

**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 COMPANY; 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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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Dated: March 29, 2010

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**CORPORATE DISCLOSURE STATEMENTS PURSUANT
TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1**

TURNER BROADCASTING SYSTEM, INC.

Turner Broadcasting System, Inc. is jointly owned by Historic TW Inc., American Television and Communications Corporation, Warner Communications Inc., United Cable Turner Investment, Inc. and Time Warner Companies, Inc. Turner Broadcasting System, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly traded company has a 10% or greater stock ownership in Time Warner Inc.

TIME WARNER INC.

Time Warner Inc. is a publicly traded Delaware corporation, and no shareholder owns 10% or more of Time Warner Inc.'s stock. Time Warner Inc. has no parent corporation.

FOX BROADCASTING COMPANY

Fox Broadcasting Company is a company organized under the laws of the state of Delaware and is a wholly owned direct subsidiary of Fox Networks Group, Inc., which is a wholly owned subsidiary of Fox Entertainment Group, Inc., which is a wholly owned subsidiary of News Corporation, a publicly traded company.

MAJOR LEAGUE BASEBALL PROPERTIES, INC.

Major League Baseball Properties, Inc. is wholly owned by Major League Baseball Enterprises, Inc., which is not a publicly traded company. No publicly traded corporation owns 10% or more of the stock of Major League Baseball Properties, Inc.

A&E TELEVISION NETWORKS

A&E Television Networks is a limited liability company organized under the laws of Delaware with interests held by six entities: (1) Hearst Communications, Inc., the ultimate parent of which is The Hearst Corporation, which is not publicly traded; (2) Hearst Holdings, Inc., the ultimate parent of which is The Hearst Corporation, which is not publicly traded; (3) Hearst LT, Inc., the ultimate parent of which is The Hearst Corporation, which is not publicly traded; (4) Disney/ABC International Television, Inc., whose ultimate parent company is The Walt Disney Company, which is publicly traded; (5) Cable LT Holdings, Inc., whose ultimate parent company is The Walt Disney Company, which is publicly traded; and (6) NBC-A&E Holding, Inc., whose ultimate parent companies are General Electric Company and Vivendi S.A., each of which is publicly traded.

AEG LIVE LLC

AEG Live LLC is a limited liability company organized under the laws of Delaware and is owned by the Anschutz Entertainment Group, Inc. No publicly traded company owns 10% or more of AEG Live LLC's stock.

VECTOR 2 LLC

Vector 2 LLC is a limited liability company organized under the laws of the State of Delaware and is a wholly owned subsidiary of Vector Management LLC, which is 50% owned by Front Line Management Group Inc., which is 75% owned by Ticketmaster Entertainment Inc.

SONY/ATV TUNES LLC

Sony/ATV Tunes LLC is a limited liability company organized under the laws of the state of Delaware and is owned by Sony/ATV Music Publishing LLC and Sony/MJ Music Publishing LLC. The only public company that owns 10% or more of the shares of Sony ATV/Tunes LLC is Sony Corporation, which is organized under the laws of Japan.

UNIVERSAL MUSIC PUBLISHING, INC.

Universal Music Publishing, Inc. is a corporation organized under the laws of California and its ultimate corporate parent is Vivendi S.A., a foreign corporation that is publicly traded in France.

UNIVERSAL-POLYGRAM INTERNATIONAL PUBLISHING, INC.

Universal-Polygram International Publishing, Inc. is a corporation organized under the laws of Delaware and its ultimate corporate parent is Vivendi S.A., a foreign corporation that is publicly traded in France.

KOBALT MUSIC PUBLISHING AMERICA, INC.

Kobalt Music Publishing America, Inc. is a privately-held corporation organized under the laws of Delaware. Its parent company Kobalt Music Group Ltd. is a privately-held corporation organized under the laws of the United Kingdom.

BOSTON RED SOX BASEBALL CLUB LIMITED PARTNERSHIP

Boston Red Sox Baseball Club Limited Partnership is a Massachusetts limited partnership. One percent of ownership interest in the Boston Red Sox Baseball Club Limited Partnership is held by New England Sports Ventures LLC (“NESV”) and 99% of ownership interest in the Boston Red Sox Baseball Club Limited Partnership is held by New England Sports Ventures IV LLC (“NESV IV”). NESV IV is wholly owned by NESV, which is wholly owned by New England Sports Ventures I LLC (“NESV I”). The New York Times Company holds more than 10% ownership interest in NESV I.

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REASONS WHY ORAL ARGUMENT NEED NOT BE HEARD

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and First Circuit Local Rule 34.0(a), appellees respectfully submit that no oral argument is necessary because the District Court applied settled principles in granting summary judgment and ordering discovery, and because the facts and legal arguments are adequately presented in the briefs and record. Accordingly, appellees believe that the decisional process would not be significantly aided by oral argument.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court properly granted summary judgment in favor of defendants-appellees on plaintiffs-appellants' copyright infringement claim where it correctly concluded that there is no genuine issue of material fact regarding the lack of substantial similarity between the copyrighted work and an allegedly infringing work?

2. Whether the District Court properly exercised its discretion in limiting discovery prior to summary judgment briefing on plaintiffs-appellants' copyright infringement claim to the dispositive issue of substantial similarity?

INTRODUCTION

Appellant Samuel Bartley Steele and his wholly-owned, unincorporated businesses (collectively “Steele”) filed a pro se suit against approximately twenty defendants seeking \$400 billion in alleged damages. His initial complaint claimed that his 2004 song about the Boston Red Sox had been misappropriated in a hit song by the band Bon Jovi and in a promotional video for the 2007 Major League Baseball postseason. The defendants Steele brought into court included members of the Bon Jovi band and their affiliated music publishing businesses; national television and media companies such as Turner Broadcasting System, Inc., Fox Broadcasting Company, and A&E Television Networks; Major League Baseball Properties, Inc.; music publishing companies, including Universal Music Publishing, Inc. and Sony/ATV Tunes LLC; and a range of other sports and entertainment entities.

Throughout the District Court proceedings, Steele’s claims, and the defendants against whom he asserted them, changed and evolved. He added and dropped theories; he added and dropped defendants. Bending over backwards to be solicitous of a pro se plaintiff, the District Court initially granted defendants’ motion to dismiss only with regard to a limited number of claims and defendants. The District Court left Steele’s copyright claim in place and gave Steele an opportunity to conduct discovery on the threshold copyright issue of substantial

similarity between his song and the allegedly infringing works (the Bon Jovi song and the promotional video). When the resulting discovery failed to raise a genuine issue of material fact, the District Court applied settled Supreme Court and First Circuit precedent and granted summary judgment on all claims in favor of all defendants.

In this Court, Steele, now represented by counsel, again has significantly shifted his focus. He has abandoned a core claim from the District Court (that the Bon Jovi song infringed his copyrighted song). Steele now claims infringement solely by the promotional video, and appears to be proceeding against only two appellees: Turner Broadcasting System, Inc. and Major League Baseball Properties, Inc. (Most appellees had nothing to do with the promotional video; they were involved, if at all, only in the Bon Jovi song or its distribution.) Unfortunately, however, Steele has not dismissed the other appellees from this appeal; nor has he even clarified the point for this Court with appropriate precision.

Regardless of the latest shift in focus, Steele's remaining claim is unmeritorious. The District Court's summary judgment decision, and its management of discovery, are correct and rest on well-established authority. Accordingly, appellees respectfully submit that the District Court's judgment should be affirmed in its entirety and that, pursuant to Federal Rule of Appellate Procedure 34(a), no oral argument is necessary.

**STATEMENT OF FACTS
AND PROCEEDINGS BELOW**

Because Steele has raised different claims and different theories at different times, because he has proceeded against a wide and shifting range of defendants, and because he mischaracterizes the District Court's careful adjudication of his claims, appellees will set forth the District Court proceedings in detail.

**A. Steele Files A Complaint
Against Approximately 20 Named Defendants
And Seeks Purported Damages In Excess Of \$400 Billion**

On October 8, 2008, Appellants Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz filed a pro se Complaint. (A24-36.) Steele named approximately twenty defendants, and sought purported damages in excess of \$400 billion relating to the alleged misuse and infringement of his song about the Red Sox. (Id.) Steele's Complaint alleged claims for copyright infringement and under the Lanham Act. (Id.)

The individuals and entities named as defendants included:

- Turner Broadcasting System, Inc. ("TBS");
- Time Warner Inc. (misidentified in the Complaint as "Time Warner Corporation");
- Bon Jovi (which is a federal trademark, not a legal entity);
- John Bongiovi (misidentified in the Complaint as "Jon Bongiovi");
- Richard Sambora;

- William Falcone;
- Fox Broadcasting Company (misidentified in the Complaint as “Fox Television Networks”);
- Major League Baseball Properties, Inc. (misidentified in the Complaint as “Major League Baseball/MLB Productions”) (“MLB”);
- A&E Television Networks (misidentified in the Complaint as “A&E/AETV”);
- AEG Live LLC (misidentified in the Complaint as “AEG Live”);
- Vector 2 LLC (misidentified in the Complaint as “Vector Management”);
- Aggressive Music (a d/b/a of defendant Richard Sambora);
- Bon Jovi Publishing (a d/b/a of defendant John Bongiovi);
- Pretty Blue Songs (a d/b/a of defendant William Falcone);
- The Bigger Picture Cinema Co.;
- Mark Shimmel Music; and
- The American Society of Composers, Authors and Publishers (“ASCAP”).¹

B. The Complaint Alleged That Defendants Infringed The Steele Song

Steele characterizes himself as a singer, songwriter, music publisher and music producer who wrote a country-rock “love song” in September 2004 “for his beloved Red Sox” titled “(Man I Really) Love this Team,” also known as “Man

¹ Steele later dismissed ASCAP. (A13.)

I Love this Team” (the “Steele Song”). (A24.) Steele later obtained a registered copyright for the Steele Song. (A26, A492-505.)

Steele alleged that the Steele Song anticipated the Red Sox’s success in its postseason march to the World Series championship in 2004, and provided fans with a “sing along” to urge the Red Sox on to victory. (A24.) The Steele Song includes lyrics with references well-known to Red Sox fans (and no doubt to baseball fans nationwide), such as “Yawkey Way,” “Rem-Dawg,” and “Lansdowne Street.” (A501.)

Steele alleged that, after the Steele Song was completed, he and his bands performed the song outside Fenway Park and handed out thousands of free copies of the song (CDs and sheet music), among other efforts to distribute and popularize it. (A24-25.)

Several years later, in or about June 2007, the popular music band Bon Jovi released its album “Lost Highway,” which included the hit song “I Love This Town” (the “Bon Jovi Song”). (A27.) John Bongiovi (d/b/a Bon Jovi Publishing), Richard Sambora (d/b/a Aggressive Music), and songwriter William Falcone (d/b/a Pretty Blue Songs) are collectively referred to herein as the “Bon Jovi Appellees.”

Shortly thereafter, TBS televised the 2007 MLB postseason series for the first time on cable television. (A26-27.) To promote the 2007 postseason (and

to promote TBS's role as the "new home of the postseason"), TBS allegedly created an audiovisual commercial that ran during the 2007 postseason. (A27.) This audiovisual piece (the "TBS Promo") combined (i) a shortened version of the Bon Jovi Song, (ii) video footage of the Bon Jovi band performing the Bon Jovi Song in concert, and (iii) baseball visuals, e.g., major league ballplayers in action (hitting, running bases, sliding), cheering fans, and scenes of well-known baseball stadiums. (TBS Promo at A511.) The TBS Promo does not include the Steele Song or any portion of the Steele Song; the audio for the TBS Promo is a shortened version of the Bon Jovi Song. (Id.) A copy of the TBS Promo is included on a DVD at page A511 of the Appendix.

In his Complaint, Steele alleged that both the TBS Promo and the Bon Jovi Song infringed the Steele Song. (A31.) Steele asserted that at least some defendants used the Steele Song to assemble baseball-related visual images for use in the TBS Promo, i.e., that the Steele Song was used as a "temp track." (Id.)² Steele seemed to allege, among other things, that the popular music group Bon Jovi then was retained to create a new song to match the visuals, and that the Bon Jovi

² Steele submitted as Exhibit I to his Complaint an audiovisual exhibit he prepared that overlays his Steele Song with the visuals of the TBS Promo. The defendants also submitted this audiovisual as an exhibit in support of their motion for summary judgment, a copy of which is included on a DVD at page A515 of the Appendix.

group subsequently created a longer version of that new song and released it on its “Lost Highway” album as the Bon Jovi Song. (Id.)

Steele alleged infringements both by the TBS Promo and the Bon Jovi Song. He maintained that the TBS Promo infringed his copyright and that “Bart’s baseball anthem was changed into an ad for MLB/TBS.” (A31.) Steele claimed that the Bon Jovi Song similarly infringed his copyright, and that “the record-buying public is unknowingly purchasing an ad for MLB/TBS with every ‘Lost Highway’ album.” (A31-32.) Steele stated in his Complaint that he initially had hoped to meet Bon Jovi and be invited to join the band “on tour when this all worked out” -- he observed that he had been learning to play Bon Jovi’s new songs in anticipation of the invitation -- but he had been rebuffed. (A29-30.)

Steele further alleged a Lanham Act violation based on his claim that defendants had “palm[ed] off Bart’s work as the work of another -- Bon Jovi -- in violation of the Lanham Act.” (A31.)

C. Several Defendants Move To Dismiss The Complaint

On December 8, 2008, several defendants filed their first dispositive motion and moved to dismiss the Complaint in its entirety. (A37-63 (“First Motion To Dismiss”).)³ Defendants argued that the Complaint failed to state a

³ Those defendants were: Time Warner Inc., John Bongiovi, Richard Sambora, William Falcone, MLB, A&E Television Networks, AEG Live LLC,

claim for copyright infringement because the mandatory side-by-side comparison of the works at issue (the Steele Song and the allegedly infringing works of (i) the Bon Jovi Song and (ii) the TBS Promo) demonstrated that no cognizable claim could be raised as to the essential copyright element of substantial similarity. (A49-58.) Defendants also argued that the Complaint failed to state a claim for “palming-off” under the Lanham Act because the claim was based on the allegation that Steele purportedly did not receive authorship or credit for a particular work (the province of the Copyright Act), not that there was confusion with respect to the origin, sponsorship, or approval of goods or services (the province of the Lanham Act). (A58-60.)

Three additional defendants later moved to dismiss the Complaint and adopted the arguments set forth in the First Motion To Dismiss.⁴

D. Steele Files An Amended Complaint That Adds And Drops Claims And Defendants

After receiving two extensions of time to respond to the First Motion To Dismiss, on January 30, 2009, Steele filed (i) an “Amended Complaint” (A141-49) and (ii) a document titled “Plaintiffs’ Amended Complaint And Opposition To

Vector 2 LLC, Aggressive Music, Bon Jovi Publishing, and Pretty Blue Songs. (A37-39.) Other defendants had not yet been served.

⁴ Those defendants were: Fox Broadcasting Company, Sony/ATV Tunes LLC and Turner Broadcasting System, Inc. (A134-40.)

Motion To Dismiss” (A150-63). Steele’s Amended Complaint reasserted the copyright infringement claim contained in the Complaint; it also omitted the Lanham Act claim, but now added a claim under Massachusetts General Laws Chapter 93A. (A147-48.)⁵ The Amended Complaint likewise added additional parties, including the Boston Red Sox Baseball Club Limited Partnership (“Red Sox”) and Kobalt Music Publishing America, Inc. (A142-43.)

E. Several Defendants Move To Dismiss The Amended Complaint

On February 18, 2009, several defendants filed their second dispositive motion and moved to dismiss the Amended Complaint in its entirety. (A164-91 (“Second Motion To Dismiss”).) Defendants argued that the Amended Complaint (like Steele’s first Complaint) failed to state a claim for copyright infringement because the mandatory side-by-side comparison of the works at issue (the Steele Song and (i) the Bon Jovi Song and (ii) the TBS Promo) demonstrated that no colorable claim had be raised as to substantial similarity. (A176-86.) Defendants also argued that the complaint failed to state a claim under Massachusetts General Laws Chapter 93A. (A186-90.)

⁵ In their First Motion To Dismiss, defendants explained that Steele’s claim of \$400 billion in damages conflicted with the copyright statute (A61-62); Steele’s Amended Complaint did not include a specified amount of damages.

Additionally, on February 18, 2009, six other defendants filed a motion to dismiss that joined in the Second Motion To Dismiss. They asserted, as an independent basis for dismissal, that none of those entities even was mentioned in a substantive allegation in the Amended Complaint. (A289-94.)⁶ Several additional defendants subsequently moved to dismiss the Amended Complaint and adopted the arguments set forth in the Second Motion To Dismiss.⁷

On March 4, 2009, Steele filed an opposition to all defendants' motions to dismiss the Amended Complaint. (A297-355.)

On March 16, 2009, several defendants filed motions for leave to file reply memoranda of law in further support of their motions to dismiss the Amended Complaint, which the District Court subsequently granted. (A17-19.) Those defendants then filed their reply memoranda of law. (A438-48.)

F. The District Court Hears Oral Argument On Defendants' Motions To Dismiss And Advises Steele To Obtain Counsel

On March 31, 2009, the District Court heard oral argument on the motions to dismiss the Amended Complaint. (Transcript at A388-420.) Because

⁶ Those defendants were: Fox Broadcasting Company, Sony/ATV Tunes LLC, A&E Television Networks, AEG Live LLC, Vector 2 LLC and The Bigger Picture. Steele later voluntarily dismissed The Bigger Picture. (A18.)

⁷ Those defendants were: Mark Shimmel, Kobalt Music Publishing America, Inc., Universal Music Publishing, Inc., Universal-Polygram International Publishing, Inc. and the Red Sox. (A295-96, A356-57, A361-62, A364-65.)

the hearing was docketed as a Rule 16 Scheduling Conference, the parties also conferred before the hearing and filed a proposed scheduling order and plan for discovery as required by the Federal Rules of Civil Procedure. (A16, A366-74, A393.) Contrary to the implication in Steele's brief (see Steele Br. at 19, 74-75), all parties knew, or should have known, that the proposed scheduling order and discovery plan were subject to the District Court's approval (D. Mass. L.R. 16.1(d) (stating that the parties' joint submission "shall be considered by the judge as advisory only" (emphasis added))) and to the pending motions to dismiss.

At the outset of that hearing, the District Court urged Steele to obtain legal counsel:

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

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

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

THE COURT: Okay.

MR. STEELE: -- for obvious reasons. The number of defendants, everybody seemed to have a conflict of interest or worked with one of the parties at some point or a defendant it represented. I know my procedural legal knowledge is not up

to par with the defense attorneys, but I believe that I know copyright law well enough to represent myself in this case.

THE COURT: As I say, you're entitled to do that, Mr. Steele, and I'm not questioning that. I'm just trying to put it in your head once again that it may be -- it may be in your best interests to try to obtain counsel -- or to continue to try to obtain counsel because, as this case goes along, you're going to be required to abide by rules of procedure that are sometimes arcane and hard to understand, but, nevertheless, you will be required to abide by them. That's just why I'm suggesting that to you now.

(A392-93.)⁸

At the hearing, it became clear that Steele sought to pursue his Lanham Act claim even though he had not included that claim in his Amended Complaint (and the original Complaint was superseded as a matter of law upon the filing of the Amended Complaint.) In light of Steele's pro se status, the District Court stated that it would "bend[] over backward to be fair to a pro se" plaintiff and would consider all of Steele's pleadings (and thus consider the Lanham Act claim). (A411.)

Accordingly, the District Court heard oral argument on Steele's three claims -- his copyright infringement claim, his Lanham Act claim, and his Chapter 93A claim. With respect to the copyright infringement claim, the District Court

⁸ Steele subsequently reiterated his intent to proceed pro se: "I should have the chance to fight this huge conundrum of lawyers. I think I can do it. . . . I think that they have a problem." (A406.) Later in the hearing, the District Court again urged Steele obtain legal counsel. (A408.)

indicated that, based on the motion to dismiss papers providing a facial comparison of the Steele Song with the Bon Jovi Song and the TBS Promo and their dissimilarities, “the plaintiff has a large mountain to climb in proving the claim [that] . . . substantially similar works . . . are involved here.” (A393-94.) The District Court then provided Steele with multiple opportunities to articulate in detail all of the bases upon which he believed his Steele Song is substantially similar to the Bon Jovi Song and to the TBS Promo. (A401-14.) The District Court explained that it was “disinclined to dismiss the complaint at this stage of the proceeding and would “permit the plaintiff to have a limited amount of discovery” on the issue of substantial similarity, after which motions for summary judgment could be filed. (A393-94, A400.) Steele did not object to this proposal.

G. The District Court Dismisses Steele’s Lanham Act And Chapter 93A Claims, But Denies The Motion To Dismiss The Copyright Infringement Claim To Permit Steele To Conduct Discovery On The Issue Of Substantial Similarity

On April 3, 2009, the District Court entered a Memorandum and Order ruling on defendants’ motions to dismiss. (A375-87 (“April 3, 2009 Order”).) First, the District Court dismissed Steele’s Lanham Act and Chapter 93A claims, the legal bases for which are not relevant to the instant proceeding because Steele is not appealing the District Court’s dismissal of those claims.

Second, the District Court dismissed four defendants (Sony ATV/Tunes LLC, Vector 2 LLC, Fox Broadcasting Company, and Universal

Music Publishing, Inc.) because Steele's multiple pleadings, even when read together and in the light most favorable to Steele, did not contain any substantive allegations of wrongdoing against those defendants. (A382-83.)⁹ Steele is not appealing the District Court's dismissal of these defendants.

Third, the District Court denied defendants' motion to dismiss the copyright claim. (A384-86.) Recognizing the "intuitive appeal" of defendants' argument that the District Court could conduct a side-by-side comparison of the works at issue to evaluate whether Steele raised a colorable claim of substantial similarity, the District Court nevertheless stated that Steele "is entitled to gather and present evidence of substantial similarity beyond what is included in the pleadings" and concluded that "the most prudent course of action is to permit, at this stage, limited discovery on the issue of substantial similarity." (A385-86.) Consequently, the District Court ordered discovery to proceed on that issue alone, and set a briefing schedule for the filing of summary judgment motions following

⁹ The District Court, giving Steele the benefit of every doubt, did not dismiss defendants Mark Shimmel, A&E Television Networks, AEG Live LLC, and Universal-Polygram International Publishing, Inc. because it concluded Steele's multiple pleadings contained some "marginally implicative" allegations against those defendants. (A383.)

the completion of that discovery (as the District Court had indicated it planned to do at the March 31, 2009 hearing). (A386-87.)¹⁰

H. Steele Fails To Serve Any Discovery Requests On Defendants

Although Steele was authorized to conduct discovery on the issue of substantial similarity, Steele failed to avail himself of that opportunity. For example, Steele never served document requests and never noticed any depositions. Steele also failed to meaningfully and timely participate in the discovery process, belatedly providing cursory responses to written discovery propounded by several defendants. (A476, A752.)

I. Defendants Move For Summary Judgment On The Copyright Infringement Claim

On June 10, 2009, several defendants filed a motion for summary judgment on Steele's copyright infringement claim. (A449-577.) Specifically, these defendants argued that Steele failed to raise a viable claim for copyright infringement because the mandatory side-by-side comparison of the works at issue (the Steele Song and (i) the Bon Jovi Song and (ii) the TBS Promo) demonstrates

¹⁰ The District Court also held that "the only work at issue for which Steele has registered a copyright" is the Steele Song and that, to the extent that Steele sought to raise claims for other works (such as Steele's alleged derivative works), he could not do so because copyright registration is a mandatory prerequisite for a copyright infringement suit. (April 3, 2009 Order at A384; see Transcript at A402-03.) Steele has not appealed the District Court's dismissal of any claims predicated upon works other than the Steele Song.

that no factual issue had been established as to the essential copyright element of substantial similarity. (A461-73.) Defendants' summary judgment submission included, among other things, a report from defendants' expert witness concluding there was no substantial similarity between the Steele Song and either the Bon Jovi Song or the TBS Promo. (A549-73.)¹¹

On July 17, 2009, Steele filed his opposition to defendants' motions for summary judgment. (A590-726.) Steele submitted more than 25 exhibits and statements of so-called "ordinary observers," many of which had not been produced in response to defendants' timely discovery requests. (A636-99.) These "ordinary observers" included Steele's girlfriend, college dorm-mate, former roommate, co-worker, and music agent, among others. (Id.) Steele also provided an unsigned statement by a musical expert who highlighted differences in music and lyrics between the Steele Song and the Bon Jovi Song, and concluded that Steele's case was "not strong musicologically." (A439-40.)

On July 29, 2009, several defendants filed a motion for leave to file a reply memorandum of law in further support of their motion for summary judgment, which the District Court granted. (A21, A727-48.) Those defendants

¹¹ Defendant Kobalt Music Publishing America, Inc. subsequently filed a motion for summary judgment joining in this motion. (A581-89.)

filed their reply memorandum of law, which attached a supplemental rebuttal report from defendants' expert witness. (A749-65.)

J. The District Court Grants Defendants' Motion For Summary Judgment On The Copyright Infringement Claim

On August 19, 2009, the District Court granted defendants' motion for summary judgment on Steele's remaining copyright infringement claim. (A766-81 ("August 19, 2009 Order").) The District Court stated the framework for analyzing a copyright infringement claim as articulated by this Court in Johnson v. Gordon, 409 F.3d 12 (1st Cir. 2005) and reasoned that under controlling First Circuit precedent "substantial similarity (or lack thereof) can be decided by the Court as a matter of law." (A771-73.) Applying that legal standard to the facts in the summary judgment record, the District Court concluded that "no reasonable jury could find substantial similarity" between the Steele Song and either the Bon Jovi Song or the TBS Promo. (A779.) The District Court entered judgment in favor of all defendants and against Steele. (A782.)

On August 28, 2009, Steele filed a motion for reconsideration, which several defendants opposed. (A783-98.) On September 15, 2009, Steele filed an affidavit in further support of his motion for reconsideration. (A815-18.) On October 13, 2009, the District Court denied Steele's motion for reconsideration. (A819-21.)

On November 6, 2009, Steele, now represented by counsel, filed a notice of appeal. (A823.) This appeal followed.¹²

¹² In his brief, Steele impermissibly interjects a litany of factual allegations and citations to various websites and other documents that are not included in the record on appeal. (See, e.g., Steele Br. at 16, 17 n.1, 18, 21 n.7, 24, 39, 79 & 80.) Those materials are not properly before this Court and should not be considered. Fifteen Thousand Eight Hundred & Forty-Four Welfare Recipients v. King, 610 F.2d 32, 35 n.1 (1st Cir. 1979) (holding that this Court would “not consider a substantial portion of the evidence upon which appellants base their claims since this evidence is not in the record and appellants’ reliance upon it is therefore improper”). In addition, Steele misstates and mischaracterizes several facts. Although appellees have not attempted to exhaustively address every inaccuracy, appellees do not concede the accuracy of Steele’s factual statements.

SUMMARY OF ARGUMENT

At the outset, it is important to identify the precise (and limited) scope of Steele's appeal. The sole claim before this Court is significantly narrower than the multiple claims and allegedly infringing works at issue in the District Court. Steele's brief makes no argument concerning the District Court's dismissal of the Lanham Act and Chapter 93A claims, and therefore those claims are not before this Court. Steele also expressly states that he is not appealing the District Court's ruling that there is no substantial similarity between the musicological elements of the works at issue. Thus, the only issue before this Court is Steele's contention that the Steele Song is infringed by the TBS Promo.

The appellees properly before this Court also are (or at least should be) significantly fewer than those haled into the District Court and included by Steele in his prosecution of this appeal. Although Steele has not dismissed most of the appellees from this case, Steele's brief does not advance any arguments concerning the District Court's April 3, 2009 Order dismissing Fox Broadcasting Company, Sony ATV/Tunes LLC, Vector 2 LLC, and Universal Music Publishing, Inc. Steele's brief likewise does not advance any arguments concerning (and does not even mention, other than in the caption) appellees Time Warner Inc., Mark Shimmel, A&E Television Networks, AEG Live LLC, Universal-Polygram International Publishing, Inc. and Kobalt Music Publishing America, Inc. Steele's

brief also leaves appellees (and the Court) guessing as to the role of the Red Sox in this appeal, as Steele's brief does not cogently advance any theory of liability concerning that entity. In a one-sentence attempted "reservation of rights," moreover, Steele asserts that he potentially may have a claim for contributory infringement against the Bon Jovi Appellees, even though he asserted no such claim in the District Court and has altogether failed to explain in his brief the legal bases for such a claim. Accordingly, the only two appellees that Steele asserts substantive arguments against in this Court are TBS and MLB.

At its core, Steele's appeal turns on the resolution of a single question: Is the Steele Song infringed by the TBS Promo? Notwithstanding Steele's refashioned theories and newfound arguments unveiled for the first time in this Court, appellees respectfully submit that the District Court correctly applied settled Supreme Court and First Circuit precedent and concluded that there is no genuine issue of material fact concerning substantial similarity between the Steele Song and the TBS Promo.

Specifically, the audio in the TBS Promo features a shortened version of the Bon Jovi Song, which Steele now concedes is not substantially similar to the Steele Song; the images in the TBS Promo match the lyrics in the Bon Jovi Song, rather than the Steele Song; the images in the TBS Promo include scenes featuring many MLB teams, players, and ballparks (not just the Red Sox); the images in the

TBS Promo include many scenes of the Bon Jovi band in concert, which have nothing to do with the Steele Song; and many of Steele's claimed similarities between the Steele Song and the TBS Promo are unprotectible scènes à faire and otherwise involve trite and commonplace depictions. The District Court also properly concluded that Steele failed to raise a genuine issue of material fact regarding his "synchronization" rights.

Finally, the District Court appropriately exercised its discretion and permitted discovery only on the dispositive issue of substantial similarity. This reasonable discovery plan provided Steele an ample opportunity to obtain factual information potentially relevant to the issue of substantial similarity while simultaneously safeguarding defendants against burdensome and irrelevant discovery. Steele, moreover, never raised objections to the District Court's discovery order and therefore this issue is not preserved for appeal.

ARGUMENT

I. THE LIMITED SCOPE OF STEELE'S APPEAL

It is important to be clear about what claims and which appellees remain in Steele's appeal. As Steele has framed it, this appeal concerns solely whether the District Court properly granted defendants' summary judgment motion with respect to whether the Steele Song was infringed by the TBS Promo -- and only then with respect to appellees TBS and MLB.

**A. Claims: This Appeal Involves Only Steele’s
Copyright Infringement Claim Concerning The TBS Promo**

**1. Steele Is Not Appealing The District Court’s
Dismissal Of The Lanham Act And Chapter 93A Claims**

In his brief, Steele states that this appeal is “a copyright infringement case.” (Steele Br. at 14, 35-36.) Steele’s brief does not address the dismissed Lanham Act or Chapter 93A claims. As this Court has held, all arguments that have not been briefed and developed on appeal are abandoned. See, e.g., United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). Accordingly, the District Court’s dismissal of the Lanham Act and Chapter 93A claims is not at issue on this appeal.

**2. Steele Is Not Appealing The District
Court’s Ruling That There Is No Substantial
Similarity Between The Steele Song And The Bon Jovi Song**

In his brief, Steele expressly concedes that he is “not challenging the district court’s strictly musicological conclusions on appeal.” (Steele Br. at 29.)¹³ Indeed, Steele asserts that the District Court had before it “two discrete claims: (1) infringement of the Steele Song by the [TBS Promo] and (2) infringement of the Steele Song by the Bon Jovi Song.” (Id. at 35.) Characterizing his appeal as a “narrowing of the issues,” Steele states that he “appeals the district court’s ruling

¹³ This concession is not surprising in light of the musicological evidence in the summary judgment record confirming that there is no substantial similarity between the Steele Song and the Bon Jovi Song, and the conclusion of Steele’s own expert that Steele’s case was “not strong musicologically.” (A640.)

as to Steele's claim of infringement of his [Steele Song] by the [TBS Promo]." (Id. at 35-36.) Consequently, Steele is not appealing the District Court's holding that there is no substantial similarity between the Steele Song and the Bon Jovi Song (and necessarily he is not appealing the District Court's holding that there is no substantial similarity between the Steele Song and the musicological elements of the TBS Promo). Thus, as the case comes to this Court, the only allegedly infringing work is the TBS Promo.¹⁴

¹⁴ Besides the TBS Promo (and the now-abandoned Bon Jovi Song), no other work is before the Court as an allegedly infringing work. To the extent that Steele's brief may at times suggest that copyright infringement arose solely from the purported creation of an unidentified unauthorized "copy" of his song used in the creation of the TBS Promo, such a speculative, phantom "working copy" of the Steele Song is not properly before this Court as an independent allegedly infringing work. As Steele acknowledges, the only allegedly infringing works presented to the District Court were the TBS Promo and the Bon Jovi Song. (Steele Br. at 35.) Any potential attempt by Steele to revise his allegations (yet again) and advance new theories in this Court about the infringing work at issue is unavailing. See, e.g., McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991) (rejecting plaintiff's "belated effort to give substance to its [] undeveloped theory" and holding that "[i]f claims are merely insinuated rather than actually articulated in the trial court, we will ordinarily refuse to deem them preserved for appellate review"); S.E.C. v. Tambone, --- F.3d ---, No. 07-1384, 2010 WL 796996, at *12 (1st Cir. 2010) (en banc) ("A party cannot switch horses mid-stream, changing its theory of liability at a later stage of the litigation in hopes of securing a swifter steed.").

**B. Appellees: This Appeal
Involves Only Appellees TBS And MLB**

**1. Steele Is Not Appealing The
District Court's Dismissal Of Appellees
Fox Broadcasting Company, Sony ATV/Tunes LLC,
Vector 2 LLC And Universal Music Publishing, Inc.**

In his brief, Steele acknowledges that the District Court's April 3, 2009 Order dismissed all of his claims "against several defendants entirely." (Steele Br. at 14.) The District Court's April 3, 2009 Order dismissed "appellees" Fox Broadcasting Company, Sony ATV/Tunes LLC, Vector 2 LLC, and Universal Music Publishing, Inc. because it concluded that Steele's multiple pleadings, even when read together and in the light most favorable to Steele, did not contain any substantive allegations of wrongdoing against those defendants. (A382-83.) Steele has not briefed or developed any argument on appeal concerning the dismissal of those four defendants, and therefore has abandoned any argument with respect to those entities. Tambone, 2010 WL 796996, at *12; McCoy, 950 F.2d at 22; Zannino, 895 F.2d at 17. Accordingly, those appellees should be dismissed from this proceeding. See generally First Cir. R. 27.0(c).

**2. Steele Does Not Mention Several
Appellees In His Brief And Therefore Those
Entities Should Be Dismissed From This Appeal**

Steele makes no argument in his brief concerning "appellees" Time Warner Inc., Mark Shimmel, A&E Television Networks, AEG Live LLC,

Universal-Polygram International Publishing, Inc. and Kobalt Music Publishing America, Inc. Indeed, although Steele has not dismissed any of those defendants-appellees from the appeal, he never even mentions them in his brief (other than in the listing of appellees in the caption on the cover page) -- not once. Accordingly, Steele has waived any arguments challenging the District Court's grant of summary judgment in favor of those appellees and they should be dismissed from this proceeding. Zannino, 895 F.2d at 17; McCoy, 950 F.2d at 22. See generally First Cir. R. 27.0(c).

**3. Appellee Boston Red Sox
Should Be Dismissed From This Appeal**

It is unclear from Steele's brief whether he seeks to implicate the Red Sox in the alleged infringement of the Steele Song by the TBS Promo, and, if so, in what manner. Steele states that a copy of the Steele Song was sent to a Red Sox official (Steele Br. at 22-23), but he does not identify -- and certainly does not develop -- the basis for alleged Red Sox liability.

This deficiency is crucial because Steele, as plaintiff and appellant, has the burden to make his theory of liability clear and discernible. Reifler v. Brown (In re Simply Media, Inc.), 583 F.3d 55, 56 (1st Cir. 2009) (per curiam) (dismissing appeal and declining to "reach any of the issues on the merits" where appellant's "deficient" "opening brief leaves unclear what claims are being advanced and what facts bear on what claims"); Fed. R. App. P. 28 (requiring an

appellant's brief to contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). Steele has failed to cogently articulate any arguments with respect to the Red Sox, and thus that entity also should be dismissed from this appeal. See generally First Cir. R. 27.0(c).

**4. The Bon Jovi Appellees
Should Be Dismissed From This Appeal**

The Bon Jovi Appellees also should be dismissed from this appeal. Steele asserts that he "does not explicitly waive his claims against Bon Jovi because any finding of infringement by the [TBS Promo] necessitates -- or at least leaves room for -- a finding of contributory infringement by Bon Jovi insofar as it performed the music to the [TBS Promo]." (Steele Br. at 35 n.15.) There is a fundamental problem with Steele's attempted reservation, however: Steele never asserted a contributory infringement claim against the Bon Jovi Appellees in his extensive pleadings in the District Court. Thus, Steele cannot attempt to raise this theory for the first time on appeal. United States v. Slade, 980 F.2d 27, 30 (1st Cir. 1992) ("It is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals.").¹⁵

¹⁵ Even if a contributory infringement claim against the Bon Jovi Appellees were preserved -- which it is not -- such a claim could not prevail. See Part II.E at pages 51-53, infra.

Aside from that one-sentence conclusory statement, Steele does not otherwise develop his argument against the Bon Jovi Appellees. Accordingly, Steele's argument as to the Bon Jovi Appellees is waived, and the Bon Jovi Appellees should be dismissed from this appeal. See Zannino, 895 F.2d at 17 (holding that "a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace" (internal quotation mark omitted)). See also Tambone, 2010 WL 796996, at *12; Reifler, 583 F.3d at 56; McCoy, 950 F.2d at 22. See generally First Cir. R. 27.0(c).

**II. THE DISTRICT COURT'S DECISION
GRANTING SUMMARY JUDGMENT ON
STEELE'S COPYRIGHT INFRINGEMENT CLAIM
REGARDING THE TBS PROMO SHOULD BE AFFIRMED**

A. Standard Of Review

This Court's review of a grant of a motion for summary judgment is de novo, a standard in which the Court reviews the "summary judgment record in the light most amiable to the party opposing the motion, indulging all reasonable inferences in that party's favor." Morris v. Gov't Dev. Bank of P.R., 27 F.3d 746, 748 (1st Cir. 1994). Nevertheless, a party may not rely upon "conclusory allegations, improbable inferences, and unsupported speculation" to defeat a motion for summary judgment. Lopez-Carrasquillo v. Rubianes, 230 F.3d 409, 413 (1st Cir. 2000) (internal quotation marks omitted). If the party opposing summary judgment failed to meet its burden of putting forth "specific facts, in

suitable evidentiary form to counter the evidence [the movant] has presented,” the District Court’s entry of summary judgment was proper and should be affirmed. Id. (internal quotation marks omitted).

In addition, an appellate court may affirm a district court decision “on any independently sufficient ground made manifest by the record.” Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 173 (1st Cir. 1998) (internal quotation marks omitted).

B. The District Court Identified And Applied The Correct Legal Standard Applicable To A Copyright Infringement Claim

The District Court correctly stated and applied the legal standard for assessing a copyright infringement claim, and the corresponding framework for conducting the mandatory side-by-side substantial similarity analysis. (August 19, 2009 Order at A771-73.) To succeed on a copyright infringement claim, 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., 499 U.S. 340, 361 (1991); see Johnson v. Gordon, 409 F.3d 12, 17 (1st Cir. 2005).

1. Ownership Of A Valid Copyright

To satisfy the first prong of the copyright infringement test, a plaintiff may introduce a certificate of copyright as prima facie evidence of ownership of a valid copyright. Johnson, 409 F.3d at 17-18. The defendants do not dispute that Steele owns a valid copyright in the Steele Song.

**2. Copying Of Constituent
Elements Of The Work That Are Original**

To satisfy the second prong of the copyright infringement test, a plaintiff must prove both (a) that copying of copyrighted material actually occurred and (b) that the copying “rendered the infringing and copyrighted works ‘substantially similar.’” Johnson, 409 F.3d at 18.

(a) Proving Actual Copying

A plaintiff may demonstrate, as a factual matter, that the copying of copyrighted material actually occurred by introducing direct or circumstantial evidence of copying. Id. A plaintiff may satisfy his burden by introducing, if available, direct evidence of copying. Id. A plaintiff may also satisfy his burden by introducing circumstantial evidence that the alleged infringer “enjoyed access to the copyrighted work and that a sufficient degree of similarity exists between the copyrighted work and the allegedly infringing work to give rise to an inference of actual copying.” Id. This circumstantial “access” evidence is also referred to as establishing “probative similarity,” which is “somewhat akin to, but different than, the requirement of substantial similarity that emerges at the second step in the progression.” Id. (emphasis added).¹⁶

¹⁶ Steele repeatedly argues that he believes he could prove access to and copying of the Steele Song. (See, e.g., Steele Br. at 22-24, 29, 36, 75-81.) Those arguments are irrelevant to the current appeal because no amount of access to or

The District Court's August 19, 2009 Order granting summary judgment on Steele's copyright infringement claim in no way rests on this component of the second prong of the copyright infringement test. (A766-81.) The District Court's August 19, 2009 Order rests entirely on the other component of the second prong -- substantial similarity. (Id.)

(b) Proving Substantial Similarity

In addition to proving actual copying, a plaintiff must also "establish that the copying is actionable by prov[ing] that the copying of the copyrighted material was so extensive that it rendered the infringing and copyrighted works 'substantially similar.'" Johnson, 409 F.3d at 18 (alteration in original) (internal quotation marks omitted); Feist, 499 U.S. at 361 ("Not all copying . . . is copyright infringement."); 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03 (2009).

This Court applies the "ordinary observer" test in evaluating substantial similarity. Johnson, 409 F.3d at 18. Under the "ordinary observer" test, the court conducts a side-by-side analysis that compares the plaintiff's copyrighted work with the defendant's allegedly infringing work. Id. A "defendant's work will be said to be substantially similar to the copyrighted work if an ordinary

copying of the Steele Song -- even if assumed to be true -- compensates for the lack of substantial similarity between the Steele Song and the TBS Promo, the sole allegedly infringing work at issue. See footnote 14, supra.

person of reasonable attentiveness would . . . conclude that the defendant unlawfully appropriated the plaintiff's protectible expression." Id.

Significantly, substantial similarity must relate to original elements of the copyrighted work and the "aspects of the plaintiff's work [that] are protectible under copyright laws." Id. at 18-19. See also Feist, 499 U.S. at 361; Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 813 (1st Cir. 1995), aff'd, 516 U.S. 233 (1996). Accordingly, before the side-by-side comparison is made, the works at issue are first dissected to remove (i.e., filter out) all aspects that are not protected by copyright, including concepts, ideas, unoriginal expression, and public domain material. Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 34 (1st Cir. 2001); Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 608-09 (1st Cir. 1988). Copyright law also does not protect expression that is either (i) commonplace or (ii) "scènes à faire" -- "stock" characters, settings, or other standard elements that follow naturally or are indispensable to a particular theme or treatment of a topic. Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62, 68 (1st Cir. 2009) ("The doctrine of 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."); CMM Cable Rep, Inc. v. Ocean Coast Props., Inc., 97 F.3d 1504, 1522 (1st Cir. 1996) (affirming district court's grant of summary judgment "under the 'scènes à faire' doctrine" where "the complained-of

similarities consist of unoriginal elements flowing from the undisputed standard and inherent characteristics” of the subject matter at issue); Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986) (reasoning that copyright protection does not extend to “‘stock’ themes commonly linked to a particular genre” or “‘scènes à faire,’ that is, scenes that necessarily result from the choice of a setting or a situation”).

Once all of the non-protected elements are filtered out, the remaining protectible aspects of the copyrighted work are compared side-by-side with the allegedly infringing work to determine whether the resulting works (with only the protectible elements considered) are substantially similar. Johnson, 409 F.3d at 18-19; Yankee Candle, 259 F.3d at 34; Concrete Mach., 843 F.2d at 608-09.¹⁷

¹⁷ Throughout his brief, Steele confuses “probative similarity” with “substantial similarity.” (See, e.g., Steele Br. at 33, 43-44, 55.) Steele asserts that “[s]ubstantial 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.” (Id. at 33 (quoting T-Peg, Inc. v. Vt. Timber Works, Inc., 459 F.3d 97 (1st Cir. 2006)).) That statement is simply wrong, as is Steele’s quotation and characterization of this Court’s opinion in T-Peg, Inc. As this Court made clear in T-Peg, regardless of whether a plaintiff attempts to prove the “actual copying” component of the second prong of the copyright infringement test through “probative similarity” (instead of direct evidence), the plaintiff still is required to prove the independent element of substantial similarity to prevail on a copyright infringement claim. T-Peg, Inc., 459 F.3d at 111.

Steele’s assertion that “[t]o prove infringement, a party must first show ‘probative similarity,’ i.e., copying of original expression as a factual matter” (Steele Br. at 55) is also incorrect as a matter of law. So, too, is Steele’s

* * *

As this controlling framework makes clear, a plaintiff cannot succeed on a copyright infringement claim if he cannot prove that the two works are substantially similar (i.e., the second portion of the second prong of the copyright infringement test) -- regardless of whether the alleged infringer had “access” to the plaintiff’s work or actually copied the plaintiff’s work. Id.¹⁸

C. The District Court Correctly Held That There Is No Substantial Similarity Between The Steele Song And The TBS Promo

At the outset, it is worth noting that the District Court understood and concisely summarized -- twice -- Steele’s purported copyright infringement claim with respect to the TBS Promo:

characterization of the District Court’s August 19, 2009 Order as “[d]eparting from First Circuit precedent” because it allegedly “bypassed the probative similarity analysis and limited proceedings to the issue of substantial similarity.” (Id. at 55 n.20.)

¹⁸ Steele also misquotes and mischaracterizes this Court’s opinion in International Association of Machinists & Aerospace Workers v. Winship Green Nursing Center, 103 F.3d 196 (1st Cir. 1996). Quoting footnote 6 in Winship Green, Steele argues that “‘direct evidence’ of reproduction renders the ‘substantial similarity’ analysis moot because the copy is identical to the infringed work.” (See Steele Br. at 44.) Not only is this an erroneous statement of the law, but the Winship Green opinion confirms -- five lines after the quote Steele selectively included -- that a plaintiff must prove substantial similarity: “Even if a work is copied, however, no copyright infringement exists if substantial changes render the work unrecognizable.” Winship Green, 103 F.3d at 203 n.6.

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.

(A768.)

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).

(A777.) Any suggestion by Steele that the District Court did not understand his copyright infringement claim with respect to the TBS Promo (see Steele Br. at 36-37) is not only incorrect, but directly contrary to his earlier acknowledgment that the District Court “correctly summarizes the claim” (Steele’s Opposition To Motion For Summary Judgment at A591).

1. A Side-By-Side Comparison Of The Steele Song And The TBS Promo Confirms That No Ordinary Observer Could Conclude That The Two Works Are Substantially Similar

(a) The District Court’s Analysis

Applying the controlling “ordinary observer” standard to the facts in the summary judgment record, the District Court correctly concluded that “no reasonable jury could find substantial similarity” between the Steele Song and the TBS Promo. (A779.) The District Court explained the need to “dissect the

unprotected elements from Steele’s work” and to focus only on “the original elements of the Steele Song.” (A778-79.)

Specifically, the District Court reasoned that:

- “[T]he 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.” (A779.)
- “[T]he Steele Song’s references to Fenway Park and Yawkey Way are classic *scène à faire*; they are stock scenes that flow from the idea of baseball. . . . Steele does not enjoy a monopoly over the use of those images simply because he references them in a copyrighted song.” (A778 (citation omitted).)
- “[A]lthough 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.’” (A778-79.)

In sum, the summary judgment record demonstrates that no ordinary observer comparing the Steele Song side-by-side with the TBS Promo could conclude that the two works are substantially similar. See Johnson, 409 F.3d at 18, 25.

**(b) The TBS Promo Includes
A Shortened Version Of The
Bon Jovi Song, Which Steele Now Concedes
Is Not Substantially Similar To The Steele Song**

A major element of the TBS Promo is a shortened version of the Bon Jovi Song, which Steele now concedes is not substantially similar to the Steele

Song. (See Steele Br. at 29 n.11.) This concession makes the lack of substantial similarity even more pronounced because this is yet another dimension of difference between the Steele Song and the TBS Promo. (See Steele Br. at 54 (acknowledging that “[a]ny 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’” (emphasis added)).

**(c) The TBS Promo Includes Visuals From
Many MLB Teams, Not Just The Red Sox**

The TBS Promo uses visuals from in or around a number of MLB stadiums, of baseball players from various teams making great plays (e.g., pitching, hitting home runs, and sliding) and “high-fiving” each other, and fans cheering. (TBS Promo at A511.) Many of the images are taken from games at well-known stadiums around the country and include recognizable visuals of the Minnesota Twins, San Diego Padres, Philadelphia Phillies, Cleveland Indians, New York Yankees, Atlanta Braves, Milwaukee Brewers, New York Mets, Los Angeles Angels, Chicago Cubs, Arizona Diamondbacks, Seattle Mariners, and Detroit

Tigers, as well as the Boston Red Sox. (Id.) Certainly, no rights of Steele are infringed by using such footage in a video promoting the MLB postseason.¹⁹

(d) The TBS Promo Includes Visuals Of The Bon Jovi Band In Concert

The TBS Promo prominently features visuals of the Bon Jovi band playing the Bon Jovi Song in concert. (See, e.g., TBS Promo at A511 (0:12; 0:19; 0:24; 0:27; 0:39; 0:56; 1:01; 1:05; 1:09; 1:14; 1:22; 1:28; 1:32; 1:35; 1:38; 1:40; 1:45; 1:48; 2:01; 2:15; 2:22; 2:24; 2:31; 2:41).) There are no references to the Bon Jovi band in the Steele Song, or for that matter any references to concerts whatsoever. The use of these images of the Bon Jovi band further reduces any purported similarity (much less the required substantial similarity) between the Steele Song and the TBS Promo.

¹⁹ Steele's repeated statement (Steele Br. at 27, 63) that TBS was broadcasting only the National League postseason is erroneous: in 2007, TBS telecast the divisional series for both the National League and the American League, and then the National League Championship series. Steele's statement that TBS never telecast a Red Sox game (id. at 27) also is false: TBS broadcast the American League divisional series between the Red Sox and the Angels (televised on October 3, 2007, October 5, 2007 and October 7, 2007). Even if Steele's statements were accurate, moreover, his suggestion that there would be something nefarious in the use of footage of American League teams, as well as National League teams, to generate postseason excitement is inexplicable.

**(e) The TBS Promo Is
Synchronized To The Bon Jovi Song**

It is clear that the TBS Promo is meticulously synchronized to the shortened version of the Bon Jovi Song -- not the Steele Song. For example:

- When Bon Jovi sings “friendly face,” the video shows a close-up of a smiling face (TBS Promo at A511 at 0:24);
- When Bon Jovi sings “walkin’ on this street,” the video shows crowds walking (id. at 0:30);
- When Bon Jovi sings “pounding underneath my feet” is accompanied by a video close-up of stomping feet (id. at 0:37);
- When Bon Jovi sings “keeps spinning round” is matched with a video of a spinning aerial shot of a stadium (id. at 0:43);
- When Bon Jovi twice sings “down, down, down,” the video shows, first, three pitchers’ arms following through as they release the ball towards home plate (id. at 0:47), and, second, three ball players sliding into bases (id. at 2:12);
- When Bon Jovi sings “shoutin’ from the rooftops,” the video shows fans shouting from high up in the bleachers (id. at 1:36);
- When Bon Jovi sings “dancin’ in the bars,” the video shows images of people dancing in the stadium (id. at 1:38); and
- Bon Jovi’s “you got it” lyrics are timed perfectly with a great catch (id. at 1:44).

**(f) The TBS Promo Includes At Least
30 Images Of TBS And MLB Logos**

The TBS Promo also prominently features visuals of the TBS and MLB logos. (E.g., TBS Promo at A511 (0:22; 0:29; 0:31; 0:33; 0:43; 0:52; 1:06; 1:12; 1:25; 1:31; 1:34; 1:56; 1:58; 2:17; 2:19; 2:35; 2:43); Steele’s Opposition To

Second Motion To Dismiss at A301 (noting that the TBS Promo “includes at least separate 30 [sic] images of TBS and MLB logos”).) There are no references to TBS in the Steele Song, and only references to baseball generally (and the Red Sox in particular) -- not MLB -- in the Steele Song. The use of these logos further reduces any alleged similarity between the Steele Song and the TBS Promo.²⁰

²⁰ Steele suggests on appeal that the use of the phrase “say hey” in the Bon Jovi Song is a reference to Willie Mays and his “Say Hey Kid” moniker. (Steele Br. at 42-43 & n.18, 57.) First, any purported similarity is irrelevant because Steele concedes that he is abandoning any claim that the Bon Jovi Song is infringing. (*Id.* at 35.) Second, even if Steele’s claim was accurate, it would fall far short of establishing substantial similarity between the Steele Song (which does not even include the phrase “Say Hey”) and the TBS Promo. Third, Steele is precluded from raising this argument on appeal because he failed to meaningfully develop it in the District Court. This argument is only barely alluded to in Steele’s opposition to the First Motion To Dismiss and states, in its entirety: “Willie Mays, the ‘Say Hey Kid’ might be offended by defendants’ claim that these words are not about baseball.” (A313.) The first time Steele substantively raised this argument was in his motion for reconsideration, and its corresponding attachment of news articles concerning Willie Mays. (*See* Steele Br. at 43 (citing to A775, Steele’s Motion For Reconsideration).) Accordingly, this issue has not been preserved for appeal because it was the “merest of skeletons” in the District Court. *See, e.g., McCoy*, 950 F.2d at 22 (reasoning that “a party has a duty to spell out its arguments squarely and distinctly”). *See also Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 96 n.6 (1st Cir. 1996) (“We decline Appellants’ request to take into consideration the sworn statements submitted with their motion for reconsideration. Not only were they not part of the original summary judgment materials, but Appellants have not demonstrated why this new evidence could not have been timely provided with the summary judgment materials.”).

**(g) Defendants' Expert Concluded
There Was No Substantial Similarity
Between The Steele Song And The TBS Promo**

In support of their motion for summary judgment, several defendants submitted an expert report of Anthony Ricigliano.²¹ Mr. Ricigliano compared the Steele Song to the TBS [Promo] and concluded that “[f]rom the beginning to the end, the visuals and audio/lyric content of the Bon Jovi accompaniment to the TBS Promo is in sync with both the baseball visuals and with videos from live concerts of the Bon Jovi band.” (Ricigliano Report at A555.) Mr. Ricigliano further concluded that:

[S]ince the *I Really* [Steele Song] audio/video version [i.e., Steele’s “temp track” exhibit, A515] does not actually contain any clear substantive synchronization [with the TBS Promo], there is no suggestion that it was used as a reference to create the TBS video. The audio/video created by Mr. Steele shares almost no correlation to the TBS video. . . . [T]here is nothing in the composition *I Love* [the Bon Jovi Song] utilized in this commercial that rises to the level of substantial similarity of protectible musical or lyrical expression when compared with *I Really* [the Steele Song].

(Id.) Mr. Ricigliano also noted that the Steele Song was “almost totally not in sync with the visuals in the commercial.” (Id. at A554.)

²¹ Mr. Ricigliano is well qualified to provide expert testimony in this matter. Mr. Ricigliano analyzes hundreds of commercials per year, and has testified in a variety of copyright disputes. (A556.)

(h) Any Purported Similarities Steele Identifies Are Isolated And Insubstantial

Steele purports to identify 14 “similarities” in which he claims the lyrics in the Steele Song correspond to the visuals in the TBS Promo. The vast majority of those alleged similarities cannot support Steele’s position either because they are commonplace and scènes à faire or because the purported similarities do not match the TBS Promo as Steele suggests. Any remaining similarities are inconsequential in the context of the TBS Promo as a whole. See See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983) (per curiam) (affirming district court’s grant of summary judgment on the issue of substantial similarity because the “remaining five similarities are not sufficient to convince any reasonable trier of fact that the plays are substantially similar”); McMahon v. Prentice-Hall, Inc., 486 F. Supp 1296, 1304 (E.D. Mo. 1980) (noting that where there are few and widely scattered alleged coincidences that are trite and insignificant, it “is clear beyond cavil that there is no substantial similarity of expression in the works”).

Steele asserts that images in the TBS Promo of fans cheering, players “doing high-fives, shoulder pumping, and chest thumping” and ballplayers making catches and hitting home runs match the lyrics of the Steele Song. (Steele Br. at 25-27 (Points 4, 6, 9, 10, 11, 13 and 14).) These are clear examples of unprotectible scènes à faire and therefore do not affect the substantial similarity

analysis. See Coquico, 562 F.3d at 6; CMM Cable, 97 F.3d at 1522; Walker, 784 F.2d at 50.

Steele asserts that a visual in the TBS Promo of Red Sox ballplayers lines up with his lyric “Man I Really Love this Team” in the Steele Song. (Steele Br. at 26 (Point 7).) Steele neglects to mention that this same lyric also lines up at other times with images in the TBS Promo of the Bon Jovi band playing (Steele Exhibit at A515 at 1:01) and with an image of a Chicago Cubs ballplayer (id. at 2:27).

Steele asserts that a visual of Yawkey Way and its street sign line up with a lyric in the Steele Song stating “the word is out on Yawkey Way.” (Steele Br. at 25-27 (Points 2 & 3).) The visual of Yawkey Way is part of a montage of images in the TBS Promo of streets outside both Fenway Park and Wrigley Field, which line up with the lyric in the Bon Jovi Song “walkin’ on the street.” (TBS Promo at A511 at 0:30.) Additionally, the visual of the Yawkey Way street sign features a large TBS logo that is at least 10 times the size of the Yawkey Way sign. (Id.) The Steele Song does not mention TBS.²²

²² Steele neglects to mention that the TBS Promo does not include visuals of numerous baseball icons that are specifically referenced in the Steele Song, such as “Rem-Dawg,” the “Babe,” or “Cooperstown.”

Steele asserts that a visual of “Red Sox player Manny Rodriguez [sic]”²³ lines up with a lyric in the Steele Song stating that “our hometown team is series-bound.” (Steele Br. at 25 (Point 1).) This scene lasts less than two seconds. It is hardly surprising that a video promoting the 2007 postseason would include scenes of Red Sox stars because the Red Sox were one of the leading teams in baseball. Additionally, the Steele Song does not specifically refer to Ramirez (or to “Rodriguez”) at this point -- or at any point -- but rather to “our hometown team.” Steele’s apparent suggestion that any shot of a Red Sox player at this point in the video (in addition to shots of players from many other teams throughout the video) helps him to establish substantial similarity borders on the absurd.

Steele asserts that a visual of a Detroit Tigers player lines up with a lyric in the Steele Song referencing “the Tigers, Rangers, and the Jays.” (Steele Br. at 25 (Point 5).) The visual of the Detroit Tigers player actually lines up more closely with the lyric “Rangers” in the Steele Song. (See Steele Exhibit at A515 at 0:42.) In any event, the scene featuring the Tiger is fleeting and incidental.

Finally, Steele asserts that, “for 1.6 seconds, Mr. Bongiovi [is] gesturing precisely in-time with the Steele Song’s tempo and beat” and that “for 5.5 seconds, Steele’s guitar solo” in the Steele Song is matched by the TBS

²³ Steele presumably intends to refer to former Red Sox outfielder Manny Ramirez.

Promo's frame cuts. (Steele Br. at 26 (Points 8 and 12).) Steele acknowledges that intervals of time are not protectible expression under federal copyright law.

(Steele Br. at 52.) Accordingly, these purported similarities do not affect the substantial similarity analysis.²⁴

* * *

On these facts, no rational juror conducting a side-by-side comparison of the protectible elements of the Steele Song and the TBS Promo could conclude that the works are substantially similar. The TBS Promo features a shortened version of the Bon Jovi Song, which Steele now concedes is not substantially similar to the Steele Song; the images in the TBS Promo are synchronized to the lyrics in the shortened version of the Bon Jovi Song; the images in the TBS Promo include the TBS and MLB logos; the images in the TBS Promo include scenes featuring many MLB teams, players, and ballparks (not just the Red Sox); the images in the TBS Promo include many scenes of the Bon Jovi band in concert, which have nothing at all to do with the Steele Song; many of Steele's claimed similarities between the Steele Song and the TBS Promo are unprotectible scènes à

²⁴ Although Steele concedes that he is not appealing the District Court's August 19, 2009 Order with respect to the Bon Jovi Song, he nevertheless continues to discuss the title of the Steele Song. First, the TBS Promo is not titled (and Steele never argues otherwise). Second, Mr. Ricigliano conducted a "limited search" and uncovered seven other songs titled "I Love This Town," including two by well-known artists. (Ricigliano Report at A552.)

faire; and Steele's few additional claims of similarities are inaccurate or fleeting and inconsequential.²⁵

**2. Steele's "Ordinary Observer"
Submissions Are Inadmissible, And In Any
Event Do Not Alter The Conclusion That The Steele
Song And The TBS Promo Are Not Substantially Similar**

The District Court correctly concluded that the "ordinary observer" statements Steele submitted "present inadmissible lay opinion and therefore are not appropriate for consideration." (August 19, 2009 Order at A780 (citing Fed. R. Civ. P. 56(e)(1) and Fed. R. Evid. 701).) The District Court also correctly noted that the numerous "'ordinary listeners' upon whom Steele asks the Court to rely are all his personal friends or acquaintances." (Id. at A779-80.)

First, Steele does not cite any legal authorities holding that the District Court improperly concluded that the proffered "ordinary observer" statements were not appropriate for consideration on summary judgment.

Second, these witnesses are far from "ordinary," unbiased observers. For example, the statements are from Steele's "girlfriend, best friend, roommate, and coworker" (A689-91), Steele's college dorm-mate (A685-87), Steele's "life long friend" and former roommate (A699), Steele's former co-worker (A698), a

²⁵ In light of the lack of a genuine issue of material fact regarding substantial similarity, this Court could summarily affirm without reaching the question which appellees are properly before the Court. See Part I.B at pages 24-27, supra.

friend who helped Steele promote his song in 2004 (A694-96), Steele's tattoo artist (A692), and Steele's music agent (A697). None of these individuals could possibly qualify as an impartial "ordinary observer," and thus their comments are not in any way relevant or admissible. See Johnson, 409 F.3d at 22 ("Bare conclusions are seldom entitled to weight in the summary judgment calculus.").

Third, many of these "ordinary observers" comment only on musicological elements and make no statement concerning the visual elements of the TBS Promo. (See, e.g., A667-75 (stating that when he "listened to the comparison of [the Steele Song] and the MLB released by JBJ it was blatantly apparent that what I was hearing was yet another example of plagiarism" (emphasis added)); A696 ("the tune Bon Jovi was singing on TV commercials and promoting baseball sounded a lot like the song that Bart had written" (emphasis added)); A692 ("I heard the MLB/TBS/Bon Jovi song and immediately thought Bart had sold his song to them." (emphasis added)). As noted, Steele is not appealing the District Court's ruling on the musicological elements, and therefore these statements -- even if they were admissible -- are entirely irrelevant to the issue currently before this Court.

Fourth, several of these "ordinary observers" provide statements solely concerning the purported access certain defendants allegedly had to the Steele Song. (E.g., A697, A698.) The issue of access does not affect the

substantial similarity analysis, and therefore these statements -- even if they were admissible -- are likewise irrelevant to the issue currently before this Court.

Fifth, one of Steele's own "ordinary observers" who purports to have examined "all 155 frames of the footage" concluded that there are only "98 frames involving Major League Baseball players, fans or venues." (A693.) Even crediting this analysis, Steele's own "ordinary observer" confirms that more than one third of the images in the TBS Promo do not even include baseball-related imagery. (See id.)

3. The So-Called "Altered" TBS Promo

Steele asserts in conclusory fashion that the defendants "submitted an altered or otherwise inaccurate copy of its Audiovisual with its summary judgment papers." (Steele Br. at 18.) Steele's alteration theory rests entirely on the assertion that the defendants (1) added "12 seconds of 'dead air' in the beginning" before the TBS Promo and (2) removed, after the TBS Promo, "the final seconds showing the MLBAM copyright notice, '© 2007 MLBAM'." (Id. at 18-19, 38-41.)

First, the alleged alteration of the TBS Promo to add "12 seconds of 'dead air' in the beginning" and delete the "MLBAM copyright notice, '© 2007 MLBAM'" in no way alters the substantial similarity analysis. The substantial similarity analysis focuses on a comparison of the protectible elements of the two works -- not what comes before and after the works.

Second, as with many of Steele's other arguments, Steele never advanced this argument in the District Court and it is therefore not preserved for appeal. See Tambone, 2010 WL 796996, at *12; McCoy, 950 F.2d at 22; Zannino, 895 F.2d at 17. Defendants submitted a copy of the TBS promo to the District Court not once, but three separate times -- in connection with their motion to dismiss Steele's Complaint (A64-68), motion to dismiss Steele's Amended Complaint (A221-25), and motion for summary judgment (A475-78, A511). Steele never once raised any alleged "alteration" issue. Indeed, Steele was certainly aware of this alleged "alteration" because the "temp tracking" exhibit Steele submitted to the District Court (the Exhibit in which the Steele Song is superimposed on the TBS Promo visuals, A515) uses the supposedly un-altered version of the TBS Promo without the opening 12 seconds of "dead time" and with the copyright notice. It is therefore difficult to understand the purported harm Steele has suffered where both the so-called "altered" and "un-altered" versions were included in the District Court record, and he had a full opportunity to compare and present them. (See id.)

Third, to the extent that Steele had questions about the video defendants submitted, he declined to use the discovery opportunity provided by the District Court to explore such questions.²⁶

D. The District Court Correctly Held That The TBS Promo Does Not Infringe Steele's Synchronization Rights In The Steele Song

The District Court also correctly concluded that “no reasonable juror could conclude that the TBS Promo violates plaintiff’s synch rights.” (April 3, 2009 Order at A780-81.)

A synchronization right is the “right to record a copyrighted song in synchronization with [a] film or videotape.” Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 33 n.23 (1979) (Stevens, J., dissenting); ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 62 n.4 (2d Cir. 1996) (“Most commonly, synch licenses are necessary when copyrighted music is included in movies and commercials.” (emphasis added)). Thus, synchronization rights concern the actual use of -- i.e., the inclusion and incorporation of -- the plaintiff’s copyrighted material into an audiovisual work. See Agee v. Paramount Commc’ns, Inc., 59 F.3d 317, 319 (2d Cir. 1995) (a “‘synch’ right” is “the right to use recorded

²⁶ Steele’s failure to conduct discovery or to develop an argument is particularly notable in light of his statement at the motion to dismiss stage that there were “various different promo versions that were all released.” (A159.)

music in synchronization with visual images on the soundtrack of a television program or motion picture”).

The legal authorities Steele cites demonstrate that synchronization rights are implicated only where the plaintiff’s copyrighted song itself is actually used and can be heard in the resulting audiovisual work. In Agee v. Paramount Communications, Inc., the defendant created an audiovisual segment for its television show by synchronizing portions of the plaintiff’s copyrighted songs with images showing young men engaged in an unsuccessful burglary attempt. 59 F.3d at 319. In ABKCO Music, Inc. v. Stellar Records, Inc., the defendant created karaoke compact disks that synchronized copyrighted songs with a video that displayed the song’s lyrics onscreen. 96 F.3d at 62. The crucial distinction between the TBS Promo and the works at issue in both Agee and ABKCO Music is that the plaintiff’s songs were actually included in the resulting audiovisual work.

This unambiguous legal proposition also tracks Steele’s articulation of the issue in his brief: “The only additional question for the district court was -- and for this Court is -- whether MLB created an audiovisual incorporating Steele’s Song.” (Steele Br. at 51 (emphasis added).) The answer to that question is clearly “no.” (See TBS Promo at A511.) There is no factual dispute that the Steele Song is not included in the TBS Promo, and therefore there can be no infringement of

Steele's synchronization rights as a matter of law. Accordingly, the District Court's holding regarding synchronization should be affirmed.²⁷

E. Steele Cannot Assert A Claim For Contributory Infringement Of The Visual Elements Of The TBS Promo Against The Bon Jovi Appellees

In a one-sentence "argument," Steele asserts that he "does not explicitly waive his claims against Bon Jovi because any finding of infringement by the [TBS Promo] necessitates -- or at least leaves room for -- a finding of contributory infringement by Bon Jovi insofar as it performed the music to the [TBS Promo]." (Steele Br. at 35.) For multiple reasons, Steele cannot assert a claim for contributory infringement of the visual elements of the TBS Promo against the Bon Jovi Appellees.

First, for all of the reasons previously articulated, there is no substantial similarity between the Steele Song and the TBS Promo and therefore no copyright infringement. Accordingly, there can be no contributory copyright infringement by the Bon Jovi Appellees because there is no "direct infringement" for the Bon Jovi Appellees to be "contributing to." See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 931 (2005).

²⁷ The District Court also concluded that "intervals of time are not original expression protectible under federal copyright law." (A781.) Steele does not dispute this holding and acknowledges that the District Court "quite correctly" reached this conclusion. (Steele Br. at 52.)

Second, even if there were actionable copyright infringement (which there is not), Steele cannot pursue a claim for contributory infringement against the Bon Jovi Appellees. As the U.S. Supreme Court has recently stated, “[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement.” Id. There are no allegations that the Bon Jovi Appellees had any involvement with the selection or creation of the visual elements of the TBS Promo, much less that they “intentionally induc[ed] or encourag[ed]” such infringement. Id. Indeed, according to Steele’s version of events, the visual elements of the TBS Promo were created and completed before the Bon Jovi Appellees became involved:

- “[T]he Bon Jovi soundtrack was written and recorded to fit with the visual images originally suggested and selected by ‘cues’ from Bart’s song.” (Compl. ¶ 16 at A27.)
- The Steele Song was used “as a ‘temp track’ for the creation of an audio visual work which was, in turn, used to create the final soundtrack for the video.” (Opposition To First Motion To Dismiss at A151.)

As these conclusory assertions make clear, even under Steele’s own theory of the case, he has failed to raise a viable contributory infringement claim against the Bon Jovi Appellees.

Third, in any event, here again, Steele’s new contributory infringement theory is not properly before this Court because he never asserted a copyright claim for contributory infringement in the District Court. See Tambone,

2010 WL 796996, at *12; Reifler, 583 F.3d at 56; McCoy, 950 F.2d at 22; Part I.B.4 at pages 26-27, supra.

**III. THE DISTRICT COURT’S APRIL 3, 2009
ORDER LIMITING DISCOVERY TO THE
ISSUE OF SUBSTANTIAL SIMILARITY WAS A PROPER
EXERCISE OF DISCRETION AND SHOULD BE AFFIRMED**

A. Standard Of Review

This Court’s review of the District Court’s “discovery-related decisions is for abuse of discretion” and this Court will “intervene in such matters only upon a clear showing of manifest injustice.” Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9, 14 (1st Cir. 1997). Indeed, “[t]he standard of review in discovery matters is not appellant-friendly” and “[a]ppellate courts seldom intervene in discovery questions.” Modern Cont’l/Obayashi v. Occupational Safety & Health Review Comm’n, 196 F.3d 274, 281 (1st Cir. 1999) (internal quotation marks omitted); see Heidelberg Ams., Inc. v. Tokyo Kikai Seisakusho, Ltd., 333 F.3d 38, 41 (1st Cir. 2003) (affirming district court’s discovery order recognizing that it is an “uphill battle to convince us that the district court abused its discretion”). As Steele acknowledges in his brief, Steele bears a heavy burden to overcome this highly deferential abuse-of-discretion standard. (Steele Br. at 76.)

B. The District Court Properly Exercised Its Discretion In Limiting Discovery To The Issue Of Substantial Similarity

The District Court properly exercised its discretion and limited discovery to the potentially dispositive issue of substantial similarity. The District Court's April 3, 2009 Order provides:

limited discovery will proceed as follows:

- a) all discovery relevant to the issue of substantial similarity will be completed on or before May 31, 2009;

(April 3, 2009 Order at A387.)²⁸

As outlined above, Steele's purported copyright infringement claim fails as a matter of law without a viable claim of substantial similarity.

Accordingly, the District Court appropriately exercised its discretion and permitted Steele to conduct discovery on this dispositive issue prior to permitting full-scale discovery against more than a dozen remaining defendants.²⁹ This reasonable

²⁸ The text of the District Court's April 3, 2009 Order confirms that Steele was entitled to conduct "all discovery relevant to the issue of substantial similarity" generally and not, as Steele erroneously asserts, solely as to musicological similarities. (Steele Br. at 75.) Steele also wrongly states that the District Court's April 3, 2009 Order limited him "to discovering only those materials, digital or otherwise, that MLB appended as exhibits to their motions to dismiss and for summary judgment." (Id. at 82 (emphasis added).) The text of that order confirms that the District Court imposed no such limitation. (See A375-87.)

²⁹ In addition to the fact that Steele never asked the District Court for the opportunity to conduct additional discovery, the discovery Steele claims he was denied (such as "digital discovery") has no bearing on whether the Steele Song is substantially similar to the TBS Promo. (See Steele Br. 75-81.) Here again, Steele

discovery limitation allowed Steele to obtain factual information potentially relevant to the issue of substantial similarity while simultaneously safeguarding defendants against burdensome and irrelevant discovery.³⁰

Accordingly, the District Court's April 3, 2009 Order should be affirmed.

C. Steele Failed To Preserve For Appeal Any Objection To The District Court's Discovery Order

Even if the District Court's April 3, 2009 Order focusing discovery to the issue of substantial similarity was an abuse of discretion -- which it was not -- Steele failed to timely object to the District Court's order and therefore has failed to preserve for appeal any argument concerning that ruling. Slade, 980 F.2d at 30; McCoy, 950 F.2d at 22.

fails to appreciate that no amount of access or "direct evidence" can compensate for the lack of substantial similarity. In this regard, Steele also appears to be arguing that the parties -- not the District Court -- purportedly failed to prepare "a specific plan for digital discovery," and that this alleged failure of the parties somehow constitutes reversible error. (See Steele Br. at 78.) Not surprisingly, Steele cites no legal authority for this novel and untenable proposition.

³⁰ Steele's own authorities confirm that the District Court properly exercised its discretion in postponing discovery that would not affect the dispositive issue of substantial similarity. See U.S. Steel v. M. Dematteo Constr. Co., 315 F.3d 43, 53 (1st Cir. 2002) (holding that "[i]t was well within the district court's discretion to postpone discovery pertaining to [one issue] until after its decision on the dispositive legal issue" where the plaintiff "did not seek discovery on an issue of material fact that could alter the outcome of [the defendant's] contention on summary judgment") (cited in Steele Br. at 76).

In Rivera-Flores v. Bristol-Myers Squibb Caribbean, this Court held that a plaintiff's argument that he was denied discovery prior to the court's summary judgment ruling -- advanced for the first time on appeal -- was "too little and too late." 112 F.3d at 14. In reaching its conclusion, this Court noted that the plaintiff "never argued to the district court that he needed additional discovery before filing his opposition to summary judgment; nor did he file an affidavit under Fed. R. Civ. P. 56(f)." Id. Accordingly, this Court held "there was no abuse of discretion" and affirmed the district court. Id.

Similarly, in Ayala-Gerena v. Bristol Myers-Squibb Co., this Court affirmed a district court's grant of summary judgment over the plaintiffs' objection that they were denied necessary discovery where the appellants filed their summary judgment oppositions "without previously informing the [district] court of their inability to properly oppose summary judgment due to incomplete discovery." 95 F.3d at 92. This Court further noted that the appellants' summary judgment oppositions were "deafeningly silent as to their inability to oppose summary judgment due to incomplete discovery." Id.

In the current case, Steele was likewise "deafeningly silent" throughout the entire District Court proceeding as to any perceived discovery inadequacy. During the March 31, 2009 motion to dismiss hearing, the District Court proposed providing Steele with a period of time to conduct discovery solely

on the issue of substantial similarity. (A394.) Steele did not object to this proposal. On the contrary, the District Court specifically posed questions to Steele concerning his plans for discovery, and Steele made no argument that he would be prejudiced if more expansive discovery was not permitted. (See A413-14.)

Steele also remained “deafeningly silent” as to this discovery order at every subsequent stage of the District Court proceedings:

- Steele remained silent after the District Court issued its April 3, 2009 Order outlining the permissible discovery on this issue of substantial similarity.
- Steele did not file a motion for reconsideration of that April 3, 2009 Order (as he could have, and as he did with respect to other rulings in the District Court).
- Steele did not raise any purported harm resulting from the District Court’s April 3, 2009 Order when the defendants filed their motion for summary judgment, such as by submitting an affidavit pursuant to Fed. R. Civ. P. 56(f).
- Steele did not raise any purported harm resulting from the April 3, 2009 Order in his summary judgment opposition brief. (See A590-611.)
- Steele did not raise any purported harm resulting from the April 3, 2009 Order in his motion for reconsideration of the District Court’s August 19, 2009 Order granting the defendants’ summary judgment motion. (See A783-98.) On the contrary, Steele expressly discussed the District Court’s April 3, 2009 discovery order -- without objection -- and argued that “the [District] Court did not order discovery on access because the issue has been settled by Defendants’ own admission.” (A788.) If anything, Steele appeared to be endorsing the District Court’s discovery ruling.

- Steele did not raise any discovery-related issues in his affidavit filed subsequent to his motion for reconsideration. (See A815-18.)

Put simply, Steele never raised in the District Court any purported harm associated with the April 3, 2009 Order limiting discovery to the issue of substantial similarity. Accordingly, Steele's argument is "too little and too late" and should not be entertained on this appeal. See Rivera-Flores, 112 F.3d at 14; Ayala-Gerena, 95 F.3d at 92.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: March 29, 2010
Boston, Massachusetts

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,815 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 14 point.

Dated: March 29, 2010

/s/ Clifford M. Sloan

Clifford M. Sloan

CERTIFICATE OF SERVICE

I, Clifford M. Sloan, hereby certify that on March 29, 2010 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system: Christopher A.D. Hunt, The Hunt Law Firm LLC, 10 Heron Lane, Hopedale, Massachusetts 01747, cadhunt@earthlink.net, counsel of record for Plaintiffs-Appellants Samuel Bartley Steele, Bart Steele Publishing, and Steele Recordz.

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