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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

BEFORE: THE HONORABLE NATHANIEL M. GORTON

HEARING ON MOTIONS TO DISMISS

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

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

1 APPEARANCES:

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5 - and -
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
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By: Matthew J. Matule, Esq.,
9 Christopher G. Clark, Esq.,
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10 Jason Dozier, Esq.
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On behalf of the Defendants excluding Kobalt Music
12 Publishing America, Inc.

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15 On behalf of the Defendant Kobalt Music Publishing
America, Inc.
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P R O C E E D I N G S

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

MR. STEELE: I'm sorry?

THE COURT: Would you identify yourself for the record.

MR. STEELE: Samuel Bartley Steele, pro se.

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

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

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

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

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

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

03:50 THE COURT: Mr. Matule.

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

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

THE COURT: In the back row.

MR. CLARK: Christopher Clark, Skadden, Arps.

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

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

4 THE COURT: Mr. Dozier. And finally?

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

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

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

13 MR. STEELE: No, sir.

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

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

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

24 MR. STEELE: Yes, your Honor.

25 THE COURT: That means you are entitled to represent

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

5 MR. STEELE: Thank you.

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

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

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

18 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. SLOAN: That was not copyrighted.

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

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

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

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

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

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

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

1 substantial similarity?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Honor --

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

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

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

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

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

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

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

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

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

16 THE COURT: Fair enough, Mr. Cloherty.

17 Now I'll hear from Mr. Steele.

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

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

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

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

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

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

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

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

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

24 MR. STEELE: Yes.

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

1 derivative claim, right?

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

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

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

19 And does an ordinary listener hear similarities?

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

25 And, secondly --

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MR. STEELE: Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 THE COURT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. STEELE: Yup.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 resolve it as soon as possible. Yes.

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

04:32

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

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

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C E R T I F I C A T E

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

/s/ Cheryl Dahlstrom

Cheryl Dahlstrom, RMR

Official Court Reporter