua sponte* limited discovery to expert musicological analysis of circumstantial evidence of "copying," i.e., expert opinion as to whether the works were musically substantial similar. App-385-386. At the district court's March 31, 2009 hearing, the district court specifically stated it would allow discovery on only the "substantial similarity of the composition and the alleged copyright infringing song." App-394.

c. The Discovery Order's Prejudice to Steele

The discovery order applied to Steele's entire case, not just to Steele's musicological claim as to the 4:38-long Bon Jovi Song. Accordingly, Steele was forced to defend against summary judgment on his primary claim of infringement of his 2:38:90-long musical work by the 2:38:90-long multimedia MLB Audiovisual after 60 days of discovery limited to only expert musicological opinion.

The discovery order failed to contemplate or even address whether direct evidence (or lack thereof) was available as to MLB's duplication of his Song or whether MLB put his Song to video. App-387. Such evidence, in the form of computer files, was - and is - certainly available: the Red Sox located Steele's Song on

a four year-old e-mail, exemplifying the ability to easily locate pertinent digital (computer) files years after the fact. App-424.

Additional digital evidence is certainly available, given that the works in question were *digitally created and stored*, i.e., on computers

d. Applicable Law and Standard of Review

Discovery management “lies primarily within the sound discretion of the district court.” United States Steel v. M. Dematteo Construction Co., 315 F.3d 43, 53 (1st Cir. 2002) (denial of Rule 56(f) motion not abuse of discretion where damages discovery postponed until after deciding dispositive legal issue). Discovery orders are ordinarily reviewed for abuse of discretion. In Re Subpoena to Michael Witzel 531 F.3d 113, 117 (1st Cir. 2008) (denial of motion to compel upheld based lack of relevance of discovery sought).

A district court may be reversed upon a “clear showing of manifest in justice, that is, where the lower court’s discovery order was plainly wrong and resulted in substantial prejudice to the aggrieved party.” In Re Subpoena to Michael Witzel 531 F.3d 113, 117 (1st Cir. 2008) (citation omitted). A ruling may be “plainly wrong” if it was “based on an incorrect legal standard or a misapplication of the law.” Id.

e. The Significance of Electronic Discovery: The 2006 Amendment to Rule 26(f)²³

The 2006 Amendment to Federal Rule of Civil Procedure 26(f) recognized the significance of digitally stored information in modern litigation, resulting from the nearly universal incorporation of computers and digital information systems into litigants' lives. See Fed.R.Civ.P. 26(f) and Advisory Committee Notes ("Committee Notes") thereto.²⁴ The 2006 Amendment directly addressed how so-called "e-discovery" (digital discovery) is to be handled. Id.

Specifically, Rule 26(f) and Local Rule 16.1 require parties to confer in good faith to consider, among other things, digital discovery planning. Fed.R.Civ.P. 26(f)(2), 26(f)(3)(C), LR 16.1. Following the parties' conference, the parties must submit to the court a written report "outlining the [parties' discovery] plan." Fed.R.Civ.P. 26(f)(2).

In cases involving digital discovery, the parties should specifically confer about, among other things: (1) their respective computer information systems, (2) the various sources of digital information within the parties' control, (3) accessibility of that

²³ "Electronic" and "digital," as used herein, are interchangeable. The Rules and Advisory Committee Notes make clear that the use of the word "electronic" in Rule 26 and elsewhere refer to computer files which are, by definition, digital.

²⁴ Many companies and public institutions have minimized or eliminated paper files altogether.

information, (4) how and when that information should be searched and (5) the form in which digital information might be produced. See Committee Notes, 2006 Amendment to Fed.R.Civ.P. 26. Litigants' "[f]ailure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes." Id.

Finally, Rule 26(f) mandates that the parties' discovery plan "state the parties' views and proposals on... any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced." Fed.R.Civ.P. 26(f)(3)(C).

The parties here neither discussed digital discovery nor included a plan for it in their Joint Submission. Steele, as a litigant, is not blameless for these failures. Neither is MLB. Both sides were obligated to address and plan for digital discovery and include a specific plan for digital discovery in the Joint Statement. Neither did.

As a matter of equity, justice, and fair play, however, it's worth looking at the respective litigants: Steele, *pro se* and proceeding *in forma pauperis*, and MLB - which includes several of the largest *media* companies in the world represented by Skadden Arps - defending their *digital* work against a claim of infringement by *digital* means. Steele's failure to raise digital discovery issues is understandable. MLB's failure is not.

f. The Digital Discovery Denied to Steele

The agreed-to expedited discovery schedule proposed in the Joint Statement would have allowed Steele discovery of pertinent digital files of defendant/appellee TBS, which created the MLB Audiovisual at Turner Studios in Atlanta.²⁵ The digital information contained in these files is crucial direct evidence - favorable or unfavorable to Steele - relating to Steele's infringement claim as to the MLB Audiovisual. Indeed, MLB could have nipped this litigation in the bud by making available for Steele's review such exculpatory digital evidence at the outset (again, if such exculpatory evidence exists).

g. The MLB Audiovisual: A Digital Creation

Brett Langefels edited the MLB Audiovisual. App-511. Langefels edited the MLB Audiovisual at Turner Studios (a division of TBS) in Atlanta, Georgia.²⁶

According to Langefels,²⁷ he utilizes Final Cut Pro and Avid, which are industry-standard all-digital computer-based video editing software "suites."²⁸ Turner

²⁵ Turner Studios, on its website, lists among its accomplishments the "2007 MLB Playoffs on TBS." See <http://www.turnerstudios.com/pub/portfoliodetail.aspx?cid=ffd83c47-44d0-41c3-b3fb-9798f195d4b0>

²⁶ Turner Studios, on its website, lists among its accomplishments the "2007 MLB Playoffs on TBS." See <http://www.turnerstudios.com/pub/portfoliodetail.aspx?cid=ffd83c47-44d0-41c3-b3fb-9798f195d4b0>

Studios advertises its use of both Final Cut Pro and Avid.²⁹ On the audio side, Turner Studios advertises its use of the industry standard computer-based digital audio system "Pro Tools."³⁰

Digital audio and video data are, by definition, binary number sequences and are therefore worked on and stored in computers. Accordingly, the MLB Audiovisual was a purely digital creation, allowing for easy discovery of its genesis and evolution - from idea to final product - in the computers of Turner Studios, TBS, or MLB.

h. Digital Discovery - Direct Evidence

A simple examination of any or all of the following would have revealed if - and to what extent - Steele's Song played a role in the creation of the MLB Audiovisual:

(1) the digital audio or video "project files" (e.g., "Final Cut Pro" or "Pro Tools" files);

(2) the "raw" digital audio or video audio files (e.g., the digital audio and video files used in the "project files");

²⁷ See <http://www.media-match.com/profile.php?uid=984796>

²⁸ See <http://www.apple.com/finalcutstudio/finalcutpro/>;
<http://www.avid.com/video/>.

²⁹ See <http://www.turnerstudios.com/pub/whatwedodetail.aspx?cid=9410c8b2-a3f0-46b3-8a2e-d9f0eb827e19>

³⁰ See <http://www.turnerstudios.com/pub/whatwedodetail.aspx?cid=fbe9add8-5f6a-49a2-b75b-8d812bd5fb6d>

(3) electronic (or hard copy) session notes or work logs;

(4) File Transfer Protocol (“FTP”), or similar records (FTP is a system for transferring large digital files - typically audio, video, or audiovisual files);

(5) early versions, shadow or back-up files, metadata and other digital data created and stored during regular computer use.

The absence or presence of Steele’s Song could also be determined other ways. E-mail records, hard copy correspondence, and other non-digital business records (e.g., internal memoranda) would almost certainly reveal whether Steele’s Song spent any time at Turner Studios.

Finally, if necessary, Steele could have utilized other discovery tools, for example, deposing Brett Langefels, the MLB Audiovisual's editor, and/or other Turner Studios video and/or audio editors, about the creation of the MLB Audiovisual and whether Steele's Song was used in its creation.

The district court's error in ruling that substantial similarity was the only issue in this case incorrectly framed - to the prejudice of Steele - the rest of the district court proceedings. By so narrowly curtailing discovery to second-tier circumstantial evidence of copying when direct evidence of copying (or lack thereof) was available,

Steele was limited to discovering only those materials, digital or otherwise, that MLB appended as exhibits to their motions to dismiss and for summary judgment.

CONCLUSION

Steele respectfully requests that this Honorable Court reverse judgment as a matter of law against Steele and render judgment against MLB as a matter of law as to infringement of Steele's copyright. Alternatively, Steele requests reversal and remand for further discovery on the issues addressed herein.

/s/Christopher A.D. Hunt

Christopher A.D. Hunt

MA BBO# 634808

Court of Appeals Bar #61166

THE HUNT LAW FIRM LLC

10 Heron Lane

Hopedale, MA 01747

(508) 966-7300

cadhunt@earthlink.net

February 24, 2010

CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that on February 24, 2010, I caused this Brief of Appellants Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz, filed through the ECF system, to be served electronically by the Notice of Docket Activity upon the ECF filers listed below. On February 22, 2010 copies of the appendix were sent to the clerk of the First Circuit Court of Appeals and to counsel for appellees, Christopher G. Clark, at the address listed below.

Clifford M. Sloan
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005
csloan@skadden.com

Kenneth A. Plevan
Skadden, Arps, Slate, Meagher & Flom LLP
One Beacon Street
31st Floor
Boston, MA 02108
kplevan@skadden.com

Scott D. Brown
Skadden, Arps, Slate, Meagher & Flom LLP
One Beacon Street
31st Floor
Boston, MA 02108
sbrown@skadden.com

Christopher G. Clark
Skadden, Arps, Slate, Meagher & Flom LLP
One Beacon Street
31st Floor
Boston, MA 02108
sbrown@skadden.com

Matthew J. Matule
Skadden, Arps, Slate, Meagher & Flom LLP
One Beacon Street
31st Floor
Boston, MA 02108
sbrown@skadden.com

Dated: February 24, 2010

/s/ Christopher A.D. Hunt
Christopher A.D. Hunt

United States Court Of Appeals
For the First Circuit

No. 09-2571

SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING; STEELE
RECORDZ

Plaintiffs – Appellants

v.

TURNER BROADCASTING SYSTEM, INC.; TIME WARNER, INC.;
JON BONGIOVI, individually and d/b/a Bon Jovi Publishing; RICHARD
SAMBORA, individually and d/b/a Aggressive Music; WILLIAM FALCONE,
individually and d/b/a Pretty Blue Songs; FOX BROADCASTING CO.; MAJOR
LEAGUE BASEBALL PROPERTIES, INC.; MLB PRODUCTIONS, A&E;
A&E/AETV; BON JOVI; AEG LIVE, LLC; MARK SHIMMEL MUSIC; VECTOR
MANAGEMENT; AGGRESSIVE MUSIC, a/k/a Sony ATV Tunes; BON JOVI
PUBLISHING; UNIVERSAL MUSIC PUBLISHING GROUP; UNIVERSAL
POLYGRAM INTERNATIONAL PUBLISHING, INC., PRETTY BLUE SONGS;
SONY ATV TUNES; KOBALT MUSIC PUBLISHING AMERICA, INC.;
BOSTON RED SOX

Defendants – Appellees

THE AMERICAN SOCIETY OF COMPOSERS; FOX TELEVISION
STATIONS, INC.; ISLAND RECORDS, a/k/a Island Def Jam Records; THE
BIGGER PICTURE CINEMA CO.

Defendants

ADDENDUM TO APPELLANTS' BRIEF

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AS A MATTER OF LAW

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United States District Court
District of Massachusetts

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SAMUEL BARTLEY STEELE, BART)		
STEELE PUBLISHING and STEELE)		
RECORDZ,)		
Plaintiffs,)	Civil Action No.	
)	08-11727-NMG	
v.)		
)		
TURNER BROADCASTING SYSTEM,)		
INC., TIME WARNER CORPORATION,)		
JON BONGIOVI (individually and)		
d/b/a BON JOVI PUBLISHING),)		
RICHARD SAMBORA (individually)		
and d/b/a AGGRESSIVE MUSIC),)		
WILLIAM FALCONE (individually)		
and d/b/a PRETTY BLUE SONGS),)		
MAJOR LEAGUE BASEBALL)		
PROPERTIES, A&E TELEVISION)		
NETWORKS, AEG LIVE, MARK SHIMMEL)		
MUSIC, UNIVERSAL POLYGRAM)		
INTERNATIONAL PUBLISHING, THE)		
BIGGER PICTURE CINEMA CO.,)		
BOSTON RED SOX, KOBALT MUSIC)		
PUBLISHING AMERICA, INC. and)		
ISLAND DEF JAM RECORDS)		
Defendants.)		
<hr/>)	

MEMORANDUM & ORDER

GORTON, J.

The plaintiff, acting pro se, brings this case against numerous defendants for alleged copyright infringement. He alleges that a song he wrote about the Boston Red Sox was unlawfully copied and used to create an advertisement promoting Major League Baseball post-season telecasts.

I. Background

A. Factual Background

The plaintiff, Samuel Bartley Steele ("Steele"), along with two "unincorporated business organizations," Steele Publishing Company and Steele Recordz (for convenience, all of the plaintiffs are hereinafter collectively referred to as "Steele" or "plaintiff"), are residents of Chelsea, Massachusetts. Steele is a songwriter and musician who asserts that, in 2004, he wrote a "love anthem" about the Boston Red Sox ("the Red Sox") entitled "Man I Really Love This Team" ("the Steele Song"). Not surprisingly, Steele's song gained popularity around Fenway Park, the Red Sox historic stadium, in the fall of 2004 as the team played toward its first World Series Championship in 86 years.

Steele's claim for copyright infringement arises from an advertisement produced and aired by the defendant Turner Broadcasting System, Inc. ("TBS") during the 2007 Major League Baseball ("MLB") post-season ("the TBS Promo"). The TBS Promo features a song by the popular band Bon Jovi entitled "I Love This Town" ("the Bon Jovi Song") along with baseball video footage. In addition to TBS, Steele's complaint names Bon Jovi front-man John Bongiovi and guitarist Richard Sambora as defendants. Also sued were William Falcone, Time Warner Corporation, Major League Baseball Properties, the Red Sox, A&E Television Networks, AEG Live, Mark Shimmel Music, Universal

Music Publishing ("Universal Music"), Universal Polygram International Publishing, The Bigger Picture Cinema Company, Island Def Jam Records ("Island Records"), Kobalt Music Publishing America, Inc. ("Kobalt"), Fox Broadcasting Company ("Fox"), Sony ATV Tunes LLC ("Sony") and Vector 2 LLC ("Vector").

Steele asserts that the Bon Jovi Song and the TBS Promo infringe his copyright. With respect to the TBS Promo, Steele contends that it was unlawfully derived from his work through a method called "temp tracking." According to Steele, that term refers to the use of a song as a template to create an audiovisual work which, in turn, is used to create a final soundtrack. Steele alleges that much of the visual portion of the TBS Promo is derived from his song and that the Bon Jovi Song was then based upon that Promo, the Steele Song or both.

B. Procedural History

Steele filed his initial complaint alleging copyright infringement and violation of the Lanham Act on October 8, 2008. On January 30, 2009, Steele amended his complaint to add the Red Sox as a defendant and a claim pursuant to the Massachusetts Consumer Protection Act, M.G.L. c. 93A ("Chapter 93A"). The amended complaint did not include a Lanham Act claim or some of the original defendants but, at Steele's urging and in light of his pro se status, this Court considered both complaints together in deciding the defendants' motions to dismiss.

On April 3, 2009, this Court issued a Memorandum and Order dismissing the claims brought under the Lanham Act and Chapter 93A and all claims against the defendants Universal Music, Fox, Sony and Vector. Steele v. Turner Broadcasting Sys., Inc., 607 F. Supp. 2d 258 (D. Mass. 2009). The Court declined to dismiss Steele's copyright infringement claims against the remaining defendants and instead permitted limited discovery to allow Steele to "gather and present evidence of substantial similarity" including expert analysis of his song and the alleged infringing works. Id. at 265. The Court indicated that, following such discovery, it would entertain motions for summary judgment on the issue of substantial similarity.

On June 10, 2009, the remaining defendants, with the exception of Kobalt and Island Records, moved for summary judgment.¹ In support of their motion they included an expert report from musicologist Anthony Ricigliano ("the Ricigliano Report"). Kobalt separately moves for summary judgment incorporating by reference the arguments made by its co-defendants.

On July 17, 2009, Steele opposed the defendants' motions for summary judgment. He also has submitted an (unsigned) report from a musicologist, reports from various other purported

¹ No attorney has appeared on behalf of Island Records and the docket reflects that service was never made on that defendant.

experts, affidavits from "ordinary listeners" who claim to detect similarity between the Steele Song and the alleged infringing works and an affidavit of his own. On July 30, the defendants (with the exception of Kobalt and Island Records and with leave of Court) submitted a reply memorandum. Although a hearing on the motion is scheduled for September 10, 2009, this Court concludes that a decision can be rendered based on the thorough submissions currently before it.

II. Analysis

A. Legal Standard

The role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991) (quoting Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)). The burden is upon the moving party to show, based upon the pleadings, discovery and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

A fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. A genuine issue of material fact exists where the evidence with respect to the

material fact in dispute "is such that a reasonable jury could return a verdict for the nonmoving party." Id.

Once the moving party has satisfied its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The court must view the entire record in the light most hospitable to the non-moving party and indulge all reasonable inferences in that party's favor. O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993). If, after viewing the record in the non-moving party's favor, the court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate.

B. Copyright Infringement

To succeed on a claim for copyright infringement, a plaintiff must prove "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991). As part of the second prong, a plaintiff must prove that the copyrighted and alleged infringing works are "substantially similar." Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005) (citation and internal quotation marks omitted).

In determining substantial similarity, courts apply the "ordinary observer," or, "in musical milieu, the ordinary

listener test.” Id. (internal quotation marks omitted). A defendant’s work is substantially similar to the copyrighted work only if

an ordinary person of reasonable attentiveness would, upon listening to both, conclude that the defendant unlawfully appropriated the plaintiff’s protectable expression.

Id.

Importantly, for a plaintiff to succeed the substantial similarity must relate to original elements of the copyrighted work. See id. at 18-19 (citing Feist, 499 U.S. at 361). Thus, before examining the similarity between the works,

a court must engage in dissection of the copyrighted work by separating its original, protected expressive elements from those aspects that are not copyrightable.

Id. Accordingly, “an overall impression of similarity may not be enough” if “such an impression flows from similarities as to elements that are not themselves copyrightable.” Id. at 19.

Among the elements that must be dissected out are ideas and concepts which are not protected by copyright law. 17 U.S.C. § 102(b). Nor are common phrases or scene a faire, meaning “stock scenes or elements that necessarily flow from a common idea,” protected. CMM Cable Rep, Inc. v. Ocean Coast Props, Inc., 97 F.3d 1504, 1522 n.25 (1st Cir. 1996) (citation omitted); Johnson, 409 F.3d at 24.

Although ordinarily an issue for the factfinder, substantial similarity (or lack thereof) can be decided by the Court as a

matter of law. See Johnson, 409 F.3d at 18. According to the First Circuit Court of Appeals:

Summary judgment on this issue is appropriate only when a rational factfinder, correctly applying the pertinent legal standards, would be compelled to conclude that no substantial similarity exists between the copyrighted work and the allegedly infringing work.

Id. at 18, 25 (upholding grant of summary judgment based on lack of substantial similarity).

C. Application

The defendants assert that Steele's copyright infringement claim fails as a matter of law because there is no substantial similarity between his song and the alleged infringing works. In considering the issue this Court has reviewed the expert reports and other affidavits submitted by both sides. It has also carefully listened to the Steele Song and the Bon Jovi Song and viewed both the original TBS Promo and the version provided by the plaintiff in which the audio has been replaced with the Steele Song.

1. Musical Similarity

Applying the "ordinary listener" standard this Court detects no musical similarity between the Steele Song and the Bon Jovi Song. The expert analyses by opposing musicologists support that conclusion. The opinion of plaintiff's musicologist is particularly relevant because, on a motion for summary judgment, this Court considers the facts in the light most favorable to the

non-moving party. See id. at 19 (concentrating on the views of plaintiff's chosen expert).

Plaintiff has submitted an unsigned report from musicologist Alexander Stewart ("the Stewart Report") which states, in part:

This case is not strong musicologically: Melody of "hook" has only one note in common (1). Three words in common, but not the most distinctive word, "team." Harmony is commonplace. Both tunes consist primarily of I, IV, and V chords - the most commonly used chords in harmony. Moreover, "Team" [the Steele Song] is a 12-bar blues. One of the most distinctive harmonic figures in "Team," the chromatic chord change (D-D#-E) at the end of the hook, is not found in "Town" [the Bon Jovi Song]. Hook in "Town" begins on the IV chord (progression IV V I); hook of "Team" begins on V (progression V IV I). Bon Jovi song has somewhat irregular structure: 5-bar "B section"; "Team" is regular 4- and 8-bar sections[.]

Not surprisingly, the Ricigliano Report (submitted by the defendants) reaches a similar conclusion, noting that the songs

do not share any significant similarity and are not substantially similar in lyric content, melodic content (pitch series, rhythm or rhythmic patterns, melodic development and structure), or harmonic content

In response to such damaging testimony, Steele asserts that musicologists (including his own expert) are not helpful in this case because they are not qualified to compare the video evidence presented in the form of the TBS Promo. Nevertheless, this Court concludes, based upon the musicologist reports and its own review of the songs, that no reasonable jury applying the correct legal standard could find substantial similarity between the musical elements of the two works.

2. Lyrical Similarity

A comparison of the lyrics in the Steele Song and the Bon Jovi song also reveals no substantial similarity with respect to original elements. Before engaging in comparison, however, the Court must first dissect the lyrical elements of Steele's song that are not copyrightable. In this case, that turns out to be most, if not all, of the similarities.

For example, although both songs use the phrase "I love this . . ." in their title and chorus, common expressions and cliches are not copyrightable. See Johnson, 409 F.3d at 24 (phrase "You're the One for Me" too common to be copyrightable). As defendants point out, online databases reveal nearly 100 songs that use the phrase "I love this . . ." in some form in their title. Although plaintiff argues that none of those songs is about baseball, neither is the Bon Jovi Song.

The phrases "come on" and "here we go" are likewise too trite and common to warrant protection. See id. Another purported similarity, the fact that both songs rhyme "round" with "town," is also commonplace as evinced by the fact that it is found in the popular children's song "The Wheels on the Bus".

When those unprotected elements are filtered out, the Steele Song and Bon Jovi Song display little lyrical similarity, and certainly not the substantial similarity required to prove a claim of copyright infringement. As plaintiff's own musicologist

observes, the songs have “[o]nly three words in common (‘I’ ‘love’ ‘this’).” Moreover, the subject of the Steele Song “is clearly baseball and specifically the Red Sox” while the Bon Jovi song is about a town and “without the video, there would be no connection to baseball.”

In an effort to show lyrical similarity, plaintiff relies on “reports” from Jonathan Yasuda (“the Yasuda Report”), a law student with an undergraduate degree in music, and Mark Ferraguto (“the Ferraguto Report”), a musicology PhD candidate.² Both reports identify purported similarities between the structure and rhyme scheme of the Steele Song and the Bon Jovi Song.

Even assuming those individuals are qualified to render opinions on the subject, their conclusions do not create a genuine issue of material fact concerning substantial similarity. A common rhyme scheme or structure does not qualify as original expression protectable under federal copyright law. See id. at 23 (holding that a particular harmonic progression “is a stereotypical building block of musical composition, [which] lacks originality”). Furthermore, considered as a whole, differences between the two songs (as recognized by plaintiff’s own musicologist) overwhelmingly eclipse any similarity in structure and rhyme scheme. See id. at 18 (noting that “[t]he

²The Ferraguto Report is in the form of an email to the plaintiff.

substantial similarity requirement focuses holistically on the works in question"). Accordingly, even crediting the assertions of plaintiff's experts, no reasonable jury could conclude that the Bon Jovi Song is substantially similar to the original lyrical elements of the Steele Song.

3. The TBS Promo

Much of Steele's argument focuses not on similarity between the Bon Jovi Song and his own work (although he does maintain that the two are substantially similar) but, rather, on the TBS Promo, which features the Bon Jovi song along with baseball video footage and scenes from in and around major league ballparks. Steele asserts that the images in the TBS Promo bear a striking resemblance to the scenes described in his song and that, together with similarities between the two songs, the Promo conclusively demonstrates that his work was unlawfully copied.

According to Steele, his song was used as a template for the creation of the video portion of the TBS Promo. Through a process he calls "temp tracking," the defendants allegedly created the video based on the Steele Song and then replaced the audio with the Bon Jovi Song (which is based on the video, the Steele Song or both).

In an effort to show similarity (and that the TBS Promo was derived from his song) Steele has submitted a version of the TBS Promo in which the audio has been replaced with the Steele Song.

He maintains that in many places the lyrics of his song correspond to the images in the TBS Promo. In particular, Steele notes the following similarities:

- 1) At the exact moment Steele sings "Word is out on Yawkey Way," the TBS Promo shows a Yawkey Way street sign;
- 2) when Steele mentions the Detroit Tigers the TBS Promo shows a Tiger's player rounding the bases;
- 3) when Steele sings "You got to keep believin', gotta stay tough" the Promo shows players "chest butting" and acting tough; and
- 4) when Steele exhorts fans to "Get up off your seats" the Promo shows fans standing and cheering.

Again, before conducting the substantial similarity analysis, the Court must dissect the unprotected elements from Steele's work. Here, the Steele Song's references to Fenway Park and Yawkey Way are classic scene a faire; they are stock scenes that flow from the idea of baseball. CMM Cable Rep, Inc., 97 F.3d at 1522 n.25. Steele does not enjoy a monopoly over the use of those images simply because he references them in a copyrighted song. See id. (doctrine of scene a faire is "concerned with preventing a monopoly on commonplace ideas").

Furthermore, although the Steele Song does appear to match some of the images in the TBS Promo, it is inevitable that a song about baseball will at times correspond with a baseball promotional advertisement. For example, there are over a dozen scenes in the TBS Promo that display a cheering crowd (at either a ballpark or a Bon Jovi concert). Consequently, it is

unsurprising that one of those scenes parallels one of the four points in the Steele Song where he encourages fans to "Get up off your seats."

As the defendants point out, the number of places in which the TBS Promo corresponds to the lyrics of the Bon Jovi Song vastly outnumber any parallels with the Steele Song. More importantly, however, the issue is not whether the video portion of the TBS Promo is more similar to the Bon Jovi Song or the Steele Song but, rather, whether the TBS Promo is substantially similar to the original elements of the Steele Song. Because no reasonable jury could find substantial similarity between the two works, the defendants are entitled to summary judgment.

4. Other Issues

Steele raises a number of other arguments that do not change this Court's conclusion but are, nonetheless, worthy of addressing. First, to the extent that Steele maintains that the defendants stole his "marketing concept" of a baseball song that could be adapted to any team or city, such an idea or concept explicitly is unprotected by federal copyright law. 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea . . . [or] concept").

Second, Steele's effort to show a genuine issue of material fact by submitting affidavits from assorted "ordinary listeners," although understandable given his pro se status and the relevant

legal standard, is misguided for a number of reasons. First, the "ordinary listeners" upon whom Steele asks the Court to rely are all his personal friends or acquaintances. Second, there is no evidence that those ordinary listeners were "correctly applying the pertinent legal standards." See Johnson, 409 F.3d at 18. Most importantly, those affidavits present inadmissible lay opinion and therefore are not appropriate for consideration. See Fed. R. Civ. P. 56(e)(1) (affidavits must "set out facts that would be admissible in evidence"); Fed. R. Evid. 701 (lay opinion is inadmissible unless it is "helpful" to the factfinder).

Finally, Steele's assertions that the defendants violated his synchronization, or "synch," rights (by allegedly timing the display of images in the TBS Promo to his song) is also unpersuasive. A synch right is the "right to record a copyrighted song in synchronization with [a] film or videotape, and is obtained separately from the right to perform the music." Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 33 n.23 (1979) (Stevens, J., dissenting). Thus, synch rights are an additional right that a user must acquire when it seeks not only to perform the protected work but also to use it in timed-relation with an audiovisual work. See ABKO Music, Inc. v. Stellar Records, Ind., 96 F.3d 60, 62 n.4 (2d Cir. 1996). Although Steele has submitted a report from a purported music and film expert that asserts that 96% of the video sequences in the TBS Promo are synchronized to the Steele Song's quarter-note

beat, intervals of time are not original expression protectable under federal copyright law. Accordingly, no reasonable juror could conclude that the TBS Promo violates plaintiff's synch rights.

In sum, because no reasonable juror applying the correct standards could find that the original elements of the Steele Song are substantially similar to the Bon Jovi Song or the TBS Promo, summary judgment will enter in favor of the defendants.

ORDER

In accordance with the foregoing, the defendants' motions for summary judgment (Docket Nos. 92 and 98) are **ALLOWED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated August 19, 2009

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SAMUEL BARTLEY STEELE,)	
Plaintiff,)	
)	
)	
vs.)	CA No. 08-11727-NMG
)	
)	
TURNER BROADCASTING SYSTEM,)	
INC., et al,)	
Defendants.)	

BEFORE: THE HONORABLE NATHANIEL M. GORTON

HEARING ON MOTIONS TO DISMISS

John Joseph Moakley United States Courthouse
Courtroom No. 4
One Courthouse Way
Boston, MA 02210
Tuesday, March 31, 2009
3:40 p.m.

Cheryl Dahlstrom, RMR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 3209
Boston, MA 02210
Mechanical Steno - Transcript by Computer

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APPEARANCES:

Samuel Bartley Steele, Pro Se

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
By: Clifford M. Sloan, Esq.
1440 New York Avenue, NW
Washington, DC 20005

- and -

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
By: Kenneth A. Plevan, Esq.
919 Third Avenue
New York, New York 10022-3897

- and -

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
By: Matthew J. Matule, Esq.,
Christopher G. Clark, Esq.,
Scott D. Brown, Esq., and
Jason Dozier, Esq.
One Beacon Street
Boston, Massachusetts 02108
On behalf of the Defendants excluding Kobalt Music
Publishing America, Inc.

DWYER & COLLORA LLP
By: Daniel J. Cloherty, Esq.
600 Atlantic Avenue, 12th Floor
Boston, Massachusetts 02210
On behalf of the Defendant Kobalt Music Publishing
America, Inc.

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P R O C E E D I N G S

THE CLERK: This is Civil Action 08-11727, Samuel Steele vs. Turner Broadcasting System, et al. Would plaintiff and counsel for the defendants identify themselves for the record.

MR. STEELE: I'm sorry?

THE COURT: Would you identify yourself for the record.

MR. STEELE: Samuel Bartley Steele, pro se.

03:49 THE COURT: Mr. Steele, good afternoon.

MR. SLOAN: Clifford Sloan, from the Skadden, Arps law firm, for 18 of the 20 defendants.

THE COURT: Mr. Sloan for 18 of the 20. Okay. Let me put you in place here. Yes, sir.

MR. PLEVAN: Kevin Plevan, your Honor, also from the law firm --

THE COURT: Mr. Plevan, good afternoon to you.

MR. MATULE: Good afternoon, your Honor. Matthew Matule, also of Skadden, Arps --

03:50 THE COURT: Mr. Matule.

MR. MATULE: -- on behalf of the same defendants.

MR. BROWN: Good afternoon, your Honor. Scott Brown, Skadden, Arps, same team.

THE COURT: In the back row.

MR. CLARK: Christopher Clark, Skadden, Arps.

1 THE COURT: Mr. Clark. I don't have you down but
2 that's okay. Mr. Clark.

3 MR. DOZIER: Jason Dozier, Skadden, Arps.

4 THE COURT: Mr. Dozier. And finally?

5 MR. CLOHERTY: Your Honor, Daniel Cloherty, from Dwyer
6 & Collora, on behalf of Kobalt Music Publishing America, Inc.,
7 which is misnamed in the complaint as Kobalt Music Group.

8 THE COURT: All right. Mr. Cloherty, I do have you
9 listed. Thank you.

03:51 10 As I understand, this case has been brought by Mr.
11 Steele, representing himself. Mr. Steele, you're not an
12 attorney, I take it, or is that --

13 MR. STEELE: No, sir.

14 THE COURT: Okay. That's fine. You're entitled to
15 represent yourself pro se. You have two companies you also
16 represent. I take it those are not corporations; those are
17 sole proprietorships, the Bart Steele Publishing and Steele
18 Recordz, with a "Z"?

19 MR. STEELE: Yes. Those are the -- those are my
03:51 20 unincorporated businesses that own the sound recording part of
21 the --

22 THE COURT: You are the sole proprietor of both of
23 those businesses?

24 MR. STEELE: Yes, your Honor.

25 THE COURT: That means you are entitled to represent

1 yourself pro se in a case, but you can't represent a
2 corporation, by rule. So -- but the fact that these are sole
3 proprietors, we treat them as individuals, so you're the
4 individual in all three cases. So you can represent yourself.

5 MR. STEELE: Thank you.

6 THE COURT: I -- you may be seated. I would be
7 derelict, though, in my duty not to, as I always do when I have
8 pro ses, who obviously believe strongly in their claims and
9 have put a lot of work into them, to question why you do not
03:52 10 have counsel.

11 You're involved in a very serious case, and it's going
12 to involve a lot of procedure, about which I presume you don't
13 have much familiarity. And you could very much use the
14 assistance of counsel. Have you tried to get counsel to help
15 you in this matter?

16 MR. STEELE: I've spoken with several attorneys which
17 didn't want to take the case --

18 THE COURT: Okay.

19 MR. STEELE: -- for obvious reasons. The number of
03:52 20 defendants, everybody seemed to have a conflict of interest or
21 worked with one of the parties at some point or a defendant it
22 represented. I know my procedural legal knowledge is not up to
23 par with the defense attorneys, but I believe that I know
24 copyright law well enough to represent myself in this case.

25 THE COURT: As I say, you're entitled to do that, Mr.

1 Steele, and I'm not questioning that. I'm just trying to put
2 it in your head once again that it may be -- it may be in your
3 best interests to try to obtain counsel -- or to continue to
4 try to obtain counsel because, as this case goes along, you're
5 going to be required to abide by rules of procedure that are
6 sometimes arcane and hard to understand, but, nevertheless, you
7 will be required to abide by them. That's just why I'm
8 suggesting that to you now.

9 As I understand it, this is an alleged copyright
03:53 10 infringement claim. You've also filed claims under the Lanham
11 Act and under Chapter 93A. And it all surrounds the fact that
12 you have composed a song about the Boston Red Sox back in the
13 glory year of 2004. And you believe it was unlawfully copied
14 and used to create an advertisement promoting Major League
15 Baseball, more recently, in 2007.

16 The defendants, of course, have filed responses in
17 which they say there is no substantial similarity between the
18 songs. And we are here today at what was originally scheduled
19 to be a scheduling conference. But we're more concerned with
03:54 20 the motions to dismiss that have been filed by all of the
21 defendants.

22 I will give counsel and, of course, the plaintiff, Mr.
23 Steele, a chance to amplify what they have submitted, which has
24 been extensive. But I must say that I start out with a feeling
25 that the plaintiff has a large mountain to climb in proving the

1 claim of substantial -- substantially similar works that are
2 involved here.

3 I am, at least at the moment, disinclined to dismiss
4 the complaint at this stage of the proceeding, but what I am
5 inclined to do is to permit the plaintiff to have a limited
6 amount of discovery on specifically that issue, that is, the
7 substantial similarity of the composition and the alleged
8 copyright infringing song and then to have that issue briefed,
9 after a short amount of time for discovery, before we get into
03:56 10 the more extensive discovery that would be called for if this
11 case gets beyond the summary judgment point of view.

12 Now, I will hear counsel -- the moving parties in this
13 case are the defendants. And I take it, Mr. Plevan, are you
14 going to speak on behalf --

15 MR. PLEVAN: Mr. Sloan, your Honor.

16 THE COURT: Mr. Sloan. All right. Mr. Sloan will
17 speak on behalf of the defendants and their motion to dismiss.

18 MR. SLOAN: Thank you, your Honor, and may it please
19 the Court. Your Honor, as you have indicated, we are here on
03:56 20 our motion to dismiss plaintiff's amended complaint, which
21 raises a copyright infringement and the other claims that your
22 Honor mentioned.

23 And the essence of plaintiff's claim is that what he
24 calls his "love anthem" to the Boston Red Sox in 2004 was --
25 had its copyright infringed by both the Bon Jovi song and,

1 also, by the video promoting Turner Broadcasting Systems'
2 broadcast of Major League Baseball post-season, what we'll call
3 the Turner promo, that both of those infringed it.

4 And, your Honor, the central issue before the Court is
5 the question of substantial similarity. I'll briefly turn to
6 that analysis, but, first, I want to emphasize three categories
7 of claims or assertions, in light of Mr. Steele's papers, that
8 I think are important to emphasize are not part of the
9 substantial similarity analysis.

03:57 10 And the first is that he may only assert claims based
11 on his registered work, and that is the song that we were
12 discussing called "Man I Really Love this Team." And that's
13 important because Mr. Steele repeatedly, in his papers, points
14 to claims from other works of his, what he calls his derivative
15 works, which have other elements which are not part of the
16 registered works.

17 Secondly, as your Honor knows, copyright protects
18 expression. It does not protect ideas or concepts.

19 And, third, common and ordinary expressions, trite
03:58 20 expressions, also, are not protected. What the First Circuit
21 and other courts have called scene a faire, which is, themes
22 and images which are necessary to communicate a particular
23 message are not protected.

24 And the First Circuit has emphasized that in
25 undertaking the substantial similarity analysis, the

1 nonprotected elements that we've been discussing have to be set
2 aside in a process of dissection, and only the protected
3 elements can be looked at.

4 And, now, let me turn to the question of substantial
5 similarity between the -- between Mr. Steele's song and the Bon
6 Jovi song first and the promo. While, your Honor, with all
7 respect, we do think it's appropriate to deal with it on a
8 motion to dismiss and that your Honor has before him everything
9 that he needs to make the judgment that there's --

03:59 10 THE COURT: Do you have any cases from the First
11 Circuit in which a similar case has been dismissed on a motion
12 for -- a motion to dismiss for substantial -- for the lack of
13 substantial similarity?

14 MR. SLOAN: Well, your Honor, not from the First
15 Circuit. We do have from the First Circuit, though, and I
16 think is closely analogous, the case of Fudge vs. Penthouse.
17 In that case the plaintiffs were making an allegation with
18 regard to a magazine article. And they said that the magazine
19 article -- they raised claims of libel, false light and
04:00 20 intentional infliction of emotional distress. What the
21 district court said and what the First Circuit said is, just
22 looking at the four corners of the article, it cannot bear that
23 claim. There's not a cognizable claim.

24 THE COURT: That wasn't copyrighted, right?

25 MR. SLOAN: That was not copyrighted.

1 Your Honor, there's a recent case from the Northern
2 District of Illinois which we cite in our papers.

3 THE COURT: Last I heard, Illinois wasn't in the First
4 Circuit.

5 MR. SLOAN: No, I'm sorry. But in case your Honor
6 would find it persuasive, can I --

7 THE COURT: Oh, sure, you can argue it.

8 MR. SLOAN: -- go ahead and mention it? Then let me
9 come back to the First Circuit cases. I do think it is
04:00 10 illustrative. I do think the principles are the same in the
11 Northern Illinois -- in the case of O'Leary vs. Mira Books
12 because in that case the Court granted a motion to dismiss
13 based on the fact that there was no cognizable claim of
14 substantial similarity based on a review of the two novels at
15 issue. And it also involved a pro se plaintiff.

16 But it's very closely analogous because before -- the
17 Court had the two novels. There was a claim of substantial
18 similarity. The Court granted a motion to dismiss because
19 there simply was not a colorable claim of substantial
04:01 20 similarity.

21 Now, as your Honor knows, in the First Circuit, there
22 are a number of cases that deal with the question of
23 substantial similarity on summary judgment. But the principle
24 is basically the same because the question is, is there a
25 cognizable claim? Could a reasonable fact-finder find

1 substantial similarity?

2 So we think, your Honor, although those cases are
3 decided on substantial similarity, the principles are fully
4 applicable to a motion to dismiss.

5 THE COURT: In those cases, wasn't the alleged
6 infringed party allowed to have some discovery with respect to
7 an expert determining whether there was a substantial
8 similarity?

9 MR. SLOAN: Yes, your Honor, that's true. It
04:01 10 certainly is true of the Johnson vs. Gordon case.

11 But one thing that I think is very important is that
12 the ultimate standard in the case is an ordinary listener, an
13 ordinary listener of reasonable attentiveness or, as the First
14 Circuit said in Johnson vs. Gordon, a lay listener.

15 THE COURT: Which would be the only way I could listen
16 to it and have any judgment about it, right?

17 MR. SLOAN: That's right. The First Circuit, your
18 Honor, has never remotely suggested that merely by incanting
19 substantial similarity somehow there's a different rule than
04:02 20 normally applies on motion to dismiss, that somehow there's
21 some automatic rule that when you're talking about substantial
22 similarity you automatically get discovery; you automatically
23 get experts.

24 Your Honor has in front of you everything that is
25 necessary for this lay listener, ordinary listener, test. Your

1 Honor, we would submit, with regard to both the lyrics and to
2 the musical elements of the song, it's very clear that there
3 are very striking differences such that there's no cognizable
4 claim.

5 I could go through each of those, your Honor. With
6 the lyrics, very clear and striking differences. Mr. Steele's
7 song, as he has said, is a love anthem to the Boston Red Sox.
8 The Bon Jovi song, the lyrics are not even about baseball, much
9 less about the Red Sox. They're about someone's affection for
04:03 10 a particular town, its people, its character, its environment.

11 Mr. Steele points out that both songs and the titles
12 have the words "I" and "love" and "this." But it's quite clear
13 that that kind of common, ordinary expression is not entitled
14 to copyright protection any more than the phrase "You're the
15 one for me" in Johnson vs. Gordon.

16 And the same thing is true with the musical elements
17 of the song. Again, under the ordinary listener test, if one
18 listens to them, they're very strikingly different. We could
19 play them here, your Honor. We're equipped to do so.

04:03 20 THE COURT: I know you could, but you're not going to.

21 MR. SLOAN: Okay. Thank you, your Honor. That's with
22 regard to the song itself.

23 Then with regard to the video, to the Turner promo,
24 that, also, on a viewing of it, quite simply cannot bear a
25 claim, a cognizable claim, of substantial similarity. Your

1 Honor --

2 THE COURT: Why shouldn't I give Mr. Steele 60 days to
3 try to come up with an expert, some affidavit, that gives me
4 some -- something to lean on and give you, obviously, the
5 response -- a chance to respond and decide it on summary
6 judgment rather than at the motion-to-dismiss stage? I mean,
7 how is your client going to be materially harmed by, you know,
8 four or five months?

9 MR. SLOAN: Well, obviously, if your Honor decides to
04:04 10 proceed that way, we'll go forward and litigate it that way.

11 THE COURT: This is your chance to tell me why I
12 shouldn't do it.

13 MR. SLOAN: But in the almost six months since Mr.
14 Steele chose to file suit against 20 defendants, he has had
15 very abundant and extensive opportunities to refine and revise
16 his claims. We have essentially three versions of his claims
17 before us: his original complaint, the amended complaint, and
18 his opposition to a motion to dismiss. In each, he has changed
19 his claims. He sometimes has changed defendants.

04:05 20 And, your Honor, we think that Mr. Steele has had
21 enough opportunities. And the ultimate underlying question is
22 not going to change. It's a question that is within your
23 Honor's cognizance in looking at the video and comparing it to
24 Mr. Steele's song or comparing Mr. Steele's song to the Bon
25 Jovi song.

1 So under the Supreme Court standards for motion to
2 dismiss, we think it's entirely appropriate to fully apply
3 those standards. Your Honor asks why you should grant the
4 motion to dismiss. With all respect, we think that a fair
5 reading of the Supreme Court precedent compels it at this point
6 because his allegations simply do not amount to a colorable
7 claim.

8 THE COURT: All right. Thank you. I will hear from
9 Mr. Steele.

04:06 10 All right. I'll hear from the other defendant first
11 and then -- that is, that's Kobalt Music Publishing. Mr.
12 Cloherty.

13 MR. CLOHERTY: Only to the extent, I want to be clear
14 that we've joined in the arguments and that we adopt the
15 arguments of Mr. Plevan.

16 THE COURT: Fair enough, Mr. Cloherty.

17 Now I'll hear from Mr. Steele.

18 MR. STEELE: I don't know what the defense attorney's
19 term he just used -- not colorable copyright claim -- my claims
04:06 20 that I'm making is that this is quite possibly the largest
21 copyright infringement case in history because it got swept up
22 in the conglomerate media. It's in advertisement.

23 The defense attorneys have a problem here, a
24 conundrum, maybe, you could call it. Some of their defendants
25 that they're representing have admitted that Bon Jovi was

1 delivering their message, their branded message. "This is
2 where it all goes down. No matter where you're from, tonight
3 you're from right here. That's why I keep coming around to
4 Channel 31, TBS."

5 The problem with that is another defendant, Major
6 League Baseball, has admitted in the public -- in the media
7 that the lyrics are references to baseball. So then you have
8 Mr. Bongiovi who made a derivative of the advertisement that he
9 was hired to record.

04:07 10 THE COURT: Let me stop you just for a second and ask
11 you: Is it the Bon Jovi song, the Turner Broadcasting promo,
12 or both that you allege infringe your original work? It's not
13 quite clear.

14 MR. STEELE: Well, they all do, your Honor.

15 THE COURT: In other words, it's not just the song,
16 and it's not just the promo, but the both of them infringe,
17 separately?

18 MR. STEELE: Well, I actually have copyrighted my
19 audiovisual work, a video I made. I intended to make one about
04:08 20 each town, called, "Man I Love this Team/Town." So it's
21 copyrighted.

22 THE COURT: You agree with the defense counsel that it
23 is what you have a copyright on now that --

24 MR. STEELE: Yes.

25 THE COURT: -- is at issue, not what is in your

1 derivative claim, right?

2 MR. STEELE: Yes. And if it would be easier to refile
3 the complaint -- and the defense attorneys clearly know that
4 something is copyrighted the moment you burn it down.

5 Therefore, "Man I Love This Town" was copyrighted on August 22,
6 2006. The only -- you just register at the Library of Congress
7 just so you can sue. And that's the only reason it's
8 copyrighted the moment you lay it down. I haven't been
9 focusing my argument because it hasn't been copyrighted yet,
04:08 10 but I might do that in the future if that's the only way for
11 this to go forward.

12 But to answer one of the questions you asked the
13 defense attorneys, has there ever been a case like this thrown
14 out, and the answer is no. Not only has there never been a
15 case with temp tracking evidence video, not just musical, at
16 the exact same moments, okay, never, ever been thrown out and
17 at the same time never reached trial because they're always
18 settled. And there's no way to argue with temp track.

19 And does an ordinary listener hear similarities?

04:09 20 Well, if you listen to the choruses back to back -- which I
21 allege they stole the heart of the song -- yes. But the
22 intended audience, No. 1, 70 out of the 74 countries around the
23 world where this advertisement plays promoting baseball,
24 English is not the first language.

25 And, secondly --

1 THE COURT: Mr. Steele, what are the original elements
2 of your song that are substantially similar to the Bon Jovi
3 song or the Turner Broadcasting promo? What are the original
4 elements?

5 MR. STEELE: If you look at the song closer, even the
6 things that the defense attorneys allege are not similar at
7 all, the branded message that the TBS had Bon Jovi sing, "No
8 matter where you're from, tonight you're from right here. This
9 is where it call goes down, down, down. Man, I really love
04:10 10 this team."

11 Even the things that aren't similar are similar
12 because temp tracking is how this happened. Why is product
13 placement and branding? And the result was, I believe,
14 copyright infringement. They took my song. The problem with
15 term tracking and why it's illegal, once you illegally sync
16 video images, it allows somebody sitting at a computer, with no
17 musical talent, to rewrite a song with a computer mouse.
18 That's why it's illegal, and it's violating my sync right. I
19 believe that, if this case can go forward, I believe that I can
04:10 20 prove it.

21 THE COURT: I'm not sure whether I got the answer that
22 I -- to the question that I asked, and that is, what
23 specifically are the original elements of your song that are
24 substantially similar to the Bon Jovi song?

25 MR. STEELE: Well, I think the choruses are, in feel,

1 rhythm, melody, style and genre, all these things which -- some
2 of which the courts don't consider copyrightable. For example,
3 Santrayll, the "Uh-Oh" song, the courts ruled that a normally
4 uncopyrightable word like "uh-oh" was copyrightable the way
5 that he recorded it.

6 The way that I sing my country baseball anthem,
7 okay -- and, furthermore, there are parts of my songs in all
8 different parts of the Bon Jovi song, but there are parts at
9 the exact same moment. When I'm singing about a street, Bon
04:11 10 Jovi is singing about a street. I'm saying "Yawkey Way." The
11 camera pans up to a street sign of Yawkey Way at the end of the
12 bridges. At the exact same spot, after I'm talking to the
13 crowd, "You, you, you, you, you, you, you, come on, let them
14 know, say here we go," Bon Jovi says, "You, you, you, come on
15 now, here we go again." This has nothing to do with the
16 chorus. I could keep going on.

17 THE COURT: What about the Turner Broadcasting promo?
18 What are the original elements of your song that are
19 substantially similar to that promo?

04:12 20 MR. STEELE: Other than they're the exact same length,
21 and the videos lining up, it seems like, if you sync my
22 original copyrighted song over it, it lines up perfectly such
23 that it shows a Yawkey Way street sign at the exact same moment
24 I'm singing Yawkey Way. It shows a tiger the second -- like I
25 said, the musical similarities that I've pointed out, that,

1 along with the temp track evidence, is enough for this to go
2 forward because in every case I've read what -- temp tracking,
3 they attempt to come close but attempt to avoid a copyright
4 infringement.

5 The reason why temp tracking cases never get thrown
6 out is because the intent trumps the copyright infringement.
7 If they came too close to my chorus, which is the heart of my
8 baseball song and the heart of their baseball commercial, then
9 I believe it's copyright infringement. And I should have the
04:12 10 chance to fight this huge conundrum of lawyers. I think I can
11 do it.

12 Like I said, I think that they have a problem. When
13 they fight the copyright claim, I think they increase the
14 deceptive business practice claim, the Lanham and 93A. In
15 denying that Major League Baseball and Turner have admitted in
16 the public that these are baseball lyrics and that Bon Jovi was
17 delivering their message, by denying the copyright claim,
18 that's deceptive business practice if this is a branded
19 commercial like I'm alleging.

04:13 20 THE COURT: Okay. Now, you've got a claim against --
21 what is it, 20 defendants?

22 MR. STEELE: Yes, sir.

23 THE COURT: Of those 20, you mention, I think, six or
24 so in your complaint and a different six in your amended
25 complaint. Why isn't the claim by the so-called, for lack of a

1 better term, the uninvolved defendants -- why isn't their
2 motion for -- to dismiss allowable without any discovery? You
3 don't even allege anything specifically against them other than
4 the fact that you name them as parties defendant.

5 MR. STEELE: Yes. And I believe that the defense
6 attorneys are taking an example of my -- taking advantage of my
7 pro se-ness. I thought that by amending my complaint I could
8 focus the arguments and stop talking about lawn ornaments and
9 candles and telephone books and pornographic magazines. I
04:14 10 wanted to talk about temp tracking and copyright infringement,
11 so I focused my argument.

12 I didn't know I was supposed to re-allege exactly how
13 every party was involved. So in opposition to their motion, I
14 added in exactly what each party did.

15 The defense attorneys allege that Vector couldn't be a
16 contributory infringer. Well, I wrote them a letter 13 months
17 ago saying, Guys, that's my song. That video, you're
18 supporting your whole -- "I Love This Town" contest is
19 supporting your whole tour. Stop it. Therefore, if he
04:14 20 willingly went forward with this "I Love This Town" contest and
21 didn't stop AEG Live from using it to promote the contest,
22 using the ad that got more airwaves than anything -- it was the
23 most expensive advertising campaign in history.

24 THE COURT: Okay. But the non-primary defendants have
25 moved to dismiss on the grounds that you cannot state a claim

1 of copyright infringement or violations of the Lanham Act or
2 Chapter 93A. The so-called non-implicated defendants joined
3 that motion but, also, separately moved to dismiss on the
4 grounds that you have not alleged any conduct on their part
5 that violates any of your rights. What conduct of those
6 so-called non-implicated defendants have you alleged violate
7 your rights?

8 MR. STEELE: Well, if your Honor would allow, or the
9 courts, I would be happy to amend the complaint and focus the
04:15 10 arguments. But some of the non-implicated defendants, like I
11 said, Vector --

12 THE COURT: Defendants have rights, too. They have a
13 right to plead against what they think is the allegation of the
14 plaintiff. Now, very often, a plaintiff moves to amend their
15 original complaint, and it's very often allowed. But, you
16 know, two times should be enough. You shouldn't have to amend
17 your complaint each time the defendants point out to you a
18 fault with your complaint.

19 This is why it would behoove you to get some legal
04:16 20 assistance to help you draft a complaint. This is something
21 that's obviously very important to you. It obviously means a
22 lot to you both financially and otherwise. And if you had an
23 attorney that knew what -- how you draft a complaint in a
24 federal court to resist motions to dismiss, it would very much
25 help you.

1 But I'm disinclined to allow you, every time the
2 defendants point out something that's wrong with your
3 complaint, to allow you to amend it again. You know, you run
4 out of patience pretty fast. It may be that you can convince
5 me to allow you to amend it one more time, but I'm not yet
6 convinced that you have stated anything against the
7 non-implicated defendants that indicates that they shouldn't be
8 dismissed from this case.

9 Now, that leaves you with the so-called primary
04:17 10 defendants, which are, as I understand it, Turner Broadcasting;
11 Major League Baseball Properties; Time Warner; John Bongiovi,
12 individually and doing business as Bon Jovi Publishing; Richard
13 Sambora, individually and doing business as Aggressive Music;
14 and William Falcone, individually and doing business. Those
15 are the primary defendants. I'm not asking about them.

16 But I'm asking you, with respect to the remaining 14
17 or so defendants, the so-called non-implicated defendants, why
18 they shouldn't be dismissed today.

19 MR. STEELE: Well, let's take one: Universal.
04:18 20 Universal and Def Jam spend a lot of time -- because they're
21 not making much money anymore, they spend a lot of time
22 branding their artists; i.e., they seek out corporate funding
23 in order to pay for the albums, the recordings and the videos.
24 And all the musician or actor has to do is include one of their
25 branded messages in their television show or their song. And

1 the Kluger Agency is most responsible for this out in
2 California. Their two largest clients are --

3 THE COURT: What rights of yours have they violated?

4 MR. STEELE: What rights have Universal and Def Jam?

5 THE COURT: Yes.

6 MR. STEELE: I won't be able to prove whether or not
7 they were involved in the development of this advertisement
8 that they had their artists do or whether TBS and MLB wrote
9 this ad themselves and gave it to Bon Jovi.

04:18 10 THE COURT: So you want to use discovery to determine
11 whether or not you have a claim against them?

12 MR. STEELE: I want to use discovery to confirm what I
13 already know: A), that this was my song; and B), what their
14 involvement was. Turner has admitted that for the development
15 of the musical campaign they worked with Def Jam and Vector,
16 Bon Jovi's management, and Mark Shimmel, the musical consultant
17 who I talked to last year on the phone.

18 They worked with, which means they developed it
19 together. Any intelligent person can see that. And I don't
04:19 20 know whether Def Jam and the respected publisher, Universal,
21 was involved in this development. I won't be able to find out
22 exactly how much involvement and if they wrote the lyrics
23 themselves, the branded commercial lyrics, or if TBS and
24 baseball wrote them themselves.

25 I'd love to be able to find out that Bon Jovi is

1 innocent and didn't even know. I won't be able to find that
2 out, if he was given the lyrics or if he did this himself. I
3 find it very hard to believe that he did this himself. Why?
4 Because he wouldn't need to.

5 THE COURT: I have a couple of other questions for
6 you, Mr. Steele. You made a Lanham Act claim in the original
7 complaint. You didn't make it in the amended complaint, but
8 you said you didn't mean to thereby waive it. You thought both
9 of them would be combined.

04:20 10 Bending over backward to be fair to a pro se, I will
11 say, okay, giving you the benefit of the doubt, you still have
12 a claim based upon your original claim under the Lanham Act.
13 But you assert that the defendants engaged in illegal palming
14 off because the Bon Jovi song and the Turner Broadcasting promo
15 did not give credit to you as the song's true creator.

16 But, nevertheless, it doesn't seem to me that that
17 claim states a cause of action under the Lanham Act because it
18 falls under the -- this Dastar Corporation case, the United
19 States Supreme Court in 2003, that suggests that such a claim
04:21 20 as you have made does not fly under the Lanham Act.

21 What can you tell me today that entitles you to a
22 so-called palming-off claim against the defendants under the
23 Lanham Act?

24 MR. STEELE: Your Honor, the large difference with the
25 Dastar case is that the original writer, President Eisenhower,

1 not only was paid for his work but signed over his sync and
2 television movie rights. I got nothing.

3 THE COURT: All right. Finally, with respect to
4 Chapter 93A -- you know that's a Massachusetts Consumer
5 Protection Act --

6 MR. STEELE: Yup.

7 THE COURT: -- statute. But the copyright laws of the
8 United States say that unless the claim under 93A is
9 qualitatively different than your copyright infringement claim,
04:22 10 you don't have a claim under the Consumer Protection Act. So
11 how is your claim pursuant to Chapter 93A qualitatively
12 different than your copyright infringement claim?

13 MR. STEELE: Because, in denying that these are
14 baseball lyrics and branded messaging, which the defendants
15 have already admitted doing, in fighting the copyright claim
16 and in denying that, they're denying that there's a secret
17 branded message in there. And that message is: Pay for cable.
18 Pay for something that used to be free. Watch baseball but you
19 have to pay for it. And only 40 percent of this country has
04:22 20 cable television.

21 So if there's a branded message in there, a part of
22 Massachusetts and Boston itself was stolen, turned into a
23 commercial, and then sent back as a secret commercial to watch
24 MLB on TBS and pay for it. I think that's harming the public.
25 I'm trying to stand up for my fellow Massachusetts people.

1 THE COURT: Thank you. Do you have anything else that
2 you want to impart to me in the last two minutes you have in
3 the opposition to the motions to dismiss?

4 MR. STEELE: Yes. I believe that, on the facts, I
5 have out-argued the defense attorneys, which is why they're
6 focusing on the law and why they're focusing on technical
7 procedural glitches, because I feel like I have out-argued
8 them. And I feel like, if you read both complaints and if you
9 look at the similarities and the musicology reports that I've
04:23 10 had done, and all of the similarities from all the different
11 parts of both baseball songs, I feel like -- that I have proven
12 substantial similarity.

13 If you listen to those choruses back to back, they're
14 in different keys. Why do they sound so similar? Because the
15 rhythm, the lyrics, the melody. What I allege to ASCAP, by the
16 way, if you've read the ASCAP letters, when I first went to
17 them, I said, Guys, this is based on my song. It matches the
18 video perfectly. Here's all their ad messages. I said, The
19 melody of the Bon Jovi choral hook is almost exactly the same.
04:24 20 It's one note away from my harmony, which is tucked underneath.
21 You can't hear it very well when you listen to the copyrighted
22 version. But my copyrighted audiovisual, which maybe I'll
23 bring to this case if I'm allowed to, you hear the harmony very
24 clear. It sounds almost exactly the same when you sing them,
25 exactly.

1 THE COURT: All right. If I give you 60 days for
2 discovery with respect to proving to me the substantial
3 similarity of these two songs, how will you use that 60 days?
4 What will you give to me that you haven't given me already?

5 MR. STEELE: I have a couple questions that I made for
6 each of the defendants. First of all --

7 THE COURT: I'm not asking about questions. I'm
8 asking about discovery that you're going to produce to the
9 Court to convince me that your song and the Bon Jovi song are
04:25 10 "substantially similar," to use the language of the copyright
11 laws.

12 MR. STEELE: I will be able to prove, your Honor, what
13 I'm alleging. And what I've alleged is that they were -- Bon
14 Jovi was contacted by either Shimmell, possibly Major League
15 Baseball or Turner, back in 2006. And I believe that I can
16 prove why "I Love This Town" was initially released as a single
17 before any other song and then suddenly pulled and held and
18 never released as a single. According to Wikipedia, it's --
19 because it was released and then pulled is because there were
04:25 20 allegations that Bon Jovi stole it from somebody. So that
21 ruled out that it would be released as a single. I would like
22 to be able to prove these things, whether they're true or not.

23 THE COURT: All right. Thank you, Mr. Steele. I'll
24 give the defendants a short rebuttal time with respect to their
25 motion to dismiss. Mr. Sloan.

1 MR. SLOAN: Thank you, your Honor. Just a couple of
2 points. First, on the Lanham Act and the Chapter 93A, we're
3 happy to rest on our papers unless your Honor has any questions
4 you'd like to address to us about the Lanham Act.

5 THE COURT: You heard me ask the plaintiff about that.
6 If his answers conjure up anything that you want to comment on,
7 you may do so.

8 MR. SLOAN: I would briefly state, your Honor, that we
9 do think that on the Lanham Act claim it is absolutely clear
04:26 10 that it is controlled by the Supreme Court decision in Dastar
11 and the First Circuit cases applying Dastar. The kind of claim
12 that Mr. Steele is raising, that the defendants allegedly used
13 his work without crediting him, is precisely the claim that the
14 Supreme Court says does not lie under the Lanham Act. It lies,
15 if at all, under the copyright statute.

16 Secondly, your Honor, on the Chapter 93A point, as
17 your Honor pointed out, under the copyright preemption
18 analysis, there has to be something qualitatively different.
19 There is not.

04:27 20 And, in addition to that, under Chapter 93A itself,
21 even if it were not preempted, there needs to be an element of
22 rascality, as the state courts and federal courts applying
23 state law have said, which would go far beyond a mere copyright
24 claim. So as to both, we submit that it is very clear that
25 they should be dismissed.

1 Turning to the copyright claim, your Honor, I would
2 like to make a couple of points on that because I do think, as
3 we were discussing at the outset, that it is very clear that
4 there is no cognizable claim of substantial similarity. I
5 think Mr. Steele's comments -- his efforts to point to a
6 substantial similarity actually underscore that point.

7 Let me just focus on the Turner promo as an example.
8 Okay. The Turner promo is a video which intersperses video of
9 the Bon Jovi band in concert and its fans with scenes of Major
04:28 10 League Baseball. Now, at the outset, the scenes of Bon Jovi
11 and his band obviously have nothing to do with Mr. Steele's
12 song. Okay.

13 Let's look at the shots of baseball. And he's
14 claiming there's copyright infringement. The overwhelming
15 majority, almost all of the shots, again, have nothing to do
16 with Mr. Steele's video. There are shots in the video of
17 players, just as some examples, from the Chicago Cubs, from the
18 Atlanta Braves, from the Los Angeles Dodgers, from the New York
19 Mets, from the Arizona Diamondbacks, from the Philadelphia
04:28 20 Phillies, from the Seattle Mariners, a shot of Wrigley Field.
21 None of that has anything at all to do with Mr. Steele's song,
22 your Honor.

23 Now, in addition to that, the scenes of Major League
24 Baseball in a video to promote the viewership of Major League
25 Baseball are common and ordinary and classic scene a faire.

1 Yes, there are scenes of players from many different teams,
2 running, hitting, fielding, pitching, catching. Mr. Steele has
3 no ownership interest in those images. And it would be
4 exceptionally incongruous for him to try to insert those in a
5 case in which Major League Baseball, among others, is the
6 defendant.

7 Also, your Honor, just from the face of the video --
8 and we submit that it is incumbent on your Honor to look at the
9 face of the video and see whether there's a cognizable claim --
04:29 10 it is quite clear that it tracks exactly not with Mr. Steele's
11 song but with the Bon Jovi song. For example, in the Bon Jovi
12 song, when he says, "Down, down, down," there's an image of
13 three different players sliding. When he says, "Pounding
14 underneath my feet," there's an image of a batter stomping his
15 foot in the batter's box. Again, it tracks exactly with the
16 Bon Jovi song on the face of it and not with Mr. Steele's song.

17 Now, Mr. Steele points to a couple of images in his
18 claim of substantial similarity: the shot of Yawkey Way and a
19 shot of the Detroit Tiger. First of all, at best and at most
04:30 20 for Mr. Steele, these are fleeting and incidental in the
21 context of the overall video.

22 But, again, in addition to that, they are common and
23 ordinary; they're scene a faire. The shot of Yawkey Way is an
24 iconic reference for Fenway Park as part of this promotional
25 video for Major League Baseball, about a lot of teams. I might

1 point out that the shot of Yawkey Way that he points to also
2 has a TBS logo for Turner Broadcasting at least as prominent as
3 Yawkey Way. Obviously, that has nothing to do with Mr.
4 Steele's song.

5 He talks about a shot of a Detroit Tiger, and he says
6 it's at the time in his song where he talks about the tiger.
7 The shot of the Detroit Tiger is one of many players that are
8 shown in the video. I talked about the different teams before:
9 the Cubs, the Mets, and so on. Again, at most and at best, it
04:31 10 is fleeting and incidental, giving him every benefit of the
11 doubt.

12 For that reason, your Honor, we respectfully submit
13 there is no colorable claim of substantial similarity on the
14 face of the materials, the protected work and the allegedly
15 infringing work. We could go through the same analysis for the
16 lyrics and the same analysis for the music. As a result, we
17 respectfully request that plaintiff's complaint be dismissed
18 and that it be dismissed with prejudice.

19 THE COURT: All right. Thank you, Mr. Sloan. The
04:31 20 Court is going to take the matter under advisement, and I will
21 make a ruling very shortly with respect to the motion to
22 dismiss.

23 I appreciate the effort that's been made to enlighten
24 me both by the plaintiff and by defense counsel, and I will
25 carefully consider again the pleadings that are on file and

1 resolve it as soon as possible. Yes.

2 MR. CLOHERTY: Your Honor -- and I apologize. To the
3 extent that the Court -- and there was some questioning about
4 the distinction between implicated and non-implicated
5 defendants which was part of Skadden's papers. I just wanted
6 to clarify to the extent there's any ambiguity, I think Kobalt
7 would fall within the non-implicated group. There's really not
8 much about us in there. I don't think there's a lot of
9 dispute. The papers are what they are. I wanted to clarify
10 that.

04:32

11 THE COURT: Thank you. I'll take the matter under
12 advisement.

13 (Whereupon, at 4:32 p.m. the hearing concluded.)

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C E R T I F I C A T E

I, Cheryl Dahlstrom, RMR, and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 32, constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Civil Action No. 08-11727-NMG, Samuel Bartley Steele vs. Turner Broadcasting System, Inc., et al.

/s/ Cheryl Dahlstrom

Cheryl Dahlstrom, RMR
Official Court Reporter

No. 09-2571

United States Court Of Appeals
For the First Circuit

SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING; STEELE
RECORDZ

Plaintiffs – Appellants

v.

TURNER BROADCASTING SYSTEM, INC.; TIME WARNER, INC.;
JON BONGIOVI, individually and d/b/a Bon Jovi Publishing; RICHARD
SAMBORA, individually and d/b/a Aggressive Music; WILLIAM FALCONE,
individually and d/b/a Pretty Blue Songs; FOX BROADCASTING CO.; MAJOR
LEAGUE BASEBALL PROPERTIES, INC.; MLB PRODUCTIONS, A&E;
A&E/AETV; BON JOVI; AEG LIVE, LLC; MARK SHIMMEL MUSIC; VECTOR
MANAGEMENT; AGGRESSIVE MUSIC, a/k/a Sony ATV Tunes; BON JOVI
PUBLISHING; UNIVERSAL MUSIC PUBLISHING GROUP; UNIVERSAL
POLYGRAM INTERNATIONAL PUBLISHING, INC., PRETTY BLUE SONGS;
SONY ATV TUNES; KOBALT MUSIC PUBLISHING AMERICA, INC.;
BOSTON RED SOX

Defendants – Appellees

THE AMERICAN SOCIETY OF COMPOSERS; FOX TELEVISION
STATIONS, INC.; ISLAND RECORDS, a/k/a Island Def Jam Records; BIGGER
PICTURE CINEMA CO.,

Defendants

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed.R.App.32(a)(7)(B) because this brief contains 13,761 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

/s/Christopher A.D. Hunt
Christopher A.D. Hunt (BBO# 634808)
THE HUNT LAW FIRM LLC
10 Heron Lane
Hopedale, MA 01747
(508) 966-7300
cadhunt@earthlink.net

CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on February 22, 2010.

Dated: February 22, 2010

/s/ Christopher A.D. Hunt
Christopher A.D. Hunt