

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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SAMUEL BARTLEY STEELE,	:		
BART STEELE PUBLISHING, and	:		
STEELE RECORDZ,	:		
	:	Plaintiffs,	Civil Action
v.	:		No. 08-11727-NMG
	:		
TURNER BROADCASTING SYSTEM, INC.,	:		** LEAVE TO FILE
MAJOR LEAGUE PROPERTIES, INC.,	:		GRANTED 5/13/09**
TIME WARNER, INC., ISLAND DEF JAM	:		
RECORDS, FOX BROADCASTING	:		
COMPANY, JOHN BONGIOVI,	:		
INDIVIDUALLY AND D/B/A BON JOVI	:		
PUBLISHING, RICHARD SAMBORA,	:		
INDIVIDUALLY AND D/B/A AGGRESSIVE	:		
MUSIC, WILLIAM FALCON,	:		
INDIVIDUALLY AND D/B/A PRETTY	:		
BLUE SONGS, UNIVERSAL-POLYGRAM	:		
INTERNATIONAL PUBLISHING, INC.,	:		
SONY/ATV TUNES LLC, KOBALT MUSIC	:		
GROUP, A&E TELEVISION NETWORKS,	:		
AEG LIVE LLC, VECTOR 2 LLC, BOSTON	:		
RED SOX, INC., THE BIGGER PICTURE	:		
CINEMA CO., and MARK SHIMMEL	:		
MUSIC,	:		
	:	Defendants.	
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**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT
OF DEFENDANTS’ MOTIONS TO DISMISS THE AMENDED COMPLAINT**

Defendants¹ respectfully submit this reply memorandum of law to respond briefly to four arguments in Plaintiffs’ Opposition to Motion to Dismiss dated March 3, 2009 (Docket No. 61) (“Pls’ Second Opp’n”).

¹ Defendants includes the Moving Defendants and the other defendants listed on the signature page.

1. Plaintiffs' Reliance On Their Withdrawn Lanham Act Claim

In their opposition, Plaintiffs state (Pls.' Second Opp'n at 21, 22) that they are still relying on a Lanham Act claim that had been deleted from their Amended Complaint after having been asserted in the original Complaint. Mr. Steele states that the Amended Complaint was intended to "clarify my claims," and he "ask[s] the Court to consider everything in both my original and amended complaint." (Id. at 1-2.)

This request directly conflicts with established First Circuit precedent holding that an amended complaint supersedes the original complaint in its entirety, and thereafter the original complaint is a "dead letter" that "no longer performs any function in the case." ConnectU LLC v. Zuckerberg, 522 F.3d 82, 91 (1st Cir. 2008) (internal quotation marks omitted); Kolling v. Am. Power Conversion Corp., 347 F.3d 11, 16-17 (1st Cir. 2003). Guided by those principles, Defendants had treated the Lanham Act claim as withdrawn.

To the extent that the Court will consider the Lanham Act claim as within the scope of the current pleadings, Defendants reiterate that it is precluded by the U.S. Supreme Court's holding in Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003), that a copyright holder cannot maintain a reverse-palming off claim under the Lanham Act. (See Moving Defendants' Motion To Dismiss the Complaint at 15-17 (Docket No. 18).)² The Dastar principles, moreover, have been uniformly applied in this Circuit to disallow artist/author reverse palming-off claims. (See cases cited at Docket No. 18 at 15 & n.15.) As Plaintiffs have explicitly acknowledged that their Lanham Act claim is one for "Reverse Palming Off" (Pls' Second Opp'n at 18, 22), the claim falls squarely within the holding of Dastar, should be

² For the convenience of the Court, a photocopy of these pages are attached hereto as Exhibit A.

dismissed as a matter of law, and would be futile if proposed as a claim in any further amendment to the pleadings.

2. Plaintiffs' Citation To The "Inverse Ratio Rule"

Plaintiffs invite this Court to apply the "Inverse Ratio Rule." (See Pls.' Second Opp'n at 12, 15 (citing two Ninth Circuit cases).) Under that rule, a copyright holder is given the benefit of a watered-down standard for substantial similarity if there is greater access to the copyrighted work. See, e.g., Rice v. Fox Broadcasting Co., 330 F.3d 1170 (9th Cir. 2003).³

The Court should reject Plaintiffs' invitation. Application of the Inverse Ratio Rule would wholly disregard other, binding First Circuit cases that have adopted and applied the traditional substantial similarity test. See, e.g., Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005). The Inverse Ratio Rule has, to the knowledge of Defendants, not been adopted anywhere outside the Ninth Circuit. E.g., Dahlen v. Mich. Licensed Beverage Ass'n, 132 F. Supp. 2d 574, 584 n.9 (E.D. Mich. 2001). Research located no reported First Circuit or District of Massachusetts opinion that has ever mentioned, much less applied or adopted, the Inverse Ratio Rule. This is certainly not the case in which to depart from well-accepted First Circuit copyright law principles.⁴

³ Plaintiffs' invocation of the Inverse Ratio Rule seems predicated on Plaintiffs' belief that Defendants have already conceded access. (E.g., Pls' Second Opp'n at 8- 9, 12.) Defendants, of course, have made no such concession, but rather have assumed access solely for the purpose of their pending motions to dismiss. (See Opening Brief at 2 n.2 (Docket No. 49).) Should this lawsuit not be dismissed, the factual contentions concerning Defendants' purported "access" to the Steele Song, as well as actual copying, will be vigorously disputed.

⁴ The Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir, 2005), decision, which Plaintiffs describe as the "Get Up Off Your Ass and Jam" case (Pls' Second Opp'n at 12), is not applicable here because it expressly applies only to digital sampling of sound recordings. In this case, Plaintiffs have alleged copying of portions of a musical composition, not digital sampling of portions of sound recordings. In any event, Bridgeport Music is not the law in the First Circuit, and the case has been much criticized for its disregard of the substantial similarity test, even if only in a very narrow area. See 4-13 Nimmer on Copyright § 13.03[A][2][b].

Indeed, the Inverse Ratio Rule was expressly rejected by the Second Circuit nearly a half century ago. See Arc Music Corp. v. Lee, 296 F.2d 186, 187 (2d Cir. 1961) (characterizing the Inverse Ratio Rule as an “ingeniously fabricated principle of law” and holding that “[i]n the federal law of copyright we find no such principle”). Similarly, a leading commentator on copyright law has characterized the Inverse Ratio Rule as a “flawed proposition” because “even massive evidence of access cannot by itself avoid the necessity of also proving the full measure of substantial similarity.” 4-13 Nimmer on Copyright § 13.03[D] (2008).

3. Plaintiffs’ Concession That Steele’s Derivative Song Is Not Covered By Copyright

Plaintiffs now concede (as the Moving Defendants pointed out in their Opening Brief) that Steele’s federal copyright did not contain the rewrite of his initial song (referred to as the “Derivative Song”): “defendants correctly note that my rewritten song ‘Man I Really Love This Town’ was not included in my CD deposited with the copyright office.” (Pls.’ Second Opp’n at 8.) Plaintiffs further concede that the “re-recording of ‘Man I Really Love This Town’ began August 22, 2006” (id.), whereas the copyright was issued on June 30, 2006 (Brown Decl. Ex. 4). Accordingly no copyright claim can be based on the Derivative Song.⁵

4. Substantial Similarity Argument Based On Alleged Copying Of Steele’s “Hook”

Plaintiffs rely heavily on what they argue was copying of “the heart of [the Steele Song], the chorus hook.” (See Pls.’ Second Opp’n at 9, 14 (citing Santrayll v. Burrell, 39 U.S.P.Q. 2d 1052 (S.D.N.Y. 1996) (the MC Hammer “uh-oh” song).) That “chorus hook” is the

⁵ Plaintiffs’ opposition also contains an extended discussion of the “blurring of music and advertising.” (Pls.’ Second Opp’n at 7.) That discussion is irrelevant to the legal issues on this motion to dismiss.

phrase “I love this.” (Pls.’ Second Opp’n at 10).⁶ Nothing in Santrayll, however (which involved an “extended syncopated repetition of the phrase ‘uh-oh’” in what the Court described as a “distinctive rhythm,” 39 U.S.P.Q. 2d at 1053-54), converts the phrase “I love this” into anything other than a commonplace, trite phrase that cannot be protected by copyright. As is clear from that case, moreover, the court rules on such issues as a matter of law. Santrayll, 39 U.S.P.Q. 2d at 1054. Thus, this Court can, and should, hold as a matter of law that “I love this” is an unprotectable phrase, and therefore alleged copying of it by Defendants cannot prevent the dismissal of the Amended Complaint. See Johnson, 409 F.3d at 24, where the Court concluded that the phrase “You’re the One for Me” was “common,” and “hundreds of composers have registered songs capturing the same sentiment in the same verbiage. It is thus readily apparent that this lyric is too trite to warrant copyright protection.” Id.⁷

Based on Santrayll, Steele argues that: “If the phrase ‘uh-oh’ in a rap song warrants copyright protection, then surely my musical and lyrical expression ‘love this team/town,’ in a baseball song deserves the same protection against defendants’ infringing use in a baseball ad.” (Pls.’ Second Opp’n at 10; emphasis in original.) This argument has it exactly backwards -- that the Steele Song celebrates the fans’ love for their home town baseball team ensures that it must be considered a commonplace, trite expression, one that all are free to use,

⁶ Plaintiffs also cite “Love this Town” as a “hook,” but “town” was from the Derivative Song (Brown Decl. Ex. 4), and thus is not covered by Steele’s copyright. See Johnson v. Gordon, 409 F.3d at 16 (uncopyrighted version of song warranted copyright protection only to the extent that incorporated elements derived from the copyrighted version.)

⁷ Plaintiffs characterize the First Circuit’s comprehensive opinion in Johnson v. Gordon as “dubious authority” because it allegedly counseled that a court “need not listen to the songs in a music copyright case,” to which Plaintiffs’ response is “Huh?” (Pls.’ Second Opp’n at 11). To the contrary, in Johnson v. Gordon, it is readily apparent that the judges on the First Circuit panel not only listened to the music, but that they reached an independent conclusion that “the two musical segments, as written, do not sound alike . . . to an ordinary listener.” 409 F.3d at 22, n.6. Indeed, this is the reason that this Court can, based on its own hearing of the Steele Song and the Bon Jovi Song, dismiss the allegations of copying of the musical elements of the Steele Song.

certainly in connection with baseball. One need go no further than the universally recognized “Take Me Out to the Ball Game,” with its injunction to “Root, root for the home team.”

CONCLUSION

For the foregoing reasons, and the reasons in the Opening Brief, the Court should grant the Defendants’ motions to dismiss the Amended Complaint in its entirety. There should be no leave to replead, as Plaintiffs have already had multiple opportunities to review and revise their allegations.

Dated: May 18, 2009
Boston, Massachusetts

Respectfully submitted,

/s/ Matthew J. Matule
Matthew J. Matule (BBO #632075)
Scott D. Brown (BBO #662965)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Beacon Street
Boston, Massachusetts 02108
(617) 573-4800
mmatule@skadden.com

Kenneth A. Plevan (*admitted pro hac vice*)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

Clifford M. Sloan (*admitted pro hac vice*)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Counsel for Defendants
Turner Broadcasting System, Inc., Major League Baseball
Properties, Inc., Time Warner Inc., Fox Broadcasting
Company, John 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), Universal Music Publishing,
Inc., Universal-Polygram International Publishing, Inc.,
Sony/ATV Tunes LLC, A&E Television Networks, AEG
Live LLC, Vector 2 LLC, Boston Red Sox Baseball Club
Limited Partnership, The Bigger Picture, and Mark
Shimmel

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 May 18, 2009.

Dated: May 18, 2009

/s/ Matthew J. Matule
Matthew J. Matule