

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

----- X
SAMUEL BARTLEY STEELE, :
BART STEELE PUBLISHING, and :
STEELE RECORDZ, :

Plaintiffs, : Civil Action
v. : No. 08-11727-NMG
:
TURNER BROADCASTING SYSTEM, INC., : **ORAL ARGUMENT REQUESTED**
MAJOR LEAGUE PROPERTIES, INC., :
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. :
----- X

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
DISMISSING THE COPYRIGHT INFRINGEMENT CLAIM**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants (i) Turner Broadcasting System, Inc., (ii) Major League Baseball Properties, Inc., (iii) Time Warner Inc., (iv) John Bongiovi (individually and d/b/a Bon Jovi Publishing), (v) Richard Sambora (individually and d/b/a Aggressive Music), (vi) William Falcone (individually and d/b/a Pretty Blue Songs), (vii) Mark Shimmel d/b/a Mark Shimmel Music, (viii) A&E Television Networks,

(ix) AEG Live LLC, (x) Boston Red Sox Baseball Club Limited Partnership, and (xi) Universal-Polygram International Publishing, Inc. hereby move for summary judgment on the issue of substantial similarity and an order dismissing plaintiffs' only remaining claim in this lawsuit (copyright infringement) 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), defendants respectfully request oral argument on this motion.

LOCAL RULE 7.1 CERTIFICATION

I, Matthew J. Matule, hereby certify that on June 3, 2009 counsel for the defendants conferred with the Plaintiff in a good faith effort to resolve the issues herein but could not obtain his agreement to the specific relief requested in this motion.

Dated: June 10, 2009

/s/ Matthew J. Matule
Matthew J . Matule

Dated: June 10, 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., 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), Mark Shimmel d/b/a Mark
Shimmel Music, A&E Television Networks,
AEG Live LLC, Boston Red Sox Baseball Club
Limited Partnership, and Universal-Polygram
International Publishing, Inc.

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 June 10, 2009.

Dated: June 10, 2009

/s/ Matthew J. Matule
Matthew J. Matule

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Defendants. :
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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT DISMISSING THE COPYRIGHT INFRINGEMENT CLAIM**

Matthew J. Matule
Scott D. Brown
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Beacon Street
Boston, Massachusetts 02108
(617) 573-4800

Counsel for Defendants

Dated: June 10, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 3

 A. Background 4

 B. Defendants’ Expert Analysis 5

 C. Steele’s Expert Analysis 5

ARGUMENT 6

THERE IS NO TRIABLE ISSUE OF FACT REGARDING THE ABSENCE
OF SUBSTANTIAL SIMILARITY BETWEEN THE WORKS AT ISSUE 6

 A. Summary Judgment Standard 6

 1. General Legal Principles 6

 2. Granting Summary Judgment On The Issue
 Of Substantial Similarity In Music Copyright Cases 6

 3. Reliance On Expert Analysis 7

 B. Substantial Similarity Standard -- Filtering Of Unprotected Expression 8

 C. Clear Absence Of Substantial Similarity Here 9

 1. Music Comparison 10

 2. Lyrics Comparison 14

 D. Substantial Similarity Analysis As To The TBS Promo 15

CONCLUSION 18

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242 (1986).....	6
<u>CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.</u> , 97 F.3d 1504 (1st Cir. 1996).....	9, 15
<u>Concrete Machine Co. v. Classic Lawn Ornaments, Inc.</u> , 843 F.2d 600 (1st Cir. 1988).....	8
<u>Coquico, Inc. v. Rodriguez-Miranda</u> , 562 F.3d 62 (1st Cir. 2009).....	9
<u>Feist Publications, Inc. v. Rural Telephone Service Co.</u> , 499 U.S. 340 (1991).....	8
<u>Hines v. Dean</u> , No. CIV.A. 1:02CV3390-MH, 2005 WL 589803 (N.D. Ga. Mar. 10, 2005)	5, 7
<u>Johnson v. Gordon</u> , 409 F.3d 12 (1st Cir. 2005).....	<i>passim</i>
<u>Landry v. Atlantic Recording Corp.</u> , No. 04-2794, 2007 WL 4302074 (E.D. La. Dec. 4, 2007)	5, 7
<u>Lotus Development Corp. v. Borland International, Inc.</u> , 49 F.3d 807 (1st Cir. 1995), <u>aff'd</u> , 516 U.S. 233 (1996)	8
<u>McMahon v. Prentice-Hall, Inc.</u> , 486 F. Supp. 1296 (E.D. Mo. 1980).....	17
<u>O’Toole v. Northrup Grumman Corp.</u> , 499 F.3d 1218 (10th Cir. 2007)	14
<u>Yankee Candle Co. v. Bridgewater Candle Co.</u> , 259 F.3d 25 (1st Cir. 2001).....	8
<u>RULES AND STATUTES</u>	<u>PAGE(S)</u>
Fed. R. Civ. P. 56.....	6
17 U.S.C. § 102(b)	8

MISCELLANEOUS

PAGE(S)

1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2.05[D] (2007)9

2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.09[A] (2007)8

Defendants identified herein¹ respectfully submit this memorandum of law in support of their motion for summary judgment dismissing the copyright infringement claim in its entirety, and for the entry of final judgment in favor of all defendants.

PRELIMINARY STATEMENT

At issue in this lawsuit is whether either a Bon Jovi song entitled “*I Love This Town*” (“Bon Jovi Song” or “*I Love*”) or a video promoting the 2007 Major League Baseball postseason (the “TBS Promo”)² infringe a song written and copyrighted by plaintiff Samuel Bartley Steele entitled “*Man I Really Love This Team*” (“Steele Song” or “*I Really*”).³ Defendants initially moved to dismiss all three claims asserted by Steele. In this Court’s Memorandum & Order of April 3, 2009 (Docket No. 85) (“April 3 Order”), the Court held that claims asserted under the Lanham Act and Chapter 93A of the Massachusetts General Laws were legally insufficient. (*Id.* at 6-8.) In addition, the Court granted the motion to dismiss as to three defendants. (*Id.* at 8-9, 13.)

With respect to the remaining claim for copyright infringement, the Court denied that portion of the motion to dismiss to allow plaintiff “to gather and present evidence of substantial similarity beyond what is included in the pleadings.” (*Id.* at 11.) The Court ordered discovery to proceed on that issue alone, and set a briefing schedule for defendants to move for

¹ Defendants joining in this motion are listed on the signature page, *infra*. These parties are all of the defendants remaining herein except for Kobalt Music Publishing America, Inc. For convenience of reference, the defendants joining herein will simply be referred to as “defendants.”

² The TBS 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.

³ There are two other “unincorporated business organization” plaintiffs in addition to Mr. Steele. As their presence in this lawsuit does not affect the legal or factual analyses herein, we will refer only to “plaintiff” or “Steele.”

summary judgment following the completion of discovery. (Id. at 13.)⁴ As the Court noted, there can be no copyright infringement in the absence of a showing of substantial similarity, and thus other issues such as access and copying need not be addressed for there to be a complete disposition of the matter. (See id. at 10-12.)

Defendants now bring the motion for summary judgment contemplated by the Court's April 3, 2009 Order. Defendants have retained a leading musicologist to compare the Steele Song (both lyrics and music) with, first, the Bon Jovi Song, and, second, the TBS Promo. Defendants' expert analysis shows that the two songs "do not share any significant similarity and are not substantially similar in lyric content, melodic content (pitch series, rhythm or rhythmic patterns, melodic development and structure), or harmonic content," and that the musical material in each is "dramatically different[.]" (Ricigliano Report ¶ 1.)⁵ Similarly, as to the TBS Promo, the expert analysis shows that "there is no suggestion that [the Steele Song] was used as a reference to create the TBS video" and further that "[t]he audio/video created by Mr. Steele shares almost no correlation to the TBS video" (id. ¶ 27), thus establishing the lack of substantial similarity.

Defendants' musicologist's analysis justifies the dismissal of the copyright infringement claim because it shows that there is no triable factual issue as to substantial similarity. (See generally Ricigliano Report.) In addition, the Court can, applying the ordinary observer test, confirm this conclusion by engaging in its own examination of the works at issue. (See April 3 Order at 11 (quoting Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005).) This is

⁴ The Court also held that versions of the Steele Song that were never registered with the Copyright Office could not be considered in evaluating plaintiff's claims. (April 3 Order at 10.)

⁵ Report of Anthony Ricigliano, verified on May 12, 2009 ("Ricigliano Report"), attached as Exhibit 12 to the Declaration Of Scott D. Brown In Support Of Defendants' Motion For Summary Judgment Dismissing The Copyright Infringement Claim dated June 10, 2009 ("Brown Declaration") submitted in support of this motion.

especially true with respect to the purported similarities in lyrics, and the purported similarity between the images in the TBS Promo and the Steele Song's lyrics. While defendants recognize that an analysis of alleged similarities in musical elements may be more complex in the absence of an expert evaluation, the differences are so dramatic here that the Court can apply the "ordinary listener" test to confirm the conclusions of defendants' expert as to the music analysis as well. See, e.g., Johnson v. Gordon, 409 F.3d 12, 21-23 & n.6 (1st Cir. 2005).

Finally, defendants note that in response to discovery requests, plaintiffs produced an unsigned statement from a music professor at the University of Vermont. (See Brown Decl. Ex. 2.) In the unsigned statement, the music professor appears to agree in all material respects with defendants' expert on the issue of there being no substantial similarity. Thus, plaintiffs' music expert makes the following concluding observations:

This case is not strong musicologically:
 Melody of "hook" has only one note in common (1).
 Three words in common, but not the most distinctive word, "team."
 Harmony is commonplace. Both tunes consist primarily of I, IV, and V chords – the most commonly used chords in harmony. Moreover, "Team" is a 12-bar blues. One of the most distinctive harmonic figures in "Team," the chromatic chord change (D-D#-E) at the end of the hook, is not found in "Town."

(Id.)

For these reasons, the Court should grant defendants' motion for summary judgment, and dismiss Steele's Amended Complaint in its entirety.⁶

STATEMENT OF FACTS

On a motion for summary judgment, all facts are construed in favor of the non-moving party. See Johnson, 409 F.3d at 17. However, on the issue of substantial similarity, the

⁶ The Court will recall that Steele seeks to rely on his initial Complaint, filed October 8, 2008, and his Amended Complaint, filed January 30, 2009. (See April 3 Order at 4.) For the purposes of the substantial similarity analysis of the musical works, the differences between the two pleadings are not material.

only relevant “facts” are those drawn from the works themselves. See id. at 18. (See April 3 Order at 10-11.)

A. Background

The relevant background is set forth in the Court’s April 3 Order, and is briefly summarized herein. Plaintiff Steele is a songwriter, whose copyright infringement claim in this lawsuit is based on his musical work “*Man I Really Love This Team*.” (April 3 Order at 2.) On June 30, 2006, Steele obtained a copyright registration for the music and lyrics of “*I Really*.” (See id.; Brown Decl. Ex. 4.)

Appearing pro se, Steele alleges that Turner Broadcasting System, Inc. (“TBS”) used the Steele Song to assemble baseball-related images for use in an audio-visual work. (April 3 Order at 3.) TBS then allegedly retained the rock group Bon Jovi to produce a song based on those visuals. (Id.) Steele alleges that the resulting TBS Promo, and also the Bon Jovi Song “*I Love This Town*” infringe his copyright in “*I Really*.” (Id.)⁷

The Bon Jovi Song is available to the public as part of the band’s album Lost Highway, released in or about June 2007. (Brown Decl. ¶ 17.) A shorter version of “*I Love*” appears on the TBS Promo, along with visuals of the band in concert. (Id. ¶ 12, Ex. 8.)

⁷ Steele’s “*Man I Really Love This Team*,” as filed with Steele’s copyright application, is attached to the Brown Declaration as part of Exhibit 4 thereto. The Bon Jovi Song “*I Love This Town*,” as available on the band’s album Lost Highway, is Exhibit 5 to the Brown Declaration. The TBS Promo is Exhibit 6 to the Brown Declaration. The Bon Jovi Song as it appears in the TBS Promo is Exhibit 7 to the Brown Declaration. One of the attachments to Exhibit I of Steele’s original Complaint, an overlay of the TBS Promo visuals with Steele’s song, is Exhibit 8 to the Brown Declaration. An audio recording comparing what Steele has referred to as his song’s “chorus hook” (“*Man I Really Love This Team*”) with the last line of the Bon Jovi Song (“*That’s Why I Love This Town*”) is Exhibit 9 to the Brown Declaration.

B. Defendants' Expert Analysis

As noted, defendants have submitted the expert report of Anthony Ricigliano, verified on May 12, 2009. Mr. Ricigliano is a widely renowned musicologist with over three decades of relevant experience (see Ricigliano Report Ex. 1, Curriculum Vitae), including teaching at the Manhattan School of Music for 31 years.

Mr. Ricigliano has prepared musical analyses and assisted in the preparation of court cases on numerous occasions, and has testified on behalf of recording companies, music publishers, recording artists and composers, motion picture companies and advertising agencies in a variety of musical copyright disputes. (Id.) See, e.g., Landry v. Atl. Recording Corp., No. 04-2794, 2007 WL 4302074, at *6-7 (E.D. La. Dec. 4, 2007) (granting summary judgment for defendant on issue of substantial similarity, citing to the expert report of Anthony Ricigliano); Hines v. Dean, No. CIV.A. 1:02CV3390-MH, 2005 WL 589803, at *2 (N.D. Ga. Mar. 10, 2005) (same).

C. Steele's Expert Analysis

As noted, following receipt of this Court's April 3, 2009 Order, defendants promptly served Steele with discovery requests seeking discovery directed to any expert reports Steele might rely on. (Brown Decl. ¶ 2.) In response, plaintiffs submitted an unsigned statement identified as having been prepared by Alexander Stewart, a music professor from the University of Vermont. Said statement basically reaches the same conclusion as did Mr. Ricigliano, that there are no significant similarities in the music. For example, Dr. Stewart states that the "[m]elody of [the] 'hook' has only one note in common," and [t]he chord similarities are "the most commonly used chords in harmony." (Brown Decl. Ex. 2.)⁸

⁸ Defendant's expert's evaluation of Dr. Stewart's report ("Ricigliano Addendum") is included with Exhibit 12 to the Brown Declaration.

ARGUMENT

THERE IS NO TRIABLE ISSUE OF FACT REGARDING THE ABSENCE OF SUBSTANTIAL SIMILARITY BETWEEN THE WORKS AT ISSUE

As noted, Steele contends that the TBS Promo visuals are substantially similar to his lyrics. He also contends that the Bon Jovi Song is substantially similar to his song, in music and lyrics. As we show below, none of these contentions has any basis in fact.

A. Summary Judgment Standard

1. General Legal Principles

In addressing a motion for summary judgment under Federal Rule of Civil Procedure 56, the Court must determine “whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). “Summary judgment is appropriate as long as ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” Johnson, 409 F.3d at 17 (quoting Fed. R. Civ. P. 56(c)). The party opposing summary judgment “may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial,” and must offer “significant probative evidence tending to support the complaint.” Anderson, 477 U.S. at 256 (internal quotation marks omitted).

2. Granting Summary Judgment on the Issue of Substantial Similarity in Music Copyright Cases

It is well established that the issue of substantial similarity in a music copyright case “can be decided by the Court as a matter of law” on summary judgment ““when a rational factfinder, correctly applying the pertinent legal standards, would be compelled to conclude that

no substantial similarity exists between the copyrighted work and the allegedly infringing work.’” (April 3 Order at 11 (quoting Johnson, 409 F.3d at 18).)

For example, in Johnson, the court granted summary judgment for defendants on plaintiff’s claim for copyright infringement in his musical work, where “[e]ven the plaintiff’s expert” conceded that the harmonies of the two songs at issue “sound different to the ordinary listener.” 409 F.3d at 24 n.7. Similarly, in Landry, the court granted summary judgment for defendants on the issue of substantial similarity, partly based on the expert report of Anthony Ricigliano (defendants’ expert herein), which showed that both musical works at issue therein utilized ““basic elements that are common to rock and rap songs.’” 2007 WL 4302074, at *6 (quoting the expert report). Even where a plaintiff has also offered expert testimony on the issue of substantial similarity, that circumstance does not by itself create a genuine issue of fact precluding summary judgment. See, e.g., Johnson, 409 F.3d at 18; Landry, 2007 WL 4302074, at *4-7.

3. Reliance on Expert Analysis

Many courts have relied on the testimony of expert musicologists in granting motions for summary judgment in copyright cases. In Johnson, the First Circuit, after first citing expert testimony in resolving the issue of probative similarity, then referenced it as supporting evidence in affirming the grant of summary judgment for defendants on the issue of substantial similarity. See 409 F.3d at 19-22; cf. Landry, 2007 WL 4302074, at *6-7 (granting summary judgment for defendant on issue of substantial similarity); Hines, 2005 WL 589803, at *2-3 (same).

Here, there is no question that expert analyses by musicologists is precisely the type of evidence this Court contemplated when it ordered discovery limited to the issue of substantial similarity. (See April 3 Order at 12 (“Steele may offer, by affidavit, expert analysis

of his work or the [alleged] infringing work as deemed necessary and the Court will consider such analysis in making the substantial similarity determination.”.)

**B. Substantial Similarity Standard --
Filtering Of Unprotected Expression**

Under the “ordinary observer,” or “ordinary listener,” test applicable here, a “defendant’s work is substantially similar to the copyrighted work only if ‘an ordinary person of reasonable attentiveness would, upon listening to both, conclude that the defendant unlawfully appropriated the plaintiff’s protectable expression.’” (Id. at 10-11 (quoting Johnson, 409 F.3d at 18).)⁹ Furthermore, “the substantial similarity must relate to original elements of the copyrighted work.” (Id. at 11 (citing Johnson, 409 F.3d at 18-19).) See also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Lotus Dev. Corp. v. Borland Int’l, Inc., 49 F.3d 807, 813 (1st Cir. 1995), aff’d, 516 U.S. 233 (1996).

Before the requisite side-by-side comparison is made, the works at issue are first dissected to remove (i.e., filter out) all aspects that are not protected by copyright, including concepts, ideas, unoriginal expression, and public domain material. See Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 34 (1st Cir. 2001); Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 608-09 (1st Cir. 1988). 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 Johnson, 409 F.3d at 18-19; Yankee Candle, 259 F.3d at 34; Concrete Mach., 843 F.2d at 608-09.

As copyright law does not protect ideas or concepts, see 17 U.S.C. § 102(b); Johnson, 409 F.3d at 19, they need to be filtered out. Nor does copyright law protect unoriginal

⁹ Characterizing the TBS Promo or the Bon Jovi Song as a “derivative work” does not in any way change Steele’s obligation to prove substantial similarity. See 2 Nimmer § 8.09[A].

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 a topic. See CMM Cable Rep, Inc. v. Ocean Coast Props., Inc., 97 F.3d 1504, 1522 (1st Cir. 1996). See also Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62, 68 (1st Cir. 2009) (“The doctrine of *scènes à faire* denies copyright protection to elements of a work that are for all practical purposes indispensable, or at least customary, in the treatment of a given subject matter.”).

With respect specifically to the substantial similarity analysis of music, the main elements comprising musical works are harmony, structure, and melody (which includes rhythm). See 1 Nimmer & Nimmer, supra, § 2.05[D]. (See also Ricigliano Report ¶ 6.) Of those elements, it is generally the melody of a song that embodies the most protectable expression and so carries the strongest copyrightable expression. See 1 Nimmer § 2.05[D]. See also Johnson, 409 F.3d at 21-23 & n.6 (analyzing melody and finding no substantial similarity to the lay person’s ear).

C. Clear Absence Of Substantial Similarity Here

Defendants’ expert, Anthony Ricigliano, compared the music and lyrics of “*I Really*” to both versions of “*I Love*,” and the lyrics of “*I Really*” to the visuals in the TBS Promo. In sum, he “concluded that although these compositions contain somewhat similar titles, they do not share any significant similarity and are not substantially similar in lyric content, melodic content (pitch series, rhythm or rhythmic patterns, melodic development and structure), or harmonic content,” and that the musical material in each is “dramatically different.” (Ricigliano Report ¶ 1.) As respects the title, a “limited search” uncovered seven other songs titled “*I Love This Town*,” including two by well-known artists. (Id. ¶ 18.) Viewing the lyrics as a whole, Ricigliano concluded “that there are no phrases in *I Love* that may be considered to be

substantially similar to any lyric phrase in *I Really*.” (Id. ¶ 19.) As respects the TBS Promo visuals, the few similarities between them and the Steele lyrics were merely “coincidental,” and the Steele Song was “almost totally not in sync with the visuals in the commercial.” (Id. ¶ 25.)

1. Music Comparison

With regard to musical elements, “*I Really*” follows the basic 12-bar blues format, which consists of three 4-bar units (see Ricigliano Report ¶ 22), whereas “*I Love*” consists of four 4-bar phrases that follow a completely different chord pattern than “*I Really*.” (Id. ¶ 23.) Thus, the musical material in each song is “dramatically different[.]” (Id. ¶ 1.)

In order to better illustrate the differences between the musical elements of “*I Really*” and “*I Love*,” Mr. Ricigliano created three color-coded graphic charts. (See id. Ex. 4.) The first of these graphics illustrates the following conclusions of Mr. Ricigliano regarding the music of the two songs:

Observe that *I Really* consists of three melodic units. The first two begin with the repetition of the pitch G and end on the note F. The third unit contains the title and begins essentially the same as units 1 and 2. However this unit is extended and continues down through E flat concluding on the tonic note C. (Id. ¶ 12.)

The melodic content in *I Love* is dramatically different. It consists of two units. Unit 1 begins with the repetition of the note E and progresses downward to C, then to A, then to G ending on the note F. Unit 2 contains the title phrase, begins by returning to the initial note E, moves down the scale to C, returns to the E and concludes on the first note of the scale or tonic note C. (Id. ¶ 13.)

Graphic 1 also clearly illustrates that there is no significant similarity in rhythm (time values) or rhythm patterns. This chart clearly illustrates that the musical phrases that precede the title and the titles phrases are overall dramatically different in pitch, rhythm and structure. (Id. ¶ 14.)

In his opposition to defendants’ motion to dismiss, Steele placed great reliance on what he asserted was the close similarity of the music accompanying the Bon Jovi line “That’s Why I Love this Town,” with what Steele referred to as his “chorus hook” -- “Man I Really Love

This Team.” (Opposition to Motion to Dismiss, dated March 3, 2009 (“Opposition”) at 11, 18 (Docket No. 61).) Indeed, to support his position, Steele submitted to the Court two audio files on which he played them “back-to-back” five times. (See Brown Decl. Ex. 9.) In his Opposition, Steele argued that “[f]urther analysis of [Bon Jovi’s] chorus also shows substantial similarity in the chord progressions of the music and the way the chord progressions line up with the lyrics in both songs.” (Opposition at 18.)

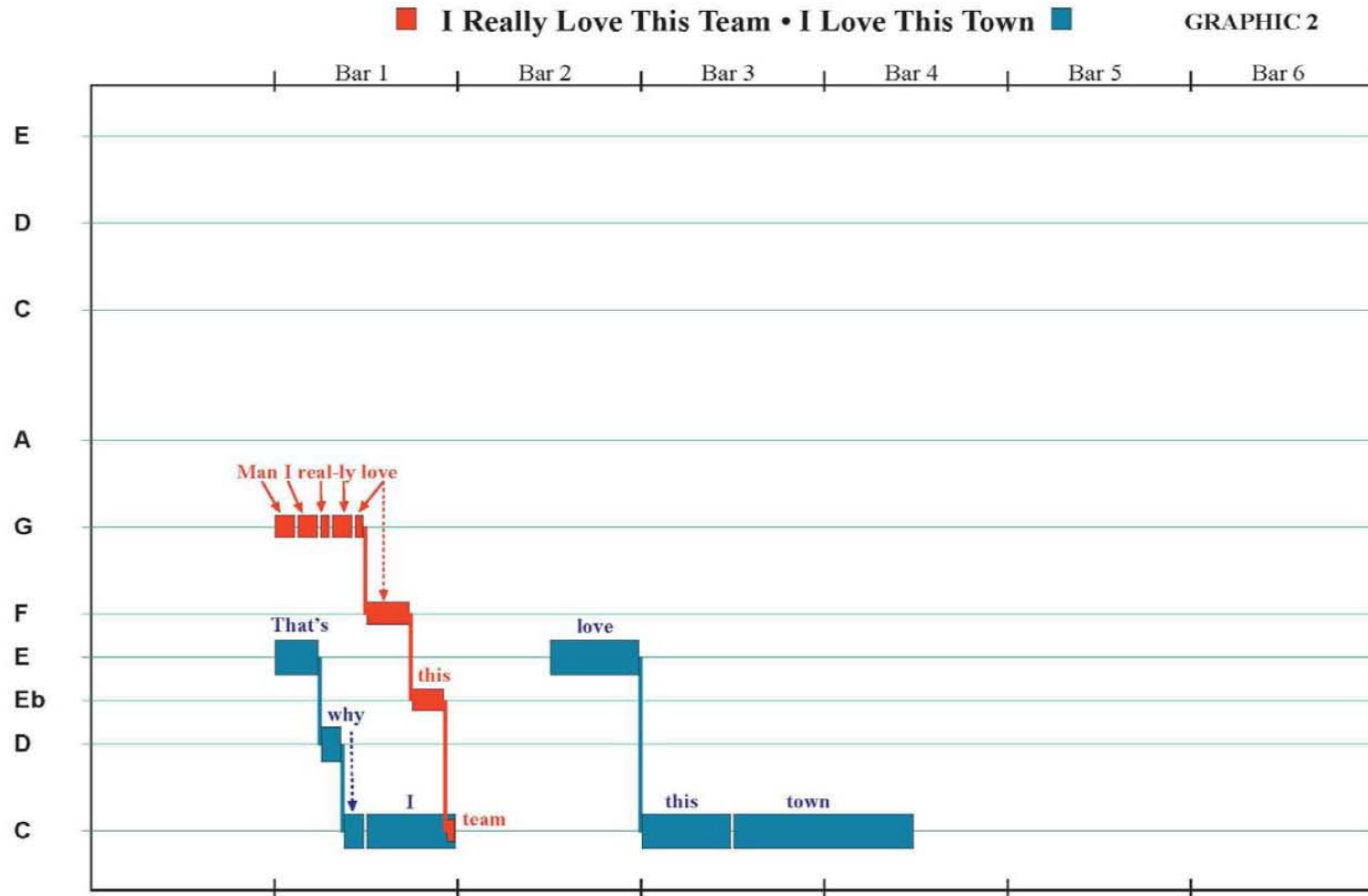
Mr. Ricigliano has specifically addressed, and refuted, this contention. “The following example illustrates that the two musical statements of the title phrase in *I Love* are significantly different in pitch series, rhythm, melodic shape and chords used in the accompaniment of the two different statements found in *I Really*”:

The image displays two musical staves. The top staff is for "I Really Love This Team" and the bottom staff is for "I Love This Town".

I Really Love This Team: The first statement, labeled "Unit 3 (8va)", has a melody of G4, G4, G4, G4, G4, F4, E♭4, C4 with chords G7, B♭, G/B, and C7. The second statement, labeled "Unit 3 (final statement)", has a melody of G4, G4, G4, G4, B♭4, B4, C4 with chords G7, B♭, G/B, and C.

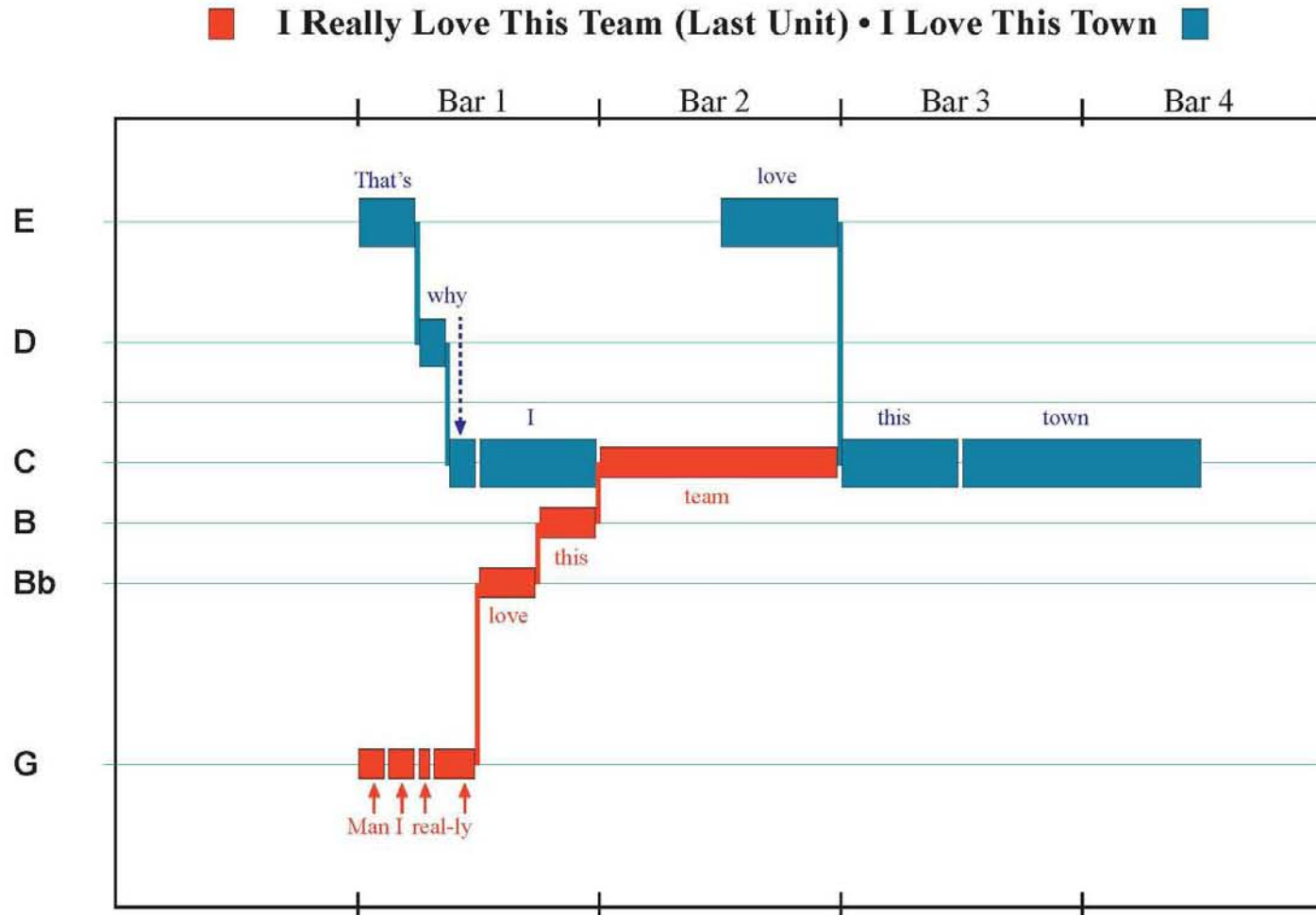
I Love This Town: The first statement, labeled "Unit 2", has a melody of E4, D4, C4, C4, E4, C4, C4 with chords C, F, G, and C. The second statement, also labeled "Unit 2", has an identical melody and chord progression.

(Ricigliano Report ¶ 16.) As Mr. Ricigliano further points out, “[t]hese distinctions become even more visually discernable when comparing these melodies in melodic Graphics 2 and 3.” (Id.) For the Court’s convenience, these two color-coded graphics taken from Mr. Ricigliano’s report are duplicated on the following two pages:



Note: Blue blocks shifted to same starting point as red and moved down an octave for comparison

GRAPHIC 3



Note: Blue blocks shifted to same starting point as red for comparison purposes

From these graphic chart comparisons, the lack of any material musical similarity is readily apparent. (Mr. Ricigliano prepared two such side-by-side comparisons because in the Steele Song there are two musical versions of the “choral hook,” as can be seen by comparing the graphic representations of “*Man I Really Love This Team*” in the two charts.)¹⁰

2. Lyrics Comparison

Comparing the lyrics of the songs, Mr. Ricigliano found that “the lyric elements that are similar are commonplace, trite, lyric material and therefore not protectable.” (*Id.* ¶ 18.) For example, a “limited search of the Library of Congress from 1978-2004 revealed that there are many songs with the title ‘*I Love This Town*.’” (*Id.* (see table documenting seven such songs).) Nor is there anything protectible in the words that overlap -- “I love this.” On-line database searches, which can be judicially noticed, see, e.g., O’Toole v. Northrup Grumman Corp., 499 F.3d 1218, 1224-25 (10th Cir. 2007), show dozens of songs that begin with the phrase “I Love This _____.” (See Brown Decl. Exs. 10, 11.)

Looking at other possible similarities, “the lyric structure of the opening and final section of *I Really* follows the basic ‘blues’ format (labeled a-b-c) . . . which is significantly different in melodic structure and development from *I Love*.” (Brown Decl. ¶ 21; compare Brown Decl. Exs. 5 and 7 (two versions of “*I Love*”) with Brown Decl. Ex. 4 (“*I Really*”).)

Even without the assistance of an expert analysis, this Court applying the ordinary observer test also can readily see that there is no shared protectible expression. The lyrics for “*I Really*” (Brown Decl. Ex. 4) cheer the Red Sox on to victory, providing numerous, easily identifiable references to the Red Sox and Fenway Park (e.g., “Pesky’s Pole,” “Yawkey Way,” “Rem-Dawg” and “Landsdown[e] Street”), and invite the crowd to cheer along: “Here we go

¹⁰ The legal insufficiency of Steele’s assertion as to the musical elements is also evident from simply listening to and comparing the two under the ordinary listener standard -- they sound totally different. (Compare Brown Decl. Ex. 6 with Ex. 8.)

Red Sox, here we go.” The chorus commands: “Now get up off your seats, Everybody scream, Man I really love this team.” (Id.)

The lyrics to “*I Love*” are completely different. In that song, there is not a single reference to the game of baseball, or even to Boston. Rather, it describes nostalgia for an unidentified hometown and references memories and feeling at home in “this town.” (Id. Exs. 5, 7.)

The only lyrical aspects of the songs at issue that Steele has previously asserted (in response to the motion to dismiss) to be similar are described as follows: “rhyming ‘goin round’ ‘hometown’ & ‘bound’ in the 1st and 2nd lines.” (Plaintiffs’ Amended Complaint And Opposition To Motion To Dismiss dated January 30, 2009, ¶ 21 (Docket No. 42) (alleging that the rhyming of “‘spinnin round, down, town’“ in the TBS Promo is similar to Steele’s rhyme scheme).) This is a trivial alleged similarity (as well as one based on commonplace lyrics, e.g. the traditional childhood favorite “Wheels on the Bus” (lyrics: “the wheels on the bus go round and round, all through the town”). The use of a rhyming pair is not protectible because copyright law provides no protection to “fragmentary words and phrases.” CMM Cable Rep, 97 F. 3d at 1519 (internal quotation marks omitted). Moreover, Mr. Ricigliano has compared the rhyming structure of the songs, and demonstrated conclusively that it provides no basis whatsoever for a claim of substantial similarity. (Ricigliano Report ¶¶ 20-21.)

D. Substantial Similarity Analysis As To The TBS Promo

Mr. Ricigliano is well qualified to comment on Steele’s claim that the baseball visuals in the TBS Promo are substantially similar to Steele’s lyrics, as Ricigliano routinely analyzes hundreds of commercials per year in his professional capacity. (See id. ¶ 27.) Addressing this issue, Mr. Ricigliano has concluded that “since the *I Really* audio/video version does not actually contain any clear substantive synchronization [with the TBS Promo], there is

no suggestion that it was used as a reference to create the TBS video. The audio/video created by Mr. Steele shares almost no correlation to the TBS video . . . there is nothing in the composition *I Love* utilized in this commercial that rises to the level of substantial similarity of protectable musical or lyrical expression when compared with *I Really*.” (Id.)

Although Steele claims that there are visuals in the TBS Promo that match the lyrics in “*I Really*,” such as the street sign Yawkey Way and an image of a Detroit Tigers player, these are in any event *scène a faire*, when viewed in the context of the video as a whole, these are obviously mere coincidences, as demonstrated by Steele’s overlay of his song on the TBS Promo visuals. (See Brown Decl. Ex. 8.) The visual of Yawkey Way is part of a montage of images of the streets outside both Fenway Park and Wrigley Field, which coincides with the lyric “walkin’ on the street” in “*I Love*,” and the visual of the Tigers player actually lines up more closely with the lyric “Rangers!” in “*I Really*.” (See Ricigliano Report ¶¶ 24-26.)

Moreover, it is clear that the TBS Promo was in fact meticulously synchronized to the Bon Jovi “*I Love*” song. “From the beginning to the end, the visuals and audio/lyric content of the Bon Jovi accompaniment to the TBS Promo is in sync with both the baseball visuals and with videos from live concerts of the Bon Jovi band.” (Id. ¶ 27.) 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 a stadium;
- Where Bon Jovi sings “down, down, down” there are three coinciding images of ball players sliding into bases;
- When Bon Jovi 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.

(See Brown Decl. Ex. 6 (TBS Promo).) These match-ups dramatically show that the TBS Promo visuals were cued from “*I Love*,” and certainly not the lyrics in “*I Really*,” thus supporting Mr. Ricigliano’s conclusion that there is no substantial similarity as alleged by Steele. (See Ricigliano Report ¶ 27.)

The TBS Promo, moreover, uses visuals from in or around a number of Major League Baseball stadiums, of baseball players from various teams making great plays (e.g., pitching, hitting home runs, sliding into base) and “high-fiving” each other, and fans cheering. (See Brown Decl. Ex. 6.) 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. (Id.) Certainly, no rights of Steele are infringed by using such footage in a video promoting the Major League Baseball postseason.

* * *

In sum, there are no protectible elements in the Steele Song that are sufficiently similar to elements in either version of “*I Love*” or the TBS 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”). Steele’s copyright claim can, and should, be dismissed on this motion for summary judgment, with prejudice.¹¹

¹¹ As noted, in its April 3 Order, the Court already found that the Lanham Act and Ch. 93A claims were legally insufficient. Accordingly, judgment should be entered in favor of all remaining defendants.

CONCLUSION

For the foregoing reasons, the Court should grant the defendants' motion for summary judgment in its entirety, and enter judgment in favor of all defendants.

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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

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 June 10, 2009.

Dated: June 10, 2009 /s/ Matthew J. Matule
Matthew J. Matule

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., 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), Mark Shimmel d/b/a Mark Shimmel Music, A&E Television Networks, AEG Live LLC, Boston Red Sox Baseball Club Limited Partnership, and Universal-Polygram International Publishing, Inc.