UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SAMUEL BARTLEY STEELE and BART STEELE PUBLISHING,	:	
Plaintiffs,	:	Civil Action
v.	:	No. 08-11727-NMG
TURNER BROADCASTING SYSTEM, INC., TIME WARNER CORPORATION, JON BONGIOVI, RICHARD SAMBORA, WILLIAM FALCONE, THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, FOX TELEVISION NETWORKS, MAJOR LEAGUE BASEBALL/MLB PRODUCTIONS, A&E/AETV, BON JOVI, AEG LIVE, MARK SHIMMEL MUSIC, VECTOR MANAGEMENT, ISLAND RECORDS/ISLAND DEF JAM RECORDS, AGGRESSIVE MUSIC/SONY ATV TUNES, BON JOVI PUBLISHING, UNIVERSAL MUSIC PUBLISHING GROUP, UNIVERSAL POLYGRAM, PRETTY BLUE SONGS and THE BIGGER PICTURE CINEMA CO.,	:	**ORAL ARGUMENT REQUESTED**
Defendants.	:	

THE MOVING DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants (i) Time Warner Inc. (misidentified in the Complaint as "Time Warner Corporation"), (ii) John Bongiovi (misidentified in the Complaint as "Jon Bongiovi"), (iii) Richard Sambora, (iv) William Falcone, (v) Major League Baseball Properties, Inc. (misidentified in the Complaint as "Major League Baseball/MLB Productions"), (vi) A&E Television Networks (misidentified in the Complaint as "A&E/AETV"), (vii) Bon Jovi (which is a United States Federal trademark, not a legal entity), (viii) AEG Live LLC (misidentified in the Complaint as "AEG Live"), (ix) Vector

2 LLC (misidentified in the Complaint as "Vector Management"), (x) Aggressive Music (a d/b/a of Defendant Richard Sambora), (xi) Bon Jovi Publishing (a d/b/a of Defendant John Bongiovi), and (xii) Pretty Blue Songs (a d/b/a of Defendant William Falcone) (collectively the "Moving Defendants") hereby move for an order dismissing the Complaint with prejudice.

The grounds for this motion are set forth in the accompanying memorandum of law.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(D), the Moving Defendants respectfully request oral argument on this motion.

LOCAL RULE 7.1 CERTIFICATION

I, Scott D. Brown, hereby certify that on December 8, 2008 I conferred with the Plaintiff in a good faith effort to resolve or narrow the issues herein but could not obtain his agreement to the specific relief requested in this motion.

Dated: December 8, 2008

/s/ Scott D. Brown
Scott D. Brown

Dated: December 8, 2008
Boston, Massachusetts

Respectfully submitted,

/s/ Matthew J. Matule

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CERTIFICATE OF SERVICE

I, Matthew J. Matule, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on December 8, 2008.

Dated: December 8, 2008

/s/ Matthew J. Matule
Matthew J. Matule

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Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF
THE MOVING DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

In his Complaint, Plaintiff Samuel Bartley Steele ("Steele") (also known as Bart Steele and doing business as Bart Steele Publishing) sets forth two causes of action: (i) alleged copyright infringement and (ii) an alleged violation of the Lanham Act. Both fail to state a claim and should be dismissed. First, the copyright claim fails because the mandatory side-by-side comparison of the works at issue in this case demonstrates that no factual issue can be raised as to the essential element of substantial similarity. Second, the Lanham Act "palming-off " claim fails because it is based on the allegation that Steele did not receive authorship or artistic credit for a particular work (the province of the Copyright Act), not that there is confusion with respect

[1] As is noted, most of the Moving Defendants are identified incorrectly or incompletely in the Complaint. Those misidentifications are, however, not contested for purposes of this motion to dismiss.

to the origin, sponsorship, or approval of goods or services (the province of the Lanham Act). Consequently, the Complaint should be dismissed in its entirety.

According to his Complaint, Steele is a singer, songwriter, music publisher, and music producer who resides in Chelsea, Massachusetts and performs with several bands throughout New England. (Compl. ¶ 1.) In September 2004, he composed "(Man I Really) Love this Team," a "love song" to his favorite baseball team, his "beloved Red Sox," (the "Steele Song"). (Id. ¶ 6.)

The Steele Song was intended to both celebrate the team's anticipated successes in its post-season march to the World Series championship and provide fans with a "sing along" to urge the Red Sox on to victory. (Id.) Indeed, the lyrics are brimming with references well-known certainly to Sox fans (and no doubt to knowledgeable baseball fans nationwide), such as "Yawkey Way," "RemDawg," "Lansdowne Street," and "Pesky's Pole." (See Ex. I to the Complaint, a CD-Rom that contains, among other things, a transcript of the lyrics to the Steele Song, also submitted for the convenience of the Court as Exhibit 10 to the Transmittal Declaration Of Scott D. Brown In Support Of The Moving Defendants' Motion To Dismiss ("Brown Decl.").)

Plaintiff alleges that after the Steele Song was completed, he and his bands, the "Bart Steele Band and Steele's other band, The Gyromatics," played it outside Fenway Park, and also handed out thousands of free copies of the song (CDs and sheet music), among other efforts to distribute and popularize it. (Compl. ¶¶ 6-8.) Plaintiff subsequently registered the Steele Song with ASCAP, and in 2006 applied for and received a federal copyright registration, Reg. No. PAu3-052-330. (Id. ¶¶ 10-12.) Steele also alleges that he copyrighted at that time a

"derivative" version of his song entitled "Man I Really Love This Town" (the "Derivative Song").[2] (Id. ¶ 9.)

In 2006, Turner Broadcasting System, Inc. ("Turner") acquired the rights to televise on cable television the Major League Baseball post-season playoff series, starting with the 2007 postseason. (Id. ¶ 14.) To promote the 2007 postseason (and to promote Turner's role as the "new home of the postseason"), Turner allegedly created an "ad" that was released on August 31, 2007 and ran through the duration of the 2007 baseball postseason. (Id. ¶ 15.) (That work will be referred to herein as the "Turner Promo.")[3] The Turner Promo combined (i) a song entitled "I Love This Town" by Bon Jovi, the world-famous band (the "Bon Jovi Song"),[4] (ii) video footage of the Bon Jovi band performing the 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 on game days.

In his Complaint, Steele appears to allege that either the Bon Jovi Song or the Turner Promo (or both) were copied from his songs, and thus are allegedly infringing on Steele's copyright. (See id. ¶¶ 28-29.) Steele also asserts that the Bon Jovi Song was distributed to the public without giving Steele proper credit as the "ghostwriter," allegedly a "palming-off" violation under the Lanham Act. (Id. ¶ 30.)

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[2] Though Steele alleges that his copyright registration includes the Derivative Song, the U.S. Copyright Office deposit copy shows otherwise. (Brown Decl. Ex. 4.) Steele, accordingly, does not have a right to bring a claim for copyright infringement of any expressive elements found only in his derivative version, and not in the original, registered song. See 17 U.S.C. § 411; Johnson v Gordon, 409 F. 3d 12, 20 (1st Cir. 2005).

[3] As Steele has not included a copy of the allegedly infringing Turner Promo in his Complaint exhibits, it is submitted with the Brown Declaration as Exhibit 1 thereto.

[4] The Bon Jovi Song is part of the Bon Jovi album "Lost Highway." (Compl. ¶¶ 17, 22.)

Steele's claims are legally insufficient on the face of the Complaint, and should be dismissed. First, Steele's copyright claim should also be dismissed as a matter of law. A side-by-side comparison of the works of authorship at issue shows such dramatic dissimilarities that there is as a matter of law no factual question regarding the essential copyright-infringement element of substantial similarity, as to either lyrics or music. See Walker v. Time Life Films, Inc., 784 F.2d 44, 46-48 (2d Cir. 1986) (affirming grant of summary judgment to defendants based on the district court's review of the two works at issue and its finding that "no reasonable observer" could conclude that there was substantial similarity between the book and the movie). See also Tracy v. Winfrey, 282 F. App'x 846, 847 (1st Cir. 2008) (unpublished) (affirming motion to dismiss under Rule 12(b)(6) where "'complaint fails to allege facts sufficient to support a claim of copyright infringement'" (quoting the trial court)); Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015 (1st Cir. 1988).

Second, Steele's palming-off claim is precluded by the Supreme Court's decision in Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003). In that case, the Court held that an author could not assert a palming-off claim on the theory that the author was not properly credited on an unauthorized work, and that to conclude otherwise would improperly confuse the separate and distinct goals of the copyright statute and the trademark statute.

Third, the Derivative Song has not been registered, and thus all infringement claims based on alleged substantial similarity with elements found only in the Derivative Song and not in the registered Steele Song should be dismissed for that reason alone. 17 U.S.C. § 411.

Finally, Steele's claim for $400 billion in copyright statutory damages is directly contrary to the plain language of the copyright statute and should be stricken from the Complaint.

LEGAL PRINCIPLES GOVERNING THE COURT'S ANALYSIS ON A MOTION TO DISMISS

In addressing a motion to dismiss under Rule 12(b)(6), the Court must construe the Complaint in the light most favorable to the plaintiff, and take all factual allegations therein as true. Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 16 (1st Cir. 1998).[5] To survive a motion to dismiss, however, allegations "must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007). See also Banco Santander de Puerto Rico v. Lopez-Stubbe (In re Colonial Mortgage Bankers Corp.), 324 F.3d 12, 15 (1st Cir. 2003) (on motion to dismiss the court need not credit bald assertions or unsupportable conclusions).

Further, as the Supreme Court recently stated, "courts must consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2509 (2007); Fudge, 840 F.2d at 1015 ("'when plaintiff fails to introduce a pertinent document as part of his pleading, defendant may introduce the exhibit as part of his motion attacking the pleading'" (citation omitted)); see also Beddall, 137 F.3d at 17 (First Circuit affirmed dismissal of complaint based on district court's consideration of a trust agreement, even though that document was not attached to the complaint, without converting motion to one for summary judgment).

Applying those principles here, the Court should consider, in addition to the facts alleged in the Complaint and the documents included as exhibits to the Complaint, materials

[5] By citing in support of this motion to the facts alleged by the Plaintiff, the Moving Defendants do not concede or acknowledge their accuracy, and reserve all rights to contest such facts if the Complaint is not dismissed.

incorporated by reference in the Complaint which constitute an essential part of the allegations, including:

- A video of the Turner Promo. (Brown Decl. Ex. 1.)
- Transcripts of the lyrics of the Bon Jovi Song as they appear on the Turner Promo (Brown Decl. Ex. 3) and on the Bon Jovi album Lost Highway (Brown Decl. Ex. 2.)
- The U.S. Copyright Office deposit materials for the Steele copyright. (Brown Decl. Ex. 4.)

For the convenience of the Court in making lyrics comparisons, Brown Declaration Exs. 5-6 present the subject lyrics in side-by-side formats.[6]

Because this additional material is central to the Complaint's allegations, it properly can be and should be considered on this motion. See, e.g., Fudge, 840 F.2d at 1015 (affirming district court's grant of motion to dismiss and consideration of an article that had not been included with complaint).

I. STEELE HAS FAILED TO STATE A CLAIM FOR COPYRIGHT INFRINGEMENT

While it is unclear, the Complaint seems to suggest that Steele is basing his copyright infringement claim on the following: (1) that the music and lyrics of the Bon Jovi Song allegedly infringe the Steele Song and/or his Derivative Song; and (2) that the Turner Promo allegedly infringes one or both of these songs.[7] To succeed on his claim, Steele would have to prove: (1) ownership of a valid copyright, and (2) unauthorized copying of constituent elements of the work that are original. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361

[6] In addition, transcripts from Steele's Ex. I CD-Rom are also attached to the Brown Declaration.

[7] Steele's copyright registration does not, as noted, include the Derivative Song (Brown Decl. Ex. 4) and he accordingly cannot rely on expressive elements, if any, found only in his derivative version. Even if, however, the Derivative Song is evaluated as if registered, as it is herein, Steele's complaint still fails to state a copyright infringement claim.

(1991); Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 813 (1st Cir. 1995); see also Johnson v. Gordon, 409 F.3d 12, 17 (1st Cir. 2005). Steele's copyright claim fails the second prong of this test as a matter of law.

In order to state a legally sufficient claim under the second prong, a colorable claim that actual copying occurred must be made. In addition, there must be more than a speculative claim that the copying, if any, was so extensive that it resulted in the works being "substantially similar." Johnson, 409 F.3d at 18; Lotus, 49 F. 3d at 813. Mere allegations of copying alone are not sufficient to state a claim, because not all copying amounts to copyright infringement. Feist, 499 U.S. at 361. For example, copyright law does not protect ideas or concepts. See 17 U.S.C. § 102(b); Johnson, 409 F.3d at 19. Nor does copyright law protect unoriginal expression, including expression that is either (i) commonplace, or (ii) "*scène a faire*" -- "stock" characters, settings, or other standard elements that follow naturally or are indispensable to a particular theme or treatment of topic. See CMM Cable Rep, Inc. v. Ocean Coast Props., Inc., 97 F.3d 1504, 1522 (1st Cir. 1996).

In comparing works to determine whether they are substantially similar, the ordinary observer -- or "ordinary listener" -- test is used. Johnson, 409 F.3d at 18. A work is considered substantially similar if, after reading, listening, or viewing the protectible elements of the works at issue side by side, an ordinary person of reasonable attentiveness would conclude that the alleged infringer appropriated the plaintiff's protectible expression. See Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 33 (1st Cir. 2001); Johnson, 409 F.3d at 18.

Importantly, before the 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 unprotected ideas, unoriginal expressions, and public domain material. Yankee Candle, 259 F.3d at 34;

Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 608-09 (1st Cir 1988). Once all of the non-protected elements are filtered out, the remaining protectible aspects of a copyright owner's work are compared side by side to the allegedly infringing work to determine whether any alleged copying appropriated elements protected by copyright law. See Yankee Candle, 259 F.3d at 34; Concrete Mach., 843 F.2d at 608-09; Johnson, 409 F.3d at 18-19.

Applying these standards to the case at bar -- regardless of whether copying is assumed for the purposes of this motion -- the Complaint fails to state a cognizable copyright claim because there can be no finding of sufficient material or meaningful similarity between protected elements of the Steele Song or the Derivative Song, on the one hand, and the Bon Jovi Song and/or the Turner Promo on the other, to constitute the requisite showing of substantial similarity.

A. Steele Has Failed To State A Claim Of Infringement As To The Bon Jovi Song

1. Music Comparison

The legal insufficiency of any claim Plaintiff may be making as to the musical elements of the Steele Song compared to the Bon Jovi Song are evident from comparing the two under the ordinary listener standard.[8]

Indeed, Steele's own submissions recognize and acknowledge a fundamental difference in the music in the Bon Jovi Song and the Steele Song. Steele attaches to the Complaint a "musicology" analysis that does not even attempt to assert that the music in the Steele Song and the Bon Jovi Song are substantially similar. (See Compl. ¶ 12, Ex. C.) Steele also attaches to the Complaint a Boston Magazine article stating that "Bon Jovi's track was country-pop glossy and [Steele's] was hoe-down gritty." (See id. Ex. G at 85.) These exhibits to

[8] It is unclear whether any such claim is even asserted.

Steele's Complaint confirm that there is no substantial similarity between the Steele Song and the Bon Jovi Song based on an analysis of the music.[9]

2. Lyrics Comparison

As to the expression contained in the lyrics of the Steele Song and the Bon Jovi Song, the Court also can readily see that there is no shared protectible expression.

First, none of the elements that can be said to be similar in any way are protectible. Plaintiff's lyrics for the Steele Song cheer the Red Sox on to victory, providing numerous, easily identifiable references to the Red Sox and Fenway Park (e.g., "Pesky's Pole"), and invite the crowd to cheer along: "Here we go Red Sox, here we go." The chorus commands: "Now get up off your seats, Everybody scream, Man I really love this team." (Brown Decl. Ex. 10.)

The Derivative Song uses many of the same lyrics found in the Steele Song but replaces the word "town" for "team" and leaves blank spots to fill in words particular to other teams in baseball or other sports in other towns.[10] (See Brown Decl. Ex. 9.) As a template, the Derivative Song is a mere "concept," and concepts such as these are expressly excluded from copyright protection. See 17 U.S.C. § 102(b). Indeed, even the Complaint simply characterizes the Derivative Song as a "marketing concept." (Compl. ¶¶ 9, 15.)

The lyrics to the Bon Jovi Song differ sharply from the lyrics of the Steele Song (and the Derivative Song). The Bon Jovi lyrics describe nostalgia for an unidentified hometown

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[9] No music comparison with the Derivative Song need be made, as Steele has submitted no evidence to indicate that the Derivative Song was ever recorded, nor does he assert in the Complaint that it was.

[10] Although the Complaint does not (and could not) raise any claims concerning the Derivative Song, the Moving Defendants nevertheless identify the significant legal hurdles that would preclude any such claim. The Moving Defendants expressly reserve any and all rights in connection with any yet-to-be-made claims concerning the Derivative Song.

and references memories and feeling at home in "this town." There is not a single reference to baseball, or even to Boston, in the Bon Jovi Song. (Brown Decl. Exs. 2-3.)

Indeed, the only lyrical aspects of the songs at issue that are asserted to be similar in Plaintiff's Complaint and exhibits are: (1) the phrases "Man, I really love this team/town" (Steele Song) and "That's why I love this town" (Bon Jovi Song); (2) Plaintiff's "Here we go Red Sox" as compared to Bon Jovi's "Come on now, here we go again, Say hey, Say yeah;" (3) the rhyme of "round" with "town" in the Derivative Song; and (4) the claimed structure of the rhymes. None of those alleged similarities are material as a matter of law.

For one, none of these lyrics are protectible expression in and of themselves. The lyrics "I love this team" and "I love this town" are common clichés, not deserving of protection. The Court can take judicial notice of the results of searches of the ASCAP and BMI online song databases (available at http://www.ascap.com/ace/search.cfm?mode=search and http://repertoire.bmi.com/startpage.asp, respectively),[11] which reveal that there are nearly 100 songs that begin with the phrase "I love this ___." (See Brown Decl. Ex. 7 (ASCAP database, 32 songs), Ex. 8 (BMI database, almost 100 entries).)[12] Other songs beginning with the phrase "I love this" on the ASCAP search (Brown Decl. Ex. 7) are, for example: "I love this game" (numbers 9-11), "I love this place" (numbers 23 through 26) and "I love this song" (numbers 27 and 28). On the BMI search (Brown Decl. Ex. 8), eight other songs appear besides the Bon Jovi Song that are titled "I love this town."

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[11] See, e.g., O'Toole v. Northrop Grumman Corp., 499 F.3d 1218, 1224-25 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web."); Coleman v. Dretke, 409 F.3d 665, 667 (5th Cir. 2005) (per curiam) (taking judicial notice of information on website); Schaffer v. Clinton, 240 F.3d 878, 885 n.8 (10th Cir. 2001) (taking judicial notice of information available on online political website).

[12] The Bon Jovi Song appears at number 32 on the ASCAP database, and it also appears on the BMI list. The Steele Songs do not appear on these lists because they start with the word "Man."

Steele also cannot claim copyright exclusivity on lyrics that contain such commonly used words. Johnson, 409 F.3d at 24 ("clichéd language and expressions that convey ideas generally expressed in a limited number of stereotypical ways are outside the scope of copyright protection"). See, e.g., Matthews v. Freedman, 157 F.3d 25, 28 (1st Cir. 1998) ("Someone who loves me went to Boston" unprotectible); Johnson, 409 F.3d at 24 ("You're the One for Me" unprotectible); CMM Cable Rep, 97 F.3d at 1520 ("If you're still 'on the clock' at quitting time" unprotectible).

Similarly, a key element in the Steele Song: "Here we go, [team name], Here we go" is an iconic cheer commonly performed at baseball and football games throughout the country. Bon Jovi, by contrast, uses the words "Here we go" in a different context, and in only one line: "Come on now, here we go again, say hey, say yeah." The rhyming of "town" and "round" (see Compl. ¶¶ 12, 15) is also used in countless songs in American music, including the traditional childhood favorite "Wheels on the Bus" (lyrics: "the wheels on the bus go round and round, all through the town") and "The Sidewalks of New York" (lyrics: "East Side, West Side, all around the town"), copyrighted 1894. The use of a rhyming pair also is not protectible because copyright law provides no protection to "fragmentary words and phrases." CMM Cable Rep, 97 F. 3d at 1519-20.

Finally, Steele appears to assert that the structure of part of his song was copied, i.e., "the verses that begin with 2 pairs of rhyming lines . . . followed by a new section of 3 rhymes." (See Compl. Ex. C.) This assertion too fails as a matter of law because a rhyming convention alone is simply too abstract an idea and too commonplace to be copyrightable. See Johnson, 409 F.3d at 23-24 (stereotypical building blocks of musical compositions lack

originality and are unprotectible). Finding substantial similarity on that basis would be akin to saying all haikus, or all sonnets, were substantially similar because of their common structure.

In sum, none of the lyrics that Plaintiff cites as the basis of his argument regarding substantial similarity constitutes copyrightable expression. As such, they must be filtered out (i.e., stricken) even before conducting any side-by-side comparison. (Indeed, the alleged similarities are so insignificant when the works are viewed as a whole, that the works cannot be said to be substantially similar even before filtration.) Accordingly, there is no basis for finding a cognizable copyright infringement claim based on an alleged similarity of lyrics.

B. Steele Has Failed To State A Claim Of Infringement As To The Turner Promo

As noted above, the Turner Promo was created by Turner in connection with its promotion of the 2007 Major League Baseball postseason. The Turner Promo combines (i) the Bon Jovi Song, (ii) video footage of the Bon Jovi band performing the 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 on game days.

The gravamen of Plaintiff's allegations concerning the Turner Promo are that alleged similarities between his song and the Turner Promo indicate that the latter must have been "written and recorded to fit with the visual images originally suggested and selected by 'cues' from Bart's song." (Compl. ¶ 16.) Steele alleges that "striking similarities" are apparent when one uses his song for the Turner Promo soundtrack, in place of the Bon Jovi Song. (Compl. ¶ 16, Ex. I.) To try to illustrate this, Steele created a video (submitted to the Court on Exhibit I) that removes the Bon Jovi Song from the Turner Promo and replaced it with his Steele Song.

Even Plaintiff's Exhibit I video comparison shows that there are very few places where the Turner Promo images and Steele's lyrics actually line up, especially considering that

both works are about the baseball postseason. Notably, in Steele's Exhibit I video comparison, his song does not start when the Turner Promo starts, nor does his song end at the same time as the Turner Promo. Accordingly, no inference regarding infringement can be drawn from the fact that: (1) the Turner Promo shows an image of a street sign of Yawkey Way in proximity to the time one hears Plaintiff sing "Word is out on Yawkey Way" in his overlaid song; (2) there is a very brief shot of Red Sox fans (along with several other different images) near the time Plaintiff in his overlaid music sings "Here we go Red Sox, here we go;" and (3) where the Turner Promo shows Red Sox fans at Fenway cheering during the lyrics "Those Fenway fans begin to cheer, Get up off your seats, Everybody scream."[13]

With respect to Steele's allegations concerning Yawkey Way, as a name it is not protectible by copyright. CMM Cable Rep, 97 F.3d at 1520. Additionally, it is such a famous reference to one of the boundaries of Fenway Park that a reference to it in the context of baseball is *scène a faire*. See, e.g., Walker, 784 F.2d at 50 (explaining that depictions of police life in the South Bronx necessarily include images of "drunks, prostitutes, vermin, and derelict cars" which are therefore unprotectible); Hoch v. MasterCard Int'l Inc., 284 F. Supp. 2d 1217, 1223 (D. Minn. 2003) (highway signs, landmarks for geographic identification, etc. on baseball stadium road trip found to be *scènes a faire*).

In a similar vein, the images of cheering fans, standing and screaming, that Plaintiff might say his lyrics evoke, are so entwined with the idea of rooting for one's favorite team (whatever the sport), especially during the playoffs, that those images are also *scènes a faire*. In addition, given that (i) over one-third of the lines in the Steele Song exhort fans to cheer

[13] Steele alleges that a "careful review" of the visual images in the Turner Promo shows that the Promo contains "mostly Red Sox and Boston images" (Compl. ¶ 12), but this is inconsistent with the Promo, as a viewing of the Promo shows.

or describe fans cheering, and (ii) there are many "crowd shots" in the Turner Promo, it is not surprising that Steele's lyrics about cheering and the Turner Promo's images of cheering occasionally overlap. Moreover, since the entirety of the Steele Song relates to the Red Sox, it would be difficult to avoid having the Red Sox images in the Turner Promo appear in temporal proximity to some lyric about the Red Sox in the Steele Song, and certainly Turner was within its rights to have included prominent visuals of the Red Sox -- at that time perhaps the preeminent team in baseball and actually in the 2007 postseason -- in its promotional piece.

Finally, the Turner Promo is comprised of images of the Bon Jovi band playing "I Love This Town" at an outdoor concert interlaced with footage in and around MLB stadiums, of baseball players making great plays (e.g., pitching, hitting home runs, sliding into base) and "high-fiving" each other, and fans cheering. Many of the images are taken from games at well-known stadiums around the country and include recognizable visuals of the Twins, Padres, Phillies, Tigers, Braves, Yankees, Brewers, Mets, Indians and Angels, as well as the Red Sox. No rights of Steele are infringed by using such footage in a video promoting the Major League Baseball postseason.

Directly contradicting Steele's argument that the Turner Promo was made from his song, the Turner Promo is timed to precisely coincide with lyrics in the Bon Jovi Song. For example:

- When Bon Jovi sings "friendly face" there is a close-up of a smiling face;
- When he sings "walkin' on this street," the video shows crowds walking;
- "pounding underneath my feet" is accompanied by a close-up of stomping feet;
- "keeps spinning round" is matched with a spinning aerial shot of the stadium;
- Where Bon Jovi sings "down, down, down" there are three coinciding images of ball players sliding into bases;

- When he sings "shoutin' from the rooftops," there are fans shouting from high up in the bleachers;
- With "dancin' in the bars," the visual shows images of people dancing in the stadium; and
- A great catch is timed perfectly to "you got it" lyrics.

These match-ups show that the Turner Promo visuals were "cued" from the Bon Jovi Song, not the lyrics in the Steele Song.

In sum, there are no protectible elements in the Steele Song (or the Derivative Song) that are sufficiently similar to elements in the Turner Promo that rise to the level of protectible expression. See McMahon v. Prentice-Hall, Inc., 486 F. Supp 1296, 1304 (E.D. Mo. 1980) (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").

II. STEELE'S LANHAM ACT "PALMING-OFF" CLAIM ALSO FAILS AS A MATTER OF LAW

A. Nature Of The "Palming-Off" Claim

As noted, Steele's second claim for relief is styled "Palming Off/Lanham Act Violation." (Compl. ¶ 30.) He alleges that the Turner Promo and the Bon Jovi Song were distributed "without giving credit to the true ghostwriters," including Steele. (Id.) These actions, it is alleged, constituted "palming off Bart's work as the work of another -- Bon Jovi -- in violation of the Lanham Act." (Id.)[14]

[14] Although Steele frames his false designation of origin claim as a case of "palming off," it is more accurately described as an allegation of "reverse passing off." See, e.g., Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. at 27 n.1 (palming off, or passing off, occurs when a "producer misrepresents his own goods or services as someone else's"; reverse passing off occurs when a "producer misrepresents someone else's goods or services as his own").

Section 43(a) of the Lanham Act proscribes conduct which causes confusion, mistake, or deception "as to the origin, sponsorship, or approval" of goods or services. 15 U.S.C. § 1125(a). In Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003), the Supreme Court held that the "origin of goods" aspect of the Lanham Act refers to "the producer of the tangible goods that are offered for sale, and not . . . the author of any idea, concept, or communication embodied in those goods." Id. at 37 (emphasis added). The Court noted that to conclude otherwise would improperly "create a species of mutant copyright law." Id. at 34.

B. Steele's Palming-Off Claim Is Barred By The Supreme Court's Holding In Dastar

Regardless of how it is characterized, Steele's Lanham Act claim falls squarely within the reasoning of Dastar. In that case, defendant repackaged plaintiff's "Crusade in Europe" television series, which had fallen into the public domain, and sold it as a video tape set entitled "World War II Campaigns in Europe." Id. at 26-27. Defendant removed all identifying information related to plaintiff's series and the underlying book, and changed the title sequences, credits and narration, but otherwise left the series intact with respect to the video images used. Id. Plaintiff claimed that selling these repackaged videos "without proper credit" constituted false designation of origin under the Lanham Act. Id. at 27. The Supreme Court squarely rejected this argument, reasoning that "origin" referred to the producer of the tangible goods, not the creator of the underlying work. Id. at 31. Because the defendant was the true originator of the goods it sold, plaintiff had no valid claim for false designation of origin under the Lanham Act. Id. at 38.

Here, Steele makes no claim to have produced and put into circulation the Turner Promo, nor does he claim to be the manufacturer or distributor of the Bon Jovi Lost Highway CD, nor to be an actual performer on that album or of the Bon Jovi Song. Rather, as did the plaintiff

in Dastar, Steele claims to have been the true artist whose work was allegedly copied without permission.

The Dastar principles have been uniformly applied in cases in this Circuit disallowing artist/author palming-off claims of the type asserted here by Steele. For example, in Zyla v. Wadsworth Div., 360 F.3d 243, 251-52 (1st Cir. 2004), the First Circuit, citing Dastar, affirmed the dismissal of plaintiff's claim for false designation of origin under the Lanham Act where the claim was based on defendant's alleged failure to properly acknowledge plaintiff's contribution to the revised edition of a nutrition textbook. Similarly, in Boston International Music, Inc. v. Austin, No. 02-12148, 2003 U.S. Dist. LEXIS 16240, at *3-5 (D. Mass. Sept. 12, 2003), the court dismissed a false designation of origin claim under the Lanham Act that had alleged that the defendant had failed to identify plaintiff as a contributor to a song on which defendant allegedly sampled plaintiff's musical composition.[15] See id.

In summary, because Steele is alleging that he failed to get "origin" credit for creative content, his Lanham Act "passing-off" claim is contrary to clear, controlling authority and should be dismissed.

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[15] See also Santa Rosa v. Combo Records, 376 F. Supp. 2d 148, 151-52 (D.P.R. 2005), (dismissing false designation of origin claim that had been based on defendant's failure to give credit to plaintiff as a singer on defendant's album), aff'd, 471 F.3d 224 (1st Cir. 2006), cert. denied, 127 S. Ct. 2265 (2007); Robles Aponte v. Seventh Day Adventist Church Interamerican Div., 443 F. Supp. 2d 228, 230-31 (D.P.R. 2006) (denying plaintiff's request to amend the complaint and add a false designation of origin claim as "futile" under Dastar, because claim was based on the unauthorized editing and publishing of plaintiff's work); Johnson v. Gordon, No. 99-10534, 2004 U.S. Dist. LEXIS 28759, at *4, *34-38 (D. Mass. Mar. 15, 2004) (the court, citing Dastar, granted summary judgment for defendant on plaintiff's false designation of origin claim for failure to give him credit as a songwriter on defendant's album packaging), adopted by No. 99-10534, 2004 U.S. Dist LEXIS 28760 (D. Mass. Sept. 30, 2004), aff'd, 409 F.3d 12 (1st Cir. 2005).

III. STEELE'S REQUEST FOR $400 BILLION IN STATUTORY DAMAGES FOR COPYRIGHT INFRINGEMENT SHOULD BE DISMISSED

In a paragraph labeled "RELIEF REQUESTED," Steele asserts that he is entitled to recover $100,000, the "statutorily authorized amount," for each of the nearly four million copies of the "Lost Highway" album Bon Jovi has sold, for a total statutory damages claim of almost $400 billion. (Compl. ¶ 31.) By asserting a right to recover the "statutorily authorized amount," Steele is presumably asserting a claim for damages under Section 504(c) of the Copyright Act, 17 U.S.C. § 504(c), which allows a copyright owner who establishes infringement to recover, in lieu of actual damages, statutory damages of up to $150,000 for willful infringement "with respect to any one work."

However, since that statute specifically limits statutory damages to a single recovery for "any one work" infringed, Steele has no right to claim statutory copyright damages for $100,000 (or indeed for any amount) for each sale of the Bon Jovi album. See § 504(c) (emphasis added). Rather, if pleaded properly, Steele could only seek up to $150,000 for willful infringement of each "work." Here, Steele acknowledges that he has only one copyright. (See Compl. ¶ 12 (citing copyright certificate PAu3-052-330, dated June 30, 2006).) While Plaintiff alleges that his registration covered both the Steele Song and the Derivative Song (id.), the copyright statute also specifically states that, for the purposes of the assessment of statutory damages, "all the parts of a compilation or derivative work constitute one work." § 504(c).[16]

That Steele's "RELIEF REQUESTED" claim for statutory copyright damages is legally insufficient, and should be stricken from the Complaint, is further confirmed by case law applying § 504(c). For example, in Venegas-Hernandez v. Sonolux Records, 370 F.3d 183 (1st

[16] Moreover, as noted, there is no reference in the deposit material to the derivative version. (Brown Decl. Ex. 4.)

Cir. 2004), the First Circuit cited the reasoning of the applicable Copyright Act House Report, which states that a "'single infringer of a single work is liable for a single amount . . . no matter how many acts of infringement are involved[.]'" Id. at 191 (emphasis added) (citation omitted). That this limitation also applies to situations with multiple alleged infringers who are allegedly jointly and severally liable was confirmed in Robles Aponte v. Seventh Day Adventist Church Interamerican Div., 443 F. Supp. 2d 228, 231-32 (D.P.R. 2006) (citing § 504(c) and holding that plaintiff's recovery is limited to a single statutory award "regardless of the number of defendants" as long as they "acted jointly and severally").

For these reasons, Steele's claim for statutory copyright damages in the amount of "almost $400 billion" should be ordered stricken from the Complaint.

CONCLUSION

For the foregoing reasons, the Court should grant the Moving Defendants' motion to dismiss the Complaint in its entirety.

Dated: December 8, 2008
Boston, Massachusetts

Respectfully submitted,

/s/ Matthew J. Matule

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CERTIFICATE OF SERVICE

I, Matthew J. Matule, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on December 8, 2008.

Dated: December 8, 2008

/s/ Matthew J. Matule
Matthew J. Matule