

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FILED
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SAMUEL BARTLEY STEELE,)
BART STEELE PUBLISHING,)
STEELE RECORDS,)
)
Plaintiffs)
)
v.)
)
TURNER BROADCASTING SYSTEM, INC.,)
Et al.)
)
Defendants.)
_____)

Civil Action No.
08-11727-NMG

PLAINTIFFS' MOTION
TO RECONSIDER OR
AMEND ORDER
ALLOWING SUMMARY
JUDGMENT

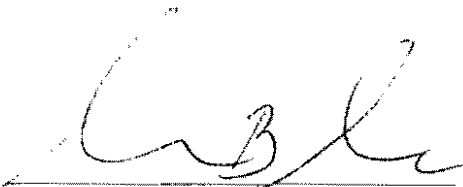
Pursuant to Federal Rules of Civil Procedure 52(a) 6 and 59, Plaintiffs hereby respectfully request that the Court reconsider its August 19, 2009 Order allowing summary judgment for defendants. In the alternative, Plaintiffs request that the Court amend that Order to allow Plaintiffs the opportunity to respond to arguments made in Defendants' Reply brief and relied upon by the Court in its August 19 Order. Specifically, Plaintiffs contend that they have not been allowed the opportunity to refute Defendants' characterization of the testimony of musicologist Dr. Alexander Stewart. Plaintiffs intended to present to the Court Dr. Stewart's response to those arguments, including a more thorough and formal analysis by Dr. Stewart. Because the August 19 Order was issued before the hearing set for September 10, 2009, Plaintiffs have been denied the opportunity to present this crucial evidence.

Plaintiffs ask the Court to reconsider or amend its Order to allow Plaintiffs the opportunity to respond to the defense argument, and the Court's apparent conclusion, based upon Mr. Stewart's analysis currently before the court. As the Court's Order notes, the Stewart report included in Plaintiffs' Opposition to the motion for summary judgment was informal. It did not include any analysis of the video evidence or compare the MLB

Promo to Plaintiffs' song. Plaintiffs included that report to comply with the time deadlines imposed by Defendants' motion, and to highlight the fact that even a musicologist comparing the songs alone saw that Plaintiffs "got a raw deal." Plaintiffs intended to present a more thorough analysis through a sur-reply brief and to address this issue at the hearing. Injustice will result if Plaintiffs are denied the opportunity to fully address this crucial issue.

Please see the attached brief for more detail. Plaintiffs respectfully request the opportunity to present a more thorough, formal (and signed) analysis by Dr. Stewart.

Respectfully submitted,



Samuel Bartley Steele

Pro Se

Dated 08/28/09

Introduction

Plaintiffs contend the Court did not give full and due consideration to (1) Defendants' infringing combination of music/lyrics and images as an independent 'audiovisual' 'work of authorship' as defined by 17 U.S.C. § 101, 102 (a); (2) Plaintiff's originality of selection, coordination and arrangement of unprotectable elements; (3) Plaintiff's originality of expression; (4) synchronization rights as rights to mechanically 'reproduce' or 'duplicate' under 17 U.S.C. § 106 (1). Plaintiff asks the Court to reconsider the evidence in light of the following summation of facts.

The report submitted Dr. Alexander Stewart was informal and incomplete because it did not compare Plaintiffs' song to the MLB/TBS promo. Plaintiffs hope to address this flaw in the record underlying the Court's August 19 Order by submitting a formal report by Dr. Stewart on the substantial similarities between Plaintiffs' song and the MLB/TBS promo audiovisual.

Defendants' Audiovisual Work

Describing the Defendants' work, the Court stated: "The TBS Promo features a song by the popular band Bon Jovi entitled "I Love This Town" along with baseball footage." (See Memorandum & Order of August 19 at 2.) Defendants explain: "[T]he TBS Promo was in fact meticulously synchronized to the Bon Jovi "I Love" song." (See Defendants' June 10 Motion for Summary Judgment at 16.) And Ricigliano: "From the beginning to the end, the visuals and audio/lyric content of the Bon Jovi accompaniment to the TBS commercial is in sync with...the baseball visuals." (See Ricigliano's Report of April 12 at 7.)

By these characterizations and as defined by The Copyright Act of 1976, such a combination of music and video is an 'audiovisual': 'Audiovisual works' are works that consist of a series of related images...together with accompanying sounds, if any. 17 U.S.C. § 101. Audiovisual works are recognized by Congress as independent 'works of authorship': Copyright protection subsists, in accordance with this title, in original works of authorship...[w]orks of authorship include the following categories:... (6) motion pictures and other audiovisual works. 17 U.S.C. § 102. Thus the Bon Jovi song and MLB/TBS visuals are fused in a singular, holistic work, with certain rights and restrictions. "[C]opyright automatically inheres in the work at the moment it is created." Montgomery v. Noga, 168 F.3d 1282, 1288. (11th Cir. 1999). Melville B. Nimmer & David Nimmer, 2 Nimmer on Copyright § 7.16[A] (1998). "Copyright arises by operation of law upon fixation of an original work of authorship in a tangible medium of expression." Greenberg v. Nat'l Geographic Soc'y, 244 F.3d 1267, 1272 (11th Cir. 2001).

Yet Defendants wish to divorce the song from the audiovisual: "The Bon Jovi Song is available to the public as part of the band's album Lost Highway" (Defendants' June 10 Motion at 4); "The audio portion

represents a shorter version of the full-length musical composition *I Love This Town*.” (Ricigliano’s May 12 Report at 6). The 2:38-second audiovisual version, however, is specifically excluded from the “phonorecord” published by Island Def Jam Records because it “meets each element of the statutory definition of audiovisual works and, therefore, cannot be a phonorecord.” See Leadsinger, Inc. v. BMG Music Publishing, 512 F.2d 522, 525 (9th Cir. 2008). “Phonorecords are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed...” 17 U.S.C. § 101. “The definition of phonorecords is explicit...that audiovisual works are not phonorecords.” Leadsinger v. BMG, 512 F.2d 522, 525. “[T]he term phonorecord expressly excludes ‘audiovisual works’...since they ‘consist of a series of related images together with accompanying sounds.’” See Abkco Music, Inc., v. Stellar Records, 96 F.3d 60, 65 (2nd Cir. 1996). Citing 17 U.S.C. § 101.

“One need have no special expertise in intellectual property law to apprehend that an audiovisual work is facially very different from a song, which would fall under the rubric of ‘musical works, including any accompanying words.’” See Raquel v. Education Mgmt. Corp., 196 F.3d 171, 174 (3rd Cir. 1999), 17 U.S.C. § 102(a)(2). The Bon Jovi song, by statute, is part of the audiovisual work, a country-rock-blues playoff baseball anthem. “There is a fundamental difference between an audiovisual work and a song.” Raquel v. Education 196 F.3d 171, 176. The song in fact is inextricably related to baseball, as result of being used as a soundtrack for the MLB/TBS Promo.

To further the proof—and contradict Defendants’ claim (“Steele misses the point that the Bon Jovi Song is not about baseball.” (Defendants’ July 29 Motion for Reply at 9 n.7))--Defendant Craig Barry, Turner Sports VP/Creative Director, said on record, “this song captures the essence of the game” [1]; “[it’s] music that represent[s]...baseball and the teams...Bon Jovi...who better to deliver the message for TBS.” [2] And Bon Jovi manager and Defendant, Jack Rovner of Vector Management, said, “Music must become part of the dialogue in the spot.” [1] Defendants have in advance negated their present claim that “the Bon Jovi song is not about baseball.” As Courts and Nimmer agree, “[Defendant] is not now permitted to make an inconsistent claim so as to better serve its position in litigation...Thus, for the purposes of this lawsuit, we must assume [the earlier claim, i.e., ‘this song captures the essence of the game and represents baseball and the teams.’]” See Arica Institute v. Palmer, 970 F.2d 106, 112 (2nd Cir. 1992). See Nimmer, 1 Nimmer on Copyright, s 2.11[C] at 2-163 to 165; Huie v. National Broadcasting Co., 184, F.Supp. 198, 200 (S.D.N.Y. 1960).

Further, TBS claims: “The lyrics of the Bon Jovi Song have absolutely nothing to do with baseball.” (Defendants’ July 29 Motion at 10); “[T]here is not a single reference to the game of baseball.” (Defendants’ Motion at 15). This claim is contradicted by Defendant Major League Baseball: “Bon Jovi and TBS are friendly

faces...[t]he band that has now crossed generations greets you with a baseball video that even includes a "Say Hey" reference to Willie Mays." [3] And by The National Baseball Hall of Fame & Museum: "Willie Mays, the Say Hey Kid." [4]. And by ESPN Sports: "New York Journal American sportswriter Barney Kremenko...tabbed him the 'Say Hey Kid.' It stuck." [5] And by the authoritative Dickson Baseball Dictionary: "Verbal trademark of Hall of Famer Willie Mays, the 'Say Hey Kid'" [6] The Defendants, 4 out of 5 times, nearing the dramatic climax of their chorus, combine *anaphora* (repetition; used by Plaintiff) and *antiphony* (call-and-response; used by Plaintiff) to repeat, for a total of 8 times, the universally recognized nickname of Hall of Fame ballplayer Willie Mays: 'Say Hey.' In the public domain, Defendants are screaming, "Willie Mays" and "Baseball!" The "ordinary observer" hears baseball music while watching baseball visuals. The Defendants collectively, therefore, created a statutory baseball audiovisual work.

Regarding the above—that the song and video each and together address baseball—Plaintiffs request reexamination of the evidence "in the light most hospitable...indulging all reasonable inferences in [his] favor." See Johnson v. Gordon, 409 F.3d 12, 14 (1st Cir. 2005). Citing Euromo.das, Inc. v. Zanella, Ltd., 368 F.3d 11, 17 (1st Cir. 2004).

Copying

"To succeed on a claim of copyright infringement, a plaintiff must prove '(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.'" (See Memorandum & Order of April 3 at 9-10. Citing Feist Publ'ns, Inc. V. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991).)

Defendants concede to Plaintiff step (1) a valid copyright: "Defendants have never disputed that Steele holds a valid copyright in the Steele Song." (See Defendants' July 29 Motion at 8.)

Now step (2) copying of original constituent elements, or "protectable expression." See Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005). See Concrete Machine Co. v. Classic Lawn Ornaments, 843 F.2d 600, 607 (1st Cir. 1988). To succeed here, "a plaintiff must prove that the copyrighted and infringing works are 'substantially similar.'" (See April 3 Order at 11. Citing Johnson 409 F.3d at 18.) "[T]he substantial similarity must relate to original elements of the copyrighted work." (See April 3 Order at 12. See Johnson at 18-19 (citation omitted).)

These fundamental principles of copyright law were made clear in the Court's April 3 Order. Yet in their Reply, the Defendants clearly misunderstood: [C]opying need not be addressed if Plaintiffs cannot raise a genuine factual question on substantial similarity." (See Defendants' July 29 Motion at 1 (emphasis added).) Yet to raise a genuine factual question on substantial similarity, proof of "copying" is unmistakably required, as explained in Concrete Machinery:

[T]he court first must determine whether there has been “copying”...to assess whether there are sufficient articulable similarities to justify a finding that the defendant has copied from the protected work. Second, once “copying” is established, the court must determine whether the copying is sufficiently substantial to constitute “unlawful appropriation” (“illicit copying”).

Concrete Mach. v. Classic Lawn, 843 F.2d 600, 604. Citing Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946). And Nimmer agrees that “copying” must accompany substantial similarity: “[T]o prove copying as a factual proposition, we have seen that the term ‘probative similarity’ is to be preferred in that context and the question of ‘substantial similarity’ arises analytically only thereafter.” See 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03[A], at 13-33 (2004). Finally, the Ninth Circuit advised Ricigliano’s adversaries in Three Boys v. Bolton case: “A copyright plaintiff must prove...infringement - that the defendant copied protected elements of the plaintiff’s work.” See Three Boys Music v. Michael Bolton, 212 F.3d 477, 479 (9th Cir. 2000).)

As such, Defendants’ misreading of copyright law and resulting claim that “copying need not be addressed [to determine substantial similarity]” is rebuked by First Circuit opinion, Nimmer, and fellow Courts. Plaintiff here will clarify the Defendants’ error: the Court specifically excluded “discovery relevant to other aspects of the case, including, without limitation, who had access to Steele’s copyrighted work or when or who was responsible for the creation of the allegedly infringing works.” (See April 3 Order at 11.)

Plaintiffs argue that the Court did not order discovery on access because the issue has been settled by Defendants’ own admission:

The Defendants admit that on October 20, 2004 a person using the email address ecmp2000@comcast.net sent an electronic mail message with a Windows Media Audio file attachment entitled “01 Man I Really Love This Team.wma” to the electronic mail address jrouke@redsox.com.

(See Defendants’ April 17 Answer at 4.) This “access” was further substantiated by the Irene Bar Affidavit in Plaintiff’s Opposition to Summary Judgement:

I personally spoke with Jay Rouke [sic] of the Boston Red Sox who asked me to email him the song that he felt the Red Sox would love, which I did immediately to jrouke@redsox.com.

The Court will “accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff’s favor.” See April 3 Order at 5. Citing Langadinos v. American Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000).

“Proof of access requires ‘an opportunity to view or to copy plaintiff’s work.’” Three Boys v. Bolton, 212 F.3d 477, 479. Citing Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1172 (9th Cir.

1977). “This is often described as providing a ‘reasonable opportunity’ or ‘reasonable possibility’ of viewing the plaintiff’s work.” Three Boys v. Bolton at 479. Quoting 4 Nimmer, § 13.02[A], at 13-19.

Defendants now offer contradiction: “Defendants, of course, have never conceded, and do not concede...access.” (See Defendants’ July 29 Motion at 4, n.3.). Plaintiffs refers the Court to their prior admission and the substantiating affidavit above.

Proof of Copying

Defendants casually and repeatedly claim Plaintiffs’ several-dozen similarities are “obviously mere coincidence” (Defendants’ June 10 Motion at 16 & 17; Ricigliano Report at 2 & 6). This claim is overturned through diligent “dissection” (Johnson at 18-19) of the audiovisual using common QuickTime® desktop software. (See July 17 Opposition, Ex. B1, Murphy Chronology Study). Consider the following examples of use of exacting lyrical musical spotting cues (painstakingly *selected, coordinated* and *arranged* to the tenth-of-a-second):

Chronological Times & Events of Plaintiff’s “Team” v. JBI/MLB/TBS Promo:

00:06:60 – 00:07:30 For 0.7 sec. Team features guitar, promo features guitar.
 00:08:00 – 00:08:40 For 0.4 sec. Team features drum, promo features drum.
 00:09:10 – 00:10:80 For 1.7 sec. Team lyrics “that’s goin’ round,” promo camera going around a baseball stadium.
 00:11:80 – 00:13:50 For 1.7 sec. Team lyrics “hometown,” promo Boston Red Sox.
 00:18:00 – 00:18:80 For 0.8 sec. Team lyrics “out on [Yawkey Way],” promo fanfare out on Yawkey Way.
 00:18:80 – 00:19:80 For 1 sec. Team lyrics “Yawkey Way,” promo street sign “Yawkey Way.”
 00:22:40 – 00:24:70 For 2.3 sec. Team lyrics “in red have come to play,” promo red-clad cheering fans.
 00:35:50 – 00:36:00 For 0.5 sec. Team piano descends, promo baseball descends.
 00:40:90 – 00:42:20 For 1.3 Team lyrics “Tigers,” promo for 0.6 sec. Tigers.
 00:56:00 – 00:56:80 For 0.8 sec. Team lyrics “[off] your seats,” promo fans off their seats cheering.
 01:04:30 – 01:09:50 For 5.2 sec. Team lyrics three times rally cheer, promo at identical moments rally cheer.
 01:07:50 – 01:09:00 For 1.5 sec. Team lyrics “[stay] tough,” promo chest-thumping.
 02:02:40 – 02:05:50 For 3.1 sec. Team lyrics “spirit far and near,” promo baseball trajectory far to near.
 02:05:50 – 02:08:50 For 3 sec. Team lyrics “The Fenway Fans,” promo for 1 sec. Fenway Fans.

The chronological accuracy of the evidence here is astounding. These are precisely the “sufficient articulable similarities to justify a finding that the defendant has copied from the protected work.” See Concrete Machinery at 604. To ask a reasonable person to believe these perfectly synchronized events occurred independently, divided by time and space, when Defendants had a copy of Plaintiff’s work, is simply too much to bear. Copying is the only reasonable conclusion here.

As further proof of “actual copying,” at exactly 02:38.90, both Team and promo begin ‘fade-out’ to end; Defendants synchronized 149 of 155 (96%) visual images to Team’s tempo, beat and measure (that it’s not 100% suggests it was not an automated task, but done painstakingly by a video editor who *selected* and *coordinated* 149 images in “timed relation” to Plaintiff’s musical and lyrical rhythmic ‘beat’ (6 Nimmer on Copyright § 30.02 [F] [3]), and *arranged* them to follow Plaintiff’s narrative; Team and promo are 2 among 15 million compositions celebrating baseball using “I Love This” in the title; Team and promo are 2 of 5 among 15 million country-rock songs featuring Boston Red Sox; Team and promo share the same dramatic narrative; numerous “studied effort[s] to make minor distinctions between the two works.” See M. Kramer Mfg., 783 F.2d at 446. For example, Plaintiff’s “goin’ round” = Defendants’ “comin’ round”; “hometown” = “feel at home”; “I Love This Team” = “I Love This Town”; “Yawkey Way” = “this street”; “say here we go” = “say hey (say yeah)”; “stand up proud, say it loud” = “shoutin’ from the rooftops”; “come on” = “come on now”; “here we go” = “here we go again”; “far and near” = “no matter where...right here”; “you gotta” = “you got it”; “feel that spirit” = “feel the heart.” Further musical similarities in phrase structure, melodic rhythm, syllabic structure and scansion, are detailed in the July 17 Yasuda Report (Opp. Ex. A1). Additionally, Plaintiff’s audiovideo experts uniformly agree the visuals were synchronized to Plaintiff’s song. (See July 17 Opp. Exs. B1 (Murphy) / B2 (Ellis) / B3 (Whitman) / B4 (Brown) / B5 (Carapezza)).

As for Defendants’ claim of “mere coincidence,” they cannot prevail on hope alone. Plaintiff’s numerous expert accounts and volumes of statistical data to the contrary make an overwhelming case against Defendants’ unfounded claim. (“Bare conclusions seldom are entitled to weight in the summary judgment calculus...[the] court need not give weight to opinion evidence that is unsupported by an adequate foundation.” See Johnson, 18, 21.) Devoid of evidence, the Defendants offer speculation. Plaintiff’s produce facts. Copying is the obvious conclusion drawn from a consideration of the numbers. The test for “probative similarity” is unquestionably met by the rampant copying by song and video of Plaintiff’s work. See Johnson at 16 .

Plaintiff’s urge the Court to recognize Defendants’ admitted and corroborated access to Plaintiff’s work; and added to the overwhelming statistical evidence of copying, Plaintiff’s asks the Court to consider the Ninth Circuit’s “inverse ratio rule,” which “require[s] a lower standard of proof of substantial similarity when a high

degree of access is shown.” Three Boys v. Bolton at 482. Quoting Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996) (citation omitted). In any event with or without, Plaintiffs’ numerical evidence and “facts of originality” are overwhelming in his favor.

Proof of Wrongful Copying

Original Expression

Feist instructs “an author who accuses another of infringement to prove ‘facts of originality, of intellectual production, of thought, and conception.’” Feist at 356. Citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 59-60 (1884).” To qualify for copyright protection, original expression must “possess some creative spark, ‘no matter how crude, humble or obvious.’” Id. Citing 1 Nimmer, Copyright 1.08[C]1. “[N]o author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed ‘expression’—that display the stamp of the author’s originality.” Feist at 357. Unprotectable elements and expression may be “selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” Feist at 354. Citing 17 U.S.C. § 101.

Selection, Arrangement, Coordination

Idea

From the top Plaintiffs set the record straight regarding the Defendants’ erroneous statement on page 10 of their July 29 Reply, that both Plaintiff’s song and JBJ/MLB/TBS promo “were made at a time when the Red Sox were the preeminent team in baseball.” Defendants have “fall[en] prey to hindsight bias.” KSR Int’l Co. v. Teleflex, Inc., 550 U.S. 398 (2007). A study of history and a reading of page 2 of the April 3 Order makes it clear the Red Sox were not preeminent when Plaintiffs created his song. In 2004 it had been 86 years of World Series misery. Behind only the Cubs and White Sox, the Red Sox and Boston fans suffered the 3rd longest losing streak in baseball history. It was not a “mechanical or routine...time-honored tradition,” nor “practically inevitable” in Boston in September, 2004, to be singing World Series anthems. Quoting Feist at 362. Especially since the playoffs had not yet begun. Yet Plaintiffs paired “intellectual labor” with “creative spark,” to transform Idea into Expression. Certainly the “idea of baseball” (See August 19 Order at 13) is not protectable, however Plaintiff’s *selection* of song subject, Red Sox playoff baseball despite 86 years of defeat, is arguably a mark of “intellectual invention” (Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 58, 60 (1884)), beyond the “narrowest and most obvious limits.” Feist at 361. Citing Bleistein v. Donaldson Lithographing Co., 188 U.S. 239-251 (1903). Plaintiff made an artistic work and a creative chronicle for the historical events of his day, contributing his share of original expression to the “Progress of...useful Arts.” Art. I, 8, cl. 8. Feist at 356, 357..

Defendants joined Plaintiffs in creating a ‘work of authorship’ which celebrates playoff baseball and features the Boston Red Sox. (Red Sox visuals predominate. See July 17 Opp. Ex. B1 Chronology Review) This *selection* of the Red Sox as featured team raises suspicion of copying and synchronization: the MLB/TBS audiovideo was promoting the 2007 National League Championship Series, yet the featured team—Boston Red Sox--play in American League.

Style

The next logical “abstraction” (See Nichols v. Universal Pictures Corporation, 45 F.2d 119, 120 (2nd Cir. 1930) by which to divide idea from expression, is the musical style or genre *selected* and *arranged* by the composer for his “‘love song’ for the Red Sox.” (See July 29’ Reply at 10.). Musical genre is not protectable; however if the “selection and arrangement are original, these elements of the work are eligible for copyright protection.” Feist at 357. Citing Patry, Copyright in Compilations of Facts, 12 Com. & Law 37, 64 (Dec. 1990).

According to the Recording Industry Association of America’s 2004 Consumer Profile [7], Plaintiff had 50 musical genres from which to *select* a song style to express his idea. “Since there are various ways of expressing that general idea, the merger doctrine need not be applied to assure that the idea will remain in the public domain.” See Arica Institute v. Palmer, 970 F.2d at 113. In the case at hand Plaintiff *selected* then later *arranged*. out of 50 possibilities, an unlikely style for a Boston Red Sox playoff anthem: electrified country-rock. (“Country Nashville sounds” (July 17 Opp. Ex. A2 Ferraguto); “country-rock” (Ex. B1 Murphy); “rock configuration” (Ex. A3 Stewart); ‘Rock’ music is a combination of blues rhythms, country music and gospel music. [8]; for country-rock song comparison, see “Folsom Prison Blues,” by Johnny Cash (Rock an Roll Hall of Fame, Inducted 1992; Country Music Hall of Fame, Inducted 1980)). In fact a selection of the Rock genre would have been the obvious choice since it claimed 23.9% of Total Sales to Country’s lesser 13%.

In Boston, the *selection* by Plaintiff of ‘country’ music for a Red Sox anthem is anything but “garden-variety” or “firmly rooted in tradition and so commonplace that [the selection] has come to be expected as a matter of course.” See Atari Games Corp. v. Oman, 979 F.2d 242, 245 (D.C. Cir. 1992). In fact, according to Radio-locator.com (formerly MIT List of Radio Stations) [9], country music is nearly non-existent in Boston: of the 50 AM & FM radio stations in Greater Boston, only 1 (102.5 WKLB) offers a country music format. In a 2004 interview, WKLB Program Director Mike Brophey said, “[C]learly we have a bit of a limited ceiling [on ratings]...in the Northeast, we worry about cowboy hats.” [10] The *selection*, then, of a country-rock format for his Boston Red Sox baseball song was in no way “indispensable, or at least customary, in the treatment of a given subject matter.” See Coquico, Inc., v. Rodriguez-Miranda, 562 F.3d 62, 68 (1st Cir. 2009). This creative,

original selection arguably “possesses at least some minimal degree of creativity.” See 1 Nimmer, Copyright 2.01[A], [B] (1990).

Defendants followed /copied Plaintiffs’ uncharacteristic *selection* of country-rock for their playoff baseball anthem featuring the Boston Red Sox. After 25 years of recording rock albums, Bon Jovi released the ‘platinum-selling, country-tinged LP *Lost Highway*.’ “[W]e made the kind of Nashville-influenced record,” said Bon Jovi guitarist and Defendant Richie Sambora. Bon Jovi told Rolling Stone they’ll be going “back to rock & roll” on their next album. [11] From a *selection* of 50 musical genres, Bon Jovi broke with 25 years of tradition to record an electrified country-rock song for inclusion in a baseball audiovisual featuring the Boston Red Sox. The only logical conclusion is that he wrote it to the video.

According to the Library of Congress’ “Bibliography of Published Baseball Music and Songs,” in the electrified country-rock era, circa 1951-Present [12],[13], there have been only four musical works published featuring the Boston Red Sox. [14] Plaintiff joins them to become 1 of 5 in 15 million songs (See ASCAP and BMI song catalogs) in the country-rock era to feature the Boston Red Sox. According to WorldCat.org (a network of collections of more than 10,000 libraries worldwide), two of those works are available exclusively in the collection at the Library of Congress; one exists publicly only in the archives of the National Baseball Hall of Fame; and one does not appear readily-available to the public. A search on Amazon.com yields no results for these songs in the commercial domain. In effect, these songs—which comprise the “customary” “subject matter” of prior art and public domain—are non-existent. Plaintiff, through a series of original and creative *selections*, has entered a field virtually unoccupied. It’s certainly reasonable to believe these selections “possess more than a de minimis quantum of creativity.” Feist at 362.

From this point forward, then, all expression from the Defendants is made with this qualification: by selecting “country-rock” as a musical genre for their Red Sox-featured playoff baseball audiovisual anthem, Defendants followed the Plaintiff’s creative yet unprotectable selections onto a field occupied by only four other songs in 15 million. Of those four songs, none is readily and publicly available. Therefore their title phrases, lyrics, melodies, rhythms, narratives, etc., are effectively removed from the public domain, and leave only the Plaintiffs’ work accessible as a country-rock Red Sox-featured playoff baseball anthem.

Each similarity in unprotectable elements (of which there are great volumes) which was discarded in the Court’s judgement, must be reevaluated in the light of the above. “The court should not lose sight of the forest for the trees; that is, it should take pains not to focus too intently on particular unprotected elements at the expense of a work’s overall protected expression.” Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62, 68 (1st Cir. 2009). Citing Situation Mgmt. Sys., Inc. v. ASP, Cons’g. LLC, ___ F.3d ___, ___ (1st Cir. 2009) [2009 WL

709422, at *5]. After selecting a highly specialized idea, subject, and musical style, Plaintiff finds great latitude for creative selection and expression since there is virtually no prior art or public domain. For instance, before discarding “Yawkey Way” or “Fenway Fans” as scenes a faire, the Court must consider the originality of expression in *selection* of (1) underlying musical style (how may other country-rock renderings of Yawkey Way?); (2) the selection of lyrical images amongst infinite Red Sox iconography, with (3) *coordinated* melody-rhythm-harmony-structure-tempo-length-meter-anaphora-antiphony-scansion; finally, (4) *arrangement* of *selected* and *coordinated* unprotectable elements to create the structure, dramatic elements (anaphora, antiphony), narrative (a fan’s odyssey from the streets outside the stadium walls to the celebration within (see Craig Barry: “The true heart of a baseball franchise lives outside the stadium walls, in the hearts and minds of the fans. These fans love their hometown as much as they love the baseball team that represents them and that is the essence of the piece.” [2])). Craig Barry recognized the value and originality of Plaintiffs’ narrative structure.

Given the highly specialized and uncommon “pattern or sequence” (See Arica v. Palmer, 970 F.2d 106, 112.) of *selection, coordination and arrangement* of unprotectable elements--which result in Plaintiff sharing the field with only 4 out of 15 million works—the Court is urged to reconsider the numerous and pervasive similarities, which when taken in light of the “baseball idea,” begin to emerge as Defendants’ “colorable alterations made to disguise piracy.” See Tennessee Fabricating Co. v. Moultrie Manufacturing Co., 421 F.2d 279, 284 (5th Cir.1970). “[I]t is not sufficient to consider the matter by looking at the component parts: the work must be reviewed as a whole, not just reviewed or analyzed part by part.” M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 436 (4th Cir. 1986). Citing Apple Barrel Productions, Inc. v. Beard, 730 F.2d at 387-88.

Heart of the Matter

Defendants do not dispute Plaintiff’s song being alone, original *and* novel in first selecting “I Love This ___” for its baseball-specific hook and title phrase (Defendants’ Rebuttal, 9, n.7), making it 1 of 15 million published songs to use this creative expression on the subject of baseball. (Library of Congress’ “Bibliography of Published Baseball Music and Songs”; ASCAP and BMI song catalogs.) Though this expression (“I Love This ___” may be commonplace among the entire pool of recorded music, within its “subject matter” or “theme or setting” (by which it is measured for exclusion under scenes a faire), the title phrase is unique. The given “subject matter” here is unquestionably baseball, and there is absolutely no custom or precedent established in the history of American songwriting for this lyrical and musical expression. Furthermore, though this phrase may be obvious, that does not preclude originality. Feist at 356. This title phrase simply does not “necessarily

flow from [the] common idea [of baseball].” See August 19 Order at 7. In fact, according to the authoritative Dickson Baseball Dictionary which includes no entry for the word “love,” this word and phrase are simply not part of the baseball lexicon. Compounding the high degree of lyrical originality within this field, the title phrase “I Love This Team” is recognized by Dr. Stewart (and not refuted by Ricigliano) as “one of the most distinctive harmonic figures [in the song].” (July 17 Opp. Ex. A3) (See Opp. Ex. A1)

Joining Plaintiffs to become the 2nd of 15 million compositions whose subject is baseball and whose musical hook and title phrase contains “I Love This __,” is the MLB/TBS audiovisual. As Nimmer says, “[T]he more creative a work, the more protection it should be accorded from copying.” 4 Nimmer on Copyright §13.05 [A][2][a]. Plaintiffs’ distinction as 1 in 15 million no doubt certifies his “fruits of intellectual labor,” and accords him deservedly high copyright protection for this element of expression. The Trade-Mark Cases, 100 U.S. at 94 (1879). Given Defendants’ admission of access and their statistically-proved copying of synchronized visuals, very strong evidence suggests here that Defendants’ misappropriated Plaintiff’s original expression and “heart” of his work. See Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985).

To further illustrate copying and “nonliteral similarity” or “inexact-copy infringement,” (4 Nimmer on Copyright § 13.03 [A] [1]-[2] (1995)), Plaintiff points to the interchangeability of Team and Town within the baseball context. For example, at 00:41:60 in the audiovisual, the jersey of the ballplayer does not feature the word ‘Tigers’ (Team), but instead ‘Detroit’ (Town); this practice is common among Major League baseball teams. Additionally, a review of the baseball standings on the New York Times sports page will reveal the Teams listed by Town name. Simply put, within the “subject matter” or “topic” or “theme” or “idea” of baseball, TEAM = TOWN.” Finally, Defendant Craig Barry corroborates: “These fans love their hometown as much as they love the baseball team...that is the essence of the piece” [2]; “More so than any other sport, baseball stands for a city.” [1]

“The mere fact that the defendant has paraphrased rather than literally copied will not preclude a finding of substantial similarity. Copyright cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.” Melville B. Nimmer & David Nimmer, 4 Nimmer on Copyright § 13.03 [A] [1]-[2] (1995). “[D]issimilarities that ‘appear quite obviously to be the result of a studied effort to make minor distinctions between the two works’ by ‘frivolous variation’ are themselves ‘compelling evidence of copying.’” Silver Ring Splint Co. v. Digisplint, 2008 WL 2478390 (4th Cir. 2008). Citing M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 444. Citing Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 618 (7th Cir.), cert. denied, 459 U.S. 880, 103 S.Ct. 176, 14 L.Ed.2d 145 (1982).

Synchronization Rights

As cited by the Court, “The Copyright Act does not explicitly confer synchronization rights, but courts have held that the synch right is derived from the exclusive right of a copyright owner, under 17 U.S.C. § 106(1), to reproduce his work.” ABKCO Music v. Stellar Records, 96 F.3d 60, 62 n.4 (2nd Cir. 1996).

“[I]nfringement of copyright owner’s reproduction right takes place ‘whenever all of any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords...by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work.’” H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 106 (1976) (“1976 House Report”). See Agee v. Paramount Communications, 59 F.3d 317, 319 (2nd Cir. 1995).

The synch right is clearly a right of simple ‘reproduction’ or ‘duplication.’ The substantial similarity test, as described by Congress (“substantial portion”), is therefore *quantitative*, not *qualitative*. In simple terms, did the Defendants hit the “record” button to embed Plaintiff’s song in their audiovisual editing software, and subsequently synchronize a series of related images (qualitatively similar, or not), to Plaintiff’s work. And was the “portion” quantitatively substantial in relation to Plaintiffs’ work.

Consider the pervasive evidence of synchronization: 149 of 155 (96%) frame cuts; identical length at 2:38-sec.; 19 ‘spotting cue’ similarities, from 00:06:60 through the final fade-out image at the end, and numerous points inbetween. The painstakingly perfect synchronization of the above similarities is conclusive proof that Defendants used Plaintiff’s in sufficiently substantial portion to infringe his synchronization rights. The Court must reconsider this evidence and apply the proper metrics (reproduction/duplication in substantial portion) for determining synch rights violation.

And regarding the use of temp tracks in closed editing suite, “[C]opyright infringement occurs whenever an unauthorized copy or phonorecord is made, even if it is used solely for the private purposes of the reproducer...” 2 M.B. Nimmer, Nimmer on Copyrights, § 8.02[C] at 8-25 – 26 (1982).

In Summation

“[S]ummary judgment on the question of originality must be denied if there is a material question of fact as to the issue of independent creation, such as where evidence exists from which a jury could find the existence of an original aesthetic appeal.” See CMM Cable Rep, Inc. v. Ocean Coast Props., Inc., 97 F.3d 1504, 1520 (1st Cir. 1996). Citing Knickerbocker Toy Co., Inc. v. Winterbrook Corp., 554 F.Supp. 1309, 1318 (D.N.H.1982).

Plaintiff urges the Court to reexamine the evidence in light of the above clarifications, and reverse its August 19 summary judgment against Plaintiff.

Footnotes:

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11. Kreps, Daniel. "Bon Jovi Return to Rock With 'The Circle' On November 10th," August 19, 2009. RollingStone.com, <http://www.rollingstone.com/rockdaily/index.php/2009/08/19/bon-jovi-return-to-rock-with-the-circle-on-november-10th/>.
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13. Campbell, M., ed., Popular Music in America: And the Beat Goes On (Cengage Learning, 3rd edn., 2008), p. 99. Widely held as the first fully formed rock 'n' roll recording is "Rocket 88" by Jackie Brenston and his Delta Cats, recorded by Sam Phillips for Sun Records in 1951.

14. Casey, Patsy Hotso. "The Red Sox Are Home Again, Hip Horray!," 1959 (Library of Congress); "Fenway to Candlestick in Song," 1983 (National Baseball Hall of Fame). McOsker, Joseph A. "Cheer the Red Sox," 1967. (Library of Congress); Finkel, Elliot. "Red Hot," (1981) (unknown).
15. Sports/Baseball/Major League Standings. New York Times. NYTimes.com, <http://nytimes.stats.com/mlb/standings.asp>.