

No. 09-2571

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

SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING; STEELE RECORDZ
Plaintiffs - Appellants

v.

VECTOR MANAGEMENT; MLB ADVANCED MEDIA, L.P.
Defendants - Appellees

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; 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; 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 U.S. DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**PETITION FOR PANEL REHEARING AND REHEARING EN BANC OF
APPELLANTS SAMUEL BARTLEY STEELE; BART STEELE PUBLISHING;
STEELE RECORDZ**

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

STATEMENT PURSUANT TO FED. R. APP. P. 35(b)

The Panel’s February 10, 2012 Judgment (“Judgment”) affirms a holding never made by the district court, on an issue barred from discovery, argument, and adjudication in district court. The district court’s order – and the Judgment – is in direct conflict with the rules of evidence and civil procedure, and decisions of the First Circuit. Airframe Systems, Inc. v. L-3 Comm. Corp., 658 F.3d 100 (1st Cir. 2011); Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62 (1st Cir. 2009); Mag Jewelry Co., Inc. v. Cherokee, Inc., 496 F.3d 108 (1st Cir. 2007); Johnson v. Gordon, 409 F.3d 12 (1st Cir. 2005); Yankee Candle Company, Inc. v. Bridgewater Candle Company, LLC, 259 F.3d 25 (1st Cir. 2001); Lotus Dev. Corp. v. Borland Int’l., Inc., 49 F.3d 807 (1st Cir. 1995), aff’d, 516 U.S. 233 (1996).

The Judgment overlooks undisputed facts and misapprehends law in conflict with Supreme Court, and First Circuit, and other Courts of Appeals’ decisions, on an issue of exceptional importance, specifically a case of first impression for federal circuit courts: the widespread advertising and entertainment industry practice of “temp-tracking,” universally acknowledged to constitute infringement, yet never addressed by the federal courts. Feist Publ’ns, Inc., v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991); Coquico, 562 F.3d at 69; Mag Jewelry, 496 F.3d at 119; Johnson, 409 F.3d 12; CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc., 97 F.3d 1504 (1st Cir.

1996); Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc., 843 F.2d 600 (1st Cir. 1988); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); Dawson v. Hinshaw Music Inc., 905 F.2d 731 (4th Cir. 1990); Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Arnstein v. Porter, 154 F.2d 464 (2^d Cir. 1946).

The Judgment conflicts with Supreme Court and First Circuit holdings on the fundamental question of whether circuit courts are duty-bound to respond to systemic fraud on the court, counsel manipulation of judicial proceedings, and abuse of party opponents. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Aoude v. Mobil Oil Corp., 892 F.2d 1115 (1st Cir. 1989).

1. The Judgment Conflicts With Supreme Court and First Circuit Decisions on Copyright Infringement

a. Failure to Apply First Circuit's Two-Part Test

The Judgment conflicts with the First Circuit's "two-part test to determine if illicit copying has occurred," i.e., through discovery of 'probative' and 'substantial' similarity. Yankee Candle, 259 F.3d at 33; Airframe Systems, 658 F.3d at 105-106; Coquico, 562 F.3d at 66-67; Mag Jewelry, 496 F.3d at 115, n.7; Johnson, 409 F.3d at 18; Lotus, 49 F.3d at 813.

The Judgment affirms the district court and finds no evidence of "probative similarity...to support an inference of actual copying," after an "independent review

of the record and briefs.” Judgment at 1. However, the district court ordered the exclusion of all discovery, argument, and adjudication of probative similarity. The order specifically forbade discovery of defendants’ ‘access’ to plaintiff’s work and their ‘creation’ of the infringing work. The district court’s departure from First Circuit precedent - at the urging of defendants – limited its decision exclusively ‘expert analysis’ of “substantial similarity.” Johnson, 409 F.3d at 18.

The Judgment therefore affirms a ruling never made on an issue the district court explicitly refused to consider. The Judgment’s “independent review” of probative similarity was necessarily severely limited, if not impossible, because probative similarity evidence – evidence of ‘actual copying’ - was excluded from the proceedings and, accordingly, the record by the district court’s order.

The Judgment’s finding of no evidence to infer “actual copying,” in light of the district court’s unprecedented decision to bypass discovery of such evidence, preemptively foreclosed plaintiff’s claim of infringement by reproduction, i.e., digital duplication.

b. Misapplication of Substantial Similarity

The Judgment’s finding of no evidence supporting an “inference of actual copying” – beyond overlooking the district court’s exclusion of such evidence – further misapprehends plaintiff’s compendium of unchallenged “articulable

similarities” that showed both ‘actual copying’ (despite the district court’s order) and substantial similarity. Concrete Mach., 843 F.2d at 608.

The Supreme Court in Feist reviewed its standard for protectible expression, i.e., originality, which the Court stated is “extremely low; even a slight amount will suffice.” Feist, 499 U.S. at 345. The Supreme Court clarified that even unprotectible elements – if “selected, coordinated, or arranged” with “a modicum of intellectual labor... no matter how crude, humble or obvious” – can qualify as original expression. Id. at 341, 345-346. The First Circuit recognizes originality in “features over which [authors] exercise[] discretion,” Concrete Mach., 843 F.2d at 607, and “artistic decisions, whether deliberately or intuitively made, concerning precise...juxtaposition of features.” Coquico, 562 F.3d at 69.

The Judgment overlooks facts of originality, misapplying *scènes à faire* at a superficial level detached from plaintiff’s – and defendants’ - work as a whole. The exclusion of ‘Yawkey Way’ as a ‘stock scene that flows from the idea of baseball’ misapprehends the basic tenet of copyright: original expression. Plaintiff’s expression of numerous discretionary elements *with* ‘Yawkey Way,’ do not “naturally stem[],’ Judgment at 1, from the idea of baseball.

Plaintiff’s work selected and arranged ‘Yawkey Way’ (1) in a work titled, “I Love This (Team/Town),” (2) performed in country-rock style, (3) appearing at

exactly 00:18:80, (4) for exactly 1-second, (5) at the end of narrative line 3, (6) accompanied by drums, bass, guitar, and piano, (7) played in 4/4 meter; *and so did defendants' work.*

The near identical expression of these seven combined elements in both works was not the result of “inevitable concomitants” of plaintiff’s and defendants’ efforts to produce a Red Sox baseball work. Coquico, 562 F.3d at 69. These seven discretionary elements are the raw material that, when combined, represent expression.

The following undisputed facts as to originality, probative, and substantial similarity, were misapprehended by the Judgment and district court:

1. Defendants admitted ‘access’ to plaintiff’s work. Mag Jewelry, 496 F.3d at 119 (“proof of access remains necessary” for infringement claim).

2. Defendants fail to deny infringing use of plaintiff’s work.

3. Plaintiff’s and defendants’ works are identical length: 2:38:90-sec. Id. (“[W]hen the similarities concern details of such an arbitrary character...an inference of copying may be drawn.”).

4. Both works’ title phrase – “I Love This (Team/Town)” - is unknown in the authoritative Dickson Baseball Dictionary, and therefore is not a “stereotyped form” of baseball, subject to scènes à faire. Judgment at 2.

5. Both works are the only two of 15 million American works to combining baseball with the title phrase “I Love This (Team/Town).” Feist, 499 U.S. at 358 (originality requires “minimal level of creativity”); Coquico, 562 F.3d at 69 (“idiosyncratic...combination is protectable”).

6. Both works feature Country-rock music, hardly “garden-variety... time-honored tradition” or an “inevitable concomitant of an effort to produce” a Red Sox baseball work. Feist, 499 U.S. at 362-363; Coquico, 562 F.3d at 69.

7. Both works comprise two of the only five works - out of 15 million - to combine country-rock music and the Boston Red Sox. Feist, 499 U.S. at 362; Coquico, 562 F.3d at 69 (copyright in original “juxtaposition of features”).

8. Both works share eighteen points of narrative and mechanical synchronization, accurate and precise to the tenth-second. Concrete Mach., 843 F.2d at 608 (courts dissect works for “articulable similarities” to justify finding of factual copying).

9. Both works share 96% chronological synchronization, that is, defendants’ work’s audiovisual edits match plaintiff’s work’s ‘beat,’ which is conclusive proof of ‘temp-tracking,’ as further explained below. Coquico, 562 F.3d at 67 (“probative similarity can, when accompanied by proof of access, serve as a harbinger of actual copying”) (quotation omitted).

The above is a but a representative sampling of plaintiff's undisputed facts of originality and articulable similarity, detailed in plaintiff's chronology study analyzing both works at exacting levels – to the tenth-second – the sheer precision of which precludes coincidence.

c. The Judgment Conflicts With First Circuit Decisions and the Rules of Evidence and Procedure at Summary Judgment

The Judgment affirms the improper exclusion, as 'unhelpful' affidavits filed by plaintiff's intended audience which recorded their 'spontaneous and immediate reaction' to the infringing work. Dawson, 905 F.2d at 735-736 (infringement analysis should consider "intended audience"); Sid & Marty Krofft, 562 F.2d at 1164 (courts should view works not "hypercritically or with meticulous scrutiny," but as would an average, reasonable spectator); Arnstein, 154 F.2d at 473 (question of substantial similarity directed to the "audience" for whom the work was composed).

The Judgment summarily affirms the district court's wholesale disregard of affidavits of plaintiff's intended audience, i.e., ordinary observers of baseball-sports television advertising. The affiants described their immediate impressions of the similarities between the works. "If the works in issue are directed to a particular audience, then the 'spontaneous and immediate' reaction of that audience is determinative." Dawson, 905 F.2d at 736 ("spontaneous and immediate" reaction of intended audience is determinative) (quotation omitted).

The district court incorrectly stated that the affiants were “all [plaintiff’s] friends and acquaintances,” whereas the undisputed record shows that four affiants were neither friends nor acquaintances of plaintiff. The affidavits conformed in every way to the Federal Rules of Evidence, but were ignored as “inadmissible lay opinion,” not “helpful” to the factfinder, and “not appropriate for consideration.” The district court offered no authority for this exclusion because none exists. Any issues as to the source of the affidavits – friends, acquaintances, or otherwise – should have properly gone to their weight, not admissibility.

As a procedural matter, with no facts impeaching the affiants’ credibility, the district court improperly overlooked their affidavits. According to accepted and usual evidentiary principles, the district court’s dubiety as to the affidavits should have gone to their weight, not admissibility. Dawson, 905 F.2d at 736.

2. This Appeal Involves a Matter of First Impression

a. *Temp-Tracking*

‘Temp-tracking’ is the secretive use of a musical work, without the owner’s permission, as a temporary soundtrack to guide the creation and editing of an audiovisual work. Once the draft audiovisual has been edited, or ‘cut,’ it is given to a composer, musician, or advertising ‘music house,’ typically with the temp track as its temporary ‘guide’ soundtrack, with instructions to compose an ‘original’ soundtrack

that matches the visual edits and ‘feel’ of the audiovisual, as well as the temp track itself. Temp-tracking violates the musical work owner’s right to reproduce and/or synchronize their work, pursuant to 17 U.S.C. § 106(1).

Temp-tracking is widespread in the advertising and entertainment industries, used for its expedience as compared to commissioning an original musical work at the outset, and because the practice is rarely uncovered by the temp-track’s owner. If done ‘properly,’ often with the aid of a musicologist to guide the process so as to avoid detection and, if necessary, make the final soundtrack more legally defensible, the soundtrack to the final published audiovisual will not be an obvious ‘rip off’ of the temp-track. This is even more the case where the temp-track is a relatively unknown work.

Temp-tracking is universally acknowledged by its practitioners and musicologists as copyright infringement.

b. Temp-Tracking Is An Exceptional Matter of First Impression

Temp-tracking has never been adjudicated in federal court. Based on industry journals and conferences, media reports, and insider information, this is because, when detected and raised, the infringer invariably settles quickly and quietly with the temp-track’s owner. The value of this illicit and pervasive practice to the advertising

and entertainment conglomerates is so high that they are strongly motivated to avoid an adverse ruling.

The fundamental question of whether the unauthorized use – by duplication and synchronization – of another’s work is copyright infringement answers itself. No one doubts that the practice is copyright infringement; but neither does anyone want a court to so hold. Industry-wide practices, huge amounts of money, and legal issues concerning indemnification agreements and insurance coverage are at stake.

The question here is even more basic, however. May a district court deny a plaintiff the ability to pursue a claim of infringement by temp-tracking by foreclosing - at the outset - the plaintiff’s ability to discover dispositive evidence of temp-tracking; that is, evidence of digital duplication, which *is* evidence of probative similarity?

Discovery of evidence of probative similarity, or ‘actual copying,’ is the normal First Circuit threshold step in an infringement case. In a temp-tracking (reproduction) claim, however, evidence of probative similarity in the form of factual copying of a digital music file is, by definition, infringing reproduction in violation of 17 U.S.C. § 106(1) and, therefore, not merely probative, but dispositive. Lotus, 49 F.3d at 815, n.8 (“literal similarity by definition is always a similarity as to the expression of ideas”); A&M Records, 239 F.3d at 1014 (“users who download files containing copyrighted music violate plaintiffs’ reproduction rights”).

Johnson recognized that “[p]lagiarists rarely work in the open” and that “direct proof of actual copying is seldom available.” Johnson, 409 F.3d at 18. Johnson held that plaintiff “*may* satisfy his first-step burden... *may* satisfy his obligation... [and] *must* show that copying actually occurred” to demonstrate probative similarity. Id. (emphasis supplied). In the context of infringing digital music downloads – and now in the context of temp-tracking - however, this is no longer the case and “direct proof of actual copying” is, in this type of case, the much simpler case to prove.

Accordingly, the district court’s order barring plaintiff from discovering or proving “that copying actually occurred,” not only conflicts with the First Circuit’s two-part test, it made little sense in a temp-tracking case where discovery of probative evidence, if found, would be dispositive, ending the liability phase of the case.

Instead, plaintiff was hamstrung, limited to showing that defendants reproduced, i.e., downloaded, his digital work through evidence that defendants’ final audiovisual was “substantially similar” to his musical work, via the unnecessarily restrictive, circuitous route of garnering expert evidence on substantial similarity.

In sum, the district court’s order, and Judgment’s affirmation, allows copyright claimants no right to evidence of factual copying, even in a temp-tracking case where such digital evidence is not only the threshold and likely dispositive – but possibly *only* - evidence.

3. Fraud On The Court

The Judgment conflicts with the United States Supreme Court's holding that a circuit court, has "both the duty and the power" to defend the integrity of the judicial system when confronted with undisputed evidence of fraud on the court. Hazel-Atlas 322 U.S. at 249-250; Aoude, 892 F.2d at 1119.

The Panel overlooks undisputed facts supported by a record comprised primarily of defendants' own documents and statements, showing defendants' multi-year, multi-jurisdictional, and multi-faceted scheme of false filings, misrepresentations, and concealment in this Court, the district court, and the Massachusetts Superior Court, which show exceptionally sophisticated fraud on the court of unprecedented magnitude.

Through gross fraud and manipulation of the district court, dishonest, abusive, and unethical conduct towards *pro se* plaintiff, defendants prevailed upon the district court. Plaintiff's emphatic, specific, and repeated objections were ignored entirely.

Several – but by no means all - undisputed facts as they pertain to the unchallenged – yet unadjudicated – fraud on the district court in this case:

1. The primary defendant – the claimed copyright holder of the infringing work - defaulted willfully and surreptitiously; defendants took affirmative and improper steps to conceal its default;

2. Defendants deleted the primary defendant's name, copyright notice, and protectable material relevant to a substantial similarity analysis from the primary evidence – the infringing work - misattributed its ownership to other defendants, and misrepresented the legal status and ownership of the work;

3. Counsel filed this altered evidence repeatedly under oath as a “true and correct copy” of the infringing work, yet - after being ‘caught out’ on their alterations - conceded that it was merely a “version;” defendants have yet to explain or correct their alterations or false declaration of counsel;

4. To further conceal the default of the primary defendant, an unserved, unrelated, similarly-named entity – who had actively evaded service by a U.S. Marshal – appeared, falsely claiming that it was the primary defendant;

5. A second defendant willfully and surreptitiously defaulted, in identical manner as the primary defendant, above; an unserved, similarly-named entity, which plaintiff had not sued or ever heard of, filed a fraudulent appearance and falsely claimed to be the second willfully defaulting defendant; this ‘proxy’ defendant additionally misrepresented itself, using a false name in its appearance and all subsequent filings.

CONCLUSION

This case is exceptionally important for its host of departures from the accepted

and traditional norms of judicial proceedings – fraud on the court, attorney misconduct, two willful defaults concealed by false appearances of two unserved proxies, departure from the Court’s infringement test - as to call for an exercise of this Court’s supervisory power. Additionally, as this case presents a matter of first impression that, unadjudicated, will allow the theft of the original works of untold numbers of individual artists to continue apace as an illegal cost-cutting tool for the most powerful and wealthy advertising and entertainment companies.

For the reasons stated above, the Judgment conflicts with Supreme Court and First Circuit precedent, involves an issue of exceptional importance, and overlooks and misapprehends material facts and law. Plaintiff respectfully requests a rehearing by the Panel or a rehearing *en banc*.

/s/Christopher A.D. Hunt
Christopher A.D. Hunt
MA BBO# 634808
Court of Appeals Bar #61166
THE HUNT LAW FIRM LLC
10 Heron Lane
Hopedale, MA 01747
(508) 966-7300
cadhunt@earthlink.net

Dated: February 24, 2012

CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that on February 24, 2012, I caused this Petition for Panel Rehearing and Rehearing En Banc of Appellant Samuel Bartley Steele, filed through the ECF system, to be served electronically by the Notice of Docket Activity upon the ECF filers listed below.

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

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

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

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

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

Dated: February 24, 2012

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

United States Court of Appeals For the First Circuit

No. 09-2571

SAMUEL BARTLEY STEELE, ET AL.,

Plaintiffs, Appellants,

v.

TURNER BROADCASTING SYSTEM, INC., ET AL.,

Defendants, Appellees,

THE AMERICAN SOCIETY OF COMPOSERS, ET AL.,

Defendants.

Before

Boudin, Howard and Thompson,
Circuit Judges.

JUDGMENT

Entered: February 10, 2012

Plaintiff-Appellant Samuel Bartley Steele ("Steele") appeals from the judgment of the district court granting summary judgment to the defendants on his copyright infringement claims.

After our own independent review of the record and the briefs of the parties we conclude that, essentially for the reasons stated by the district court in its August 19, 2009 memorandum and order, no reasonable juror could find either substantial similarity of expression sufficient to support an infringement claim or probative similarity of expression sufficient to support an inference of actual copying, even taking the evidence in the light most favorable to plaintiff. To the extent that there are similarities between the works at issue, many of them relate to stock scènes à faire naturally stemming from both works' subject matter, which are not subject to copyright protection. Mattel, Inc. v. Goldberger Doll Mfg. Co., 365 F.3d 133 (2d Cir. 2004) ("similarity of expression .

.. which necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form will preclude a finding of actionable similarity.") citing 1 Nimmer on Copyright s 143.11 at 626.2. The remaining similarities are not substantial, and the differences between the works are fundamental and extensive.

Accordingly, entry of summary judgment with regard to Steele's copyright infringement claim was appropriate. Steele's remaining claims of error are unconvincing, and the judgment of the district court is affirmed.

By the Court:

/s/ Margaret Carter, Clerk.

cc:

Christopher D. Hunt
Clifford M. Sloan
Kenneth A. Plevan
Matthew Joseph Matule
Christopher G. Clark