

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 JULY 30, 2009****
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

**REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT ON THE COPYRIGHT INFRINGEMENT CLAIM**

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Dated: July 30, 2009

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
PRELIMINARY STATEMENT	1
ARGUMENT.....	2
A. Steele’s Admission Regarding His Failure To Locate A Single Musicologist Willing To Support His Position.....	2
B. Steele’s “Temp-Tracking” Discussion Is Irrelevant	4
C. Steele Misconstrues The Concept Of Synchronization Rights.....	5
D. Steele’s Reliance On So-Called “Ordinary Observer” Evidence Is Entirely Misplaced	6
E. Steele’s “Sheer Luck” And Similar Arguments Are Equally Meritless	6
F. Steele’s Effort To Avoid Filtering Fails	8
G. Ricigliano’s Rebuttal Report Addresses Steele’s Allegations That Ricigliano Made Analytical Errors	9
CONCLUSION.....	11

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>ABKCO Music, Inc. v. Stellar Records, Inc.</u> , 96 F.3d 60 (2d Cir. 1996).....	5
<u>Harper & Row, Publishers, Inc. v. Nation Enterprises</u> , 471 U.S. 539 (1985)	9
<u>Johnson v. Gordon</u> , 409 F.3d 12 (1st Cir. 2005).....	3
<u>Maljack Productions, Inc. v. GoodTimes Home Video Corp.</u> , 81 F.3d 881 (9th Cir. 1996).....	5
<u>Three Boys Music Corp. v. Bolton</u> , 212 F.3d 477 (9th Cir. 2000).....	8
<u>Vargas v. Pfizer, Inc.</u> , 418 F. Supp. 2d 369 (S.D.N.Y. 2005)	8

<u>OTHER AUTHORITIES</u>	<u>PAGE(S)</u>
1 Melville B. Nimmer & David Nimmer, <u>Nimmer on Copyright</u> , § 1.03 (2009)	2
2 Melville B. Nimmer & David Nimmer, <u>Nimmer on Copyright</u> , § 8.09 (2009)	4
4 Melville B. Nimmer & David Nimmer, <u>Nimmer on Copyright</u> , § 13.03 (2009)	2, 3

PRELIMINARY STATEMENT

Defendants¹ respectfully submit this reply memorandum in support of their pending motion for summary judgment on the issue of substantial similarity. As the Court has stated, 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 if plaintiffs (hereinafter “Steele”) cannot raise a genuine factual question on substantial similarity. (See Memorandum & Order of April 3, 2009 (Docket No. 85) (“April 3 Order”) at 10-12.)

Defendants filed their motion for summary judgment on June 10, 2009. (See Docket No. 92 (“Defs.’ Mem.”).) On July 17, 2009, Steele filed Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment (see Docket No. 101 (“Opp.”)), attaching more than 25 exhibits and statements, many of which had not been produced to the defendants in response to their timely discovery requests.

The volume of Steele’s submissions, however, does not obscure the fundamental issue of substantial similarity. The principal deficiencies with Steele’s submission include: (i) Steele’s failure to support plaintiffs’ position with analysis by a musicologist; (ii) the lengthy discussion of “temp-tracking” is irrelevant on the issue of whether the Bon Jovi Song or the Turner Promo is substantially similar to the Steele Song; (iii) Steele’s heavy reliance on the term “synchronization rights” is based on a misunderstanding and misapplication of the term; and (iv) Steele is asking this Court to create new legal principles that would discard, not apply, the established substantial similarity test.

Steele makes repeated pleas that existing legal principles be ignored and his personal situation be rewarded, allegedly in order to deter corporations from allegedly “ripping

¹ Defendants joining in this motion are listed on the signature page, infra. For convenience of reference, said parties will simply be referred to as “defendants.”

off writers and publishers” (Opp. at 3), but an alleged imbalance between the financial resources of the parties involved has absolutely no role in a copyright infringement analysis. Substantial similarity, moreover, as an essential element of infringement, is a bedrock of copyright law (see, e.g., 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 1.03 (2009); 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 13.03 (2009)), and cannot be ignored as Steele seems to be saying.

ARGUMENT

A. Steele’s Admission Regarding His Failure To Locate A Single Musicologist Willing To Support His Position

In its ruling of April 3, 2009, this Court explicitly provided Steele with an opportunity, consistent with other “musical copyright cases,” to submit “expert analysis” of the Steele Song and the other relevant works. (See April 3 Order at 12.) Defendants’ summary judgment papers pointed out that Steele subsequently retained a qualified musicologist, who bluntly advised Steele in writing that his case had no merit. (Defs.’ Mem. at 5.) In response, Steele makes a startling admission: he actually approached numerous musicologists, and not a single one would support his position. (Opp. at 5.) To counter this conspicuous shortcoming, Steele tries to dismiss the profession of musicology as a whole, by arguing that none “know how to compare a song to an audiovisual medium” (Id.) Steele presumably means that no musicologist is qualified to compare Steele’s lyrics with the visuals in the Turner Promo. Steele states that he therefore decided to seek out purported “experts in film and video production” (id.

at 3),² and offers statements from more than one-half dozen. Defendants of course do not concede that any of Steele's "experts" actually qualify as such.

Having renounced reliance on a musicologist analysis, however, Steele must confront a serious admissibility issue. The classic test for substantial similarity is that of the ordinary observer. See Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005). For this reason, expert testimony typically is not admissible on the issue of substantial similarity. See Nimmer § 13.03[A][1][c].

There are, of course, a few exceptions to this rule. Id. As noted by this Court (see April 3 Order at 12), the ordinary listener standard may be supplemented in a music case by expert testimony. See Johnson, 409 F.3d at 18-22; see also Nimmer § 13.03[E] (the First Circuit allows testimony from musicologists in music copyright cases). The only other recognized exception for expert testimony is when the copyrighted work is a computer program. See Nimmer § 13.03. It is readily understandable why courts have developed these exceptions in areas of expression that ordinary observers may not be able to evaluate without expert assistance.

Having renounced reliance on musicologists, Steele cannot simply try to salvage his case with reliance on so-called "experts in film and video production," as there are no cases to defendants' knowledge (and Steele cites none) establishing the admissibility of any such evidence on the ordinary observer test for substantial similarity. The reason for this is apparent. This Court does not need a film editor to opine on alleged similarities between (i) Steele's lyrics (e.g., numerous references to prominent Red Sox symbols, such as Pesky's Pole and Rem Dawg) on the one hand, and (ii) the Turner visuals (e.g., numerous Major League Baseball venues in

² While on page 3 of the Opp., Steele's so-called expert Yasuda is not a musicologist, on page 9 Steele contradicts himself, and Yasuda, by presenting Yasuda as one. Yasuda himself states that he "cannot speak as a certified musicologist." (See Opp. Ex. A1, ¶ 2.)

addition to Fenway Park and numerous Major League Baseball teams in addition to the Red Sox) on the other, in order to make a judgment as to substantial similarity.

B. Steele’s “Temp-Tracking” Discussion Is Irrelevant

The lion’s share of Steele’s papers is spent trying to tar defendants with a “temp tracker” label. (E.g., Opp. at 2-4, 6, 12.) Steele asserts that “temp tracking constitutes unlawful reproduction, synchronization or ‘sync,’ and derivation, and therefore violates copyright law.” (Opp. at 2) (see also Opp. at 11: temp tracking “is illegal.”) There is, however, no case law or statutory support whatsoever for Steele’s position that the allegation of “temp tracking” constitutes copyright infringement even when the final musical expression is not substantially similar to the alleged infringed work.

Nor does Steele’s effort to combine two different copyright law concepts -- “‘sync,’ and derivation” -- into one hybrid concept in any way change or water down the substantial similarity analysis. As defendants have noted in every filing on this issue (and as Steele refuses to acknowledge), merely asserting that the Bon Jovi Song or the Turner Promo is a “derivation” or “derivative work” does not in any way change Steele’s obligation to prove substantial similarity between his work and the allegedly infringing work. See 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 8.09[A] (2009). Steele’s misunderstanding of “sync,” or synchronization, rights, in turn, is discussed below.

In sum, Steele’s unsupported conjectures and speculation regarding access and “temp-tracking” are simply irrelevant on the issue as to whether the works being compared are substantially similar.³ As defendants previously showed, evidence of substantial similarity

³ Defendants, of course, have never conceded, and do not concede, either access or copying, or that there was ever a “temp track” combining the Steele Song and the Turner Promo visuals. These issues are not before the Court.

comes from a comparison of the works at issue. That analysis demonstrates that plaintiffs do not have a viable copyright claim.

C. Steele Misconstrues The Concept Of Synchronization Rights

Steele relies heavily on an alleged violation of his “sync rights.” (E.g., Opp. at 4-6.) Steele, however, fundamentally misconstrues what is meant by “synchronization rights.” Those rights address actual use of -- i.e., the incorporation of -- a musical composition or lyrics into an audiovisual work. This is perfectly clear from Steele’s own quotations from the ABKCO case in his Opposition at 4: “Most commonly, synch licenses are necessary when copyrighted music is included in movies and commercials.” ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 62 n.4 (2d Cir. 1996) (emphasis added). At issue in ABKCO was the display of the actual lyrics of a Rolling Stones song on an audiovisual karaoke CD. See also Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 884-85 (9th Cir. 1996) (rights in the actual sound recording/soundtrack of a motion picture).

Here, by contrast, there is no factual dispute that Steele’s song was not “included” in the Turner Promo itself, neither the lyrics nor the music, and thus no “sync right” is implicated. Rather, Steele seems to be contending that some “sync right” was violated because, according to him, his song was allegedly used as the inspiration for creating the Turner Promo visuals -- even though no substantial similarity can be shown between his song and the Turner Promo. (Opp. at 4-6.) This is, again, a new legal definition created by Steele for this lawsuit -- not part of what sync rights have referred to traditionally. And, again, liberal use of the term “synchronization rights” does not give Steele an end-run around the principle of substantial similarity.

Steele goes so far as to ask this Court to recognize a new term coined by Steele: “synchrative work.” (Opp. at 4-5.) This is apparently meant to cover alleged violations of sync rights and the right to make derivative works. Here too, no such combination provides a means

of evading the substantial similarity requirement. Accordingly, Steele's coined term is meaningless in a copyright infringement analysis.

D. Steele's Reliance On So-Called "Ordinary Observer" Evidence Is Entirely Misplaced

Steele claims he has evidence of substantial similarity in testimonials from nine individuals he characterizes as "ordinary observers." (See Opp. at 14, Exs. C1-C9.) Not a single one of these witnesses, however, is merely an "ordinary," unbiased observer. Each has a history of personal connections to Steele and his music. Steele's statements are from: his college dorm-mate (Ex. C1), a local journalist who thinks there must have been copying because none of the corporate parties would return his phone calls (Ex. C2), Steele's girlfriend (Ex. C3), Steele's tattoo artist/friend (Ex. C4), a sportswriter whom Steele asked to do an analysis of the Turner Promo (Ex. C5), Steele's friend who helped promote his song in 2004 (Ex. C6), Steele's music agent (Ex. C7), Steele's former co-worker (Ex. C8), and Steele's "life long friend" and roommate at the time the Steele Song was recorded (Ex. C9). None of these individuals could possibly qualify as impartial "ordinary observers," and thus their comments are not in any way relevant or admissible.

E. Steele's "Sheer Luck" And Similar Arguments Are Equally Meritless

Steele tries to bolster the credibility of his overall position by arguing that certain similar features in the works at issue could not possibly have been mere coincidence. For example, Steele suggests that there is something suspicious and illicit about the fact that two works created in 2004 and 2007 about the major league baseball post-season both could have had references to Yawkey Way (e.g., Opp. at 10), even though the Red Sox were the preeminent team in baseball during this period and even though the reference in the Turner Promo was fleeting and incidental.

Similarly, Steele argues that defendants would have this Court believe (i) that the Bon Jovi Song was written before the Turner Promo was prepared, and (ii) “that it was sheer luck that [the Bon Jovi Song] happen[ed] to fit so well with the MLB/TBS promo.” (Opp. at 20) (emphasis added).) The simple answer is that the close correspondence between the Bon Jovi Song and the Turner Promo is neither a sign of “sheer luck,” nor of improper conduct, but rather strong evidence, based on the works themselves, that in fact the Turner Promo visuals were selected to match the Bon Jovi Song, not the Steele Song.

This evidence from the works themselves is overwhelming. For example, in the Turner Promo:

- 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) (Docket No. 94).)⁴ The conclusion to be drawn from this simple, and compelling, comparison, is one the Court can make on its own, without the assistance of purported experts.⁵

F. Steele's Effort To Avoid Filtering Fails

Steele confuses the accepted method of analyzing substantial similarity (i.e., filtering out unoriginal, non-protectable elements) with the separate argument, which defendants do not make, that his song as a whole is unoriginal. (See Opp. at 15-17.) Defendants have never disputed that Steele holds a valid copyright in the Steele Song. What defendants do argue, following widely accepted legal principles, is that unoriginal elements of a copyrighted work, such as ideas and *scenes a faire*, must be filtered out before undertaking a substantial similarity comparison. (See Defs.' Mem. at 8-9.)⁶ Steele, nevertheless, continues to rely heavily on

⁴ "Brown Decl." refers to the Declaration of Scott D. Brown in Support of Defendants' Motion for Summary Judgment Dismissing the Copyright Infringement Claim (Docket No. 94).

⁵ One of Steele's "experts," Eric Whitman, an animation instructor, observes "that the [Turner Promo] was visually all about baseball (The Red Sox)[.]" (Opp. Ex. B3, ¶ 2.) This is typical of the kind of conclusory allegation that Steele is relying on, which has no basis in reality or fact. Whitman goes on to say that "Bon Jovi's song is an awkward fit at best," but as shown above this is completely inconsistent with the undisputed evidence in the record as to the Bon Jovi Song and the Turner Promo when they are viewed and analyzed.

⁶ Many of the case cites sprinkled throughout Steele's Opposition are incorrectly stated. For example, Steele states that defendants' motion should be denied based on the holding in Vargas v. Pfizer, Inc., 418 F. Supp. 2d 369, 374 (S.D.N.Y. 2005). (See Opp. at 15-16.) However, the Vargas court made explicitly clear that similarity was not even at issue in that decision. See Vargas, 418 F. Supp. 2d at 370 n.2. Also not relevant is Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000) (cited in Opp. at 16-17), as a finding of substantial similarity in that case has no bearing on whether substantial similarity exists in this entirely unrelated case between two works of music neither of which was at issue in Bolton. Moreover, in Bolton the court based its refusal to set aside a finding of infringement on, inter alia, the fact that the hooks of each song were substantially similar as to "lyric, rhythm, and pitch" (212 F.3d at 485) whereas the hooks in the Steele Song and the Bon Jovi Song have no such similarity.

unoriginal elements, such as exhorting the crowd at a sporting event or concert by saying things like “come on” or “get’em up” (e.g., Opp. at 7-9), or the use of the words “I love this” in the titles, which Steele does not dispute is in dozens of songs. (Opp. at 17-18.)⁷ Steele’s substantial similarity analysis simply fails to recognize the need to filter, despite the clear legal requirement to do so.

G. Ricigliano’s Rebuttal Report Addresses Steele’s Allegations That Ricigliano Made Analytical Errors

Attacking defendants’ expert musicologist, Anthony Ricigliano, Steele claims that he made an analytical error by allegedly reducing the meter of the Steele Song by half. (Opp. at 19.) This has been refuted by Ricigliano in his Rebuttal Report: (1) he did not alter Steele’s meter, and (2) even if the meter is transcribed as Steele would have it, there is still no substantial similarity. (See A Rebuttal Report Regarding The Compositions ¶ 2, Ex. A hereto.)

Regrettably, Steele also engages in an unfortunate character assassination aimed at Mr. Ricigliano, accusing him, based on media reports on the subject of temp tracking, of being part of an industry-wide conspiracy to “rip-off” (used at least four times) copyrighted works. (See Opp. at 3, 11, 14, 18.) Suffice it to say that these accusations are based on complete distortions of what was reported in the articles.

Steele also misinterprets Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985). In that case, defendants copied verbatim, or near verbatim, quotes from President Ford’s unpublished memoirs regarding unknown information relating to the pardon of President Nixon, which the Court found to be a violation of plaintiff’s right of first publication unprotected by an asserted fair use defense. See id. at 560. Steele’s assertion that this case stands for the proposition that merely copying 13% of the words of a work constitutes copyright infringement (see Opp. at 7-8) is entirely off base. The Court in Harper & Row held that the copied portions were substantively the “heart” of the book.

⁷ Steele argues that his is the only baseball song with “I love this ____” in the title. (Opp. at 17.) Even so, the title is still unprotectable as *scene a faire*. In addition, Steele misses the point that the Bon Jovi Song is not about baseball.

* * *

In sum, defendants have established that there is no material fact regarding substantial similarity. First, as to the music, defendants have presented a compelling analysis from a well-known musicologist, which confirms what is evident from listening to the songs -- they lack substantial similarity in their music. By contrast, Steele readily concedes that the musicological experts he consulted refused to support his position.

Second, with respect to alleged similarities between Steele's lyrics and the Bon Jovi lyrics, any such similarities (e.g., portions of the titles), do not rise above the level of triviality and must be filtered out from the analysis. Indeed, the most striking evidence of the lack of meaningful similarity cannot be refuted -- whereas Steele's work is a "love song" for the Red Sox, the lyrics of the Bon Jovi Song have absolutely nothing to do with baseball.

Third, a comparison of Steele's lyrics with the Turner Promo visuals shows virtually no similarity whatsoever and indeed numerous dissimilarities. In the Turner Promo, for example, there are no visuals of "Rem-Dawg," the "Babe," "Peskey's Pole," or "Cooperstown."

Finally, the few similarities that do appear do not rise above mere coincidence, which is not surprising considering that both were about the Major League Baseball post-season and were made at a time when the Red Sox were the preeminent team in baseball.

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.

Dated: July 30, 2009
Boston, Massachusetts

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew J. Matule, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on July 30, 2009.

Dated: July 30, 2009 /s/ Matthew J. Matule
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Exhibit A

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 EMail: donatomu@optonline.net

A Rebuttal Report Regarding The Compositions

I Really Love This Team by Samuel Bartley Steele

and

I Love This Town by Bon Jovi

1. I reviewed the Plaintiff's Opposition To Defendants' Motion For Summary Judgment and believe it to contain distorted, misleading, unsubstantiated claims.

2. What appears to be one of Mr. Steele's claims is that the rhythmic transcription I used in my report of the melody of *I Really Love this Team* is not accurate. This is not true. The melody is notated in simple time not in "double time" as is the case with the instrumental accompaniment of this song. This is not a case of being inaccurate, but more representative of the melodic content. In this Motion Mr. Steele recognizes this and suggests such a dichotomy. On page 19 he states, "This melodic rhythm, unlike background drum beats or loops, is always inextricably fused to the lyrics of a song."

Even if one were to choose the alternate notation and double all of the time-values of Mr. Steele's melody the results are the same. For comparison I have doubled the time-values of Mr. Steele's composition and placed the initial statement above and the final statement below phrases of *I Love This Town*. Clearly the melodic units in the Bon Jovi composition are not substantially similar in pitch series, rhythm, melodic structure, or chord patterns (chord symbols are given above each musical staff).

I Really Love This Team

Unit 1 Unit 2 Unit 3

G7 F7 G7 F7 G7 B^b G/B C7

G G G G G G F G G G G G F G G G G G F E^b C

now get up off_ of your seats ev - ery - bo - dy scream Man I real-ly love_ this team.

I Love This Town

Unit 1 Unit 2

C F E min D min C F G C

E E E E E C C A A G G F E D C C E C C

This_ is where it' all_ goes_ down, down, down That's why_ I, love this town.

I Really Love This Team

Unit 1 Unit 2 Unit 3

G7 F7 G7 F7 G7 B^b G/B C

G G G G G G F G G G G F G G G G B^b B C

now get up off_ of your seats ev - ery - bo - dy scream Man I real-ly love this team.

3. I have also reviewed Mr. Jonathan Yasuda's Affidavit and have concluded that it is a flawed document that is full of errors in musical transcriptions (both pitch and rhythm) and even labeling (see *Scansion Analysis* where he attributes the lyric "I feel alive when I'm walkin on the STREET" to Mr. Steele rather than Bon Jovi).

4. Mr. Yasuda has not presented any musical comparisons that substantiate a claim that the compositions *I Really Love This Team* and *I Love This Town* are substantially similar in pitch series, rhythm, harmonic patterns, or melodic structure. In addition Mr. Yasuda has not presented any substantive similarity to consider that *I Love This Town* is a derivative of *I Really Love This Team*. Apparently Mr. Yasuda believes that an idea may be owned by a single individual.

5. Mr. Yasuda does not present one musical phrase that is substantially similar in rhythm or pitch let alone rhythm and pitch. He generally tries to make a connection between these works with short fragments that are often misleading. In his *Scansion Analysis* he illustrates what he considers to be similar significant "stressed" and "unstressed" syllables but when examined these phrases are not musically alike.

For example under the heading Chorus Refrain, Opening 6 syllables he presents the phrases "now get up off your seats." and compares this to "Say hey, say hey say yeah."

However, when the musical settings are examined (see below) it becomes apparent that they are dramatically different in pitch series, rhythm, melodic structure and chord patterns used in the accompaniment.

Clearly there is no basis for a claim that these musical settings are similar let alone substantially similar or suggestive of copying.

I Really Love This Team (Melodic Transcription by Yasuda)

Musical notation for "I Really Love This Team" (Melodic Transcription by Yasuda). The notation is on a single staff in treble clef. It shows a sequence of notes: E4, G4, G4, G4, G4, F4. Chords G7 and F7 are indicated above the staff. The lyrics are: "now get up off your seats".

I Love This Town

Musical notation for "I Love This Town". The notation is on a single staff in treble clef. It shows a sequence of notes: E4, C4, E4, C4, E4, D4, E4, D4. Chords F and G are indicated above the staff. The lyrics are: "Say hey say hey say yeah say yeah".

Sincerely,

Anthony Ricigliano
 Musicologist
 July 24, 2009