

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., :  
 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. :  
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**DEFENDANTS’ MEMORANDUM OF LAW IN  
 OPPOSITION TO PLAINTIFFS’ MOTION TO RECONSIDER  
OR AMEND ORDER ALLOWING SUMMARY JUDGMENT**

The undersigned Defendants respectfully submit this memorandum of law in opposition to the Plaintiffs’ Motion to Reconsider or Amend Order Allowing Summary Judgment (“Motion”) (Docket No. 106). It is readily apparent from Steele’s Motion and accompanying brief that he does not cite anything meriting reconsideration of the Court’s Order

dated August 19, 2009 (“August 19 Order”) which granted summary judgment for Defendants on the copyright claim based on the issue of substantial similarity.

#### **I. STANDARD ON MOTION TO RECONSIDER**

A motion to reconsider or amend pursuant to Federal Rule of Civil Procedure 59(e) is “granted only where the movant shows a manifest error of law or newly discovered evidence.” Kansky v. Coca-Cola Bottling Co. of New Eng., 492 F.3d 54, 60 (1st Cir. 2007) (affirming district court’s denial of plaintiff’s motion to reconsider its grant of summary judgment for defendant); accord F.D.I.C. v. World Univ. Inc., 978 F.2d 10, 16 (1st Cir. 1992); Ecker v. U.S., 538 F. Supp. 2d 331, 334 (D. Mass. 2008) (Gorton, J.) (“A motion for reconsideration should be granted only if the court has patently misunderstood a party or there is a significant change in the law or facts since the submission of the issues to the court by the parties.”); Adam v. Hensley, No. 07-CV-338, 2008 WL 2949230, at \*1 (D.N.H. July 30, 2008). Such motions “are aimed at reconsideration, not initial consideration . . . . They may not be used to argue a new legal theory.” F.D.I.C., 978 F.2d at 16 (internal quotation marks and citations omitted) (“[P]arties should not use [Rule 59(e) motions] to ‘raise arguments which could, and should, have been made before judgment issued.’”) (citation omitted).<sup>1</sup>

As explained below, Steele can show neither (1) “manifest error of law,” nor (2) “newly discovered evidence.”

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<sup>1</sup> In his Motion, Steele erroneously cites Rule 52(a)(6), an appellate review standard, in addition to Rule 59.

## II. STEELE'S MOTION IS MERITLESS

### A. The Stewart Report<sup>2</sup>

First, Steele contends that he has “not been allowed the opportunity to refute Defendants’ characterization of the testimony of musicologist Dr. Alexander Stewart . . . including a more thorough and formal analysis by Dr. Stewart.” (Motion at 1.) Defendants’ position on Dr. Stewart was allegedly contained in “arguments made in Defendants’ Reply brief.” (Id.) Clearly, however, this is not the case -- Defendants obtained a copy of the unsigned Stewart report during Court-authorized discovery on the issue of substantial similarity, and included said report and quoted from it in their moving papers (not the reply papers). (See Memorandum of Law in Support of Defendants’ Motion for Summary Judgment Dismissing the Copyright Infringement Claim at 5 (Docket No. 93) (“Defs.’ Mem.”).)

Not only did Steele have more than adequate time to respond regarding the Stewart Report,<sup>3</sup> he actually did address the Stewart Report in his opposition brief -- namely, he argued that “musicologists could not provide a complete analysis of the works involved, because those works include video and film -- the MLB Promo. Musicologists limit their analysis to music.” (Steele Opp. at 3.)<sup>4</sup> In other words, in his opposition, Steele asked the Court to disregard Stewart’s views on the grounds Stewart was allegedly unqualified, and now he seeks

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<sup>2</sup> References to the “Stewart Report” refer to Exhibit A3 to Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment (Docket No. 101) (“Steele Opp.”).

<sup>3</sup> Because Defendants served their motion well in advance of the Court-ordered summary judgment briefing schedule, Steele actually had five weeks within which to prepare his opposition.

<sup>4</sup> This position completely undercuts Steele’s current position on this Motion that he should be allowed to submit a supplemental report from Dr. Stewart because “[Stewart’s report] did not include any analysis of the video evidence or compare the MLB Promo to Plaintiffs’ song.” (Motion at 1-2.)

time within which to have Stewart rewrite or add to his previous views. It goes without saying that this is not a proper basis on which to seek reconsideration.

Second, Steele contends that “[b]ecause 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.” (Motion at 1 (referring to a supplemental report from Dr. Stewart).) Steele clearly misunderstands the purpose of oral argument. Thus, while Steele (without justification) accuses Defendants of in effect having sandbagged him with respect to the Stewart Report, it turns out that it is Steele who believes he can put in new evidence whenever he feels like it. We note that on the occasion of the argument on the motion to dismiss herein, the Court, after urging Steele to retain a lawyer, specifically advised Steele that “as this case goes along, you’re going to be required to abide by rules of procedure that are sometimes arcane and hard to understand, but nevertheless, you will be required to abide by them.” (Transcript of March 31, 2009 Hearing at 6 (excerpt attached hereto as Exhibit A).) That admonition apparently fell on deaf ears.

**B. Steele’s Other Arguments**

Not one of Steele’s other arguments, set forth in the untitled brief accompanying his Motion (“Reconsideration Mem.”), presents a “manifest error of law,” nor do any of these arguments present “newly discovered evidence.” Rather, Steele merely retraces the same issues he has previously addressed. See Adam, 2008 WL 2949230, at \*1 (denying pro se plaintiff’s motion for reconsideration reasoning that “a motion for reconsideration cannot be used as a vehicle to relitigate and/or rehash matters already litigated and decided by the Court” (internal quotation marks and citation omitted)). Defendants briefly address each of these arguments, organized under the same headings used by Steele.

### 1. Defendants' Audiovisual Work

Steele is apparently contending in this section that the Court did not consider the TBS Promo as an audiovisual work, but rather looked only to two songs. (Reconsideration Mem. at 1-3.) This is clearly an inaccurate characterization. It has never been in dispute that the TBS Promo is an audiovisual work, and Steele has been alleging infringement based on both the TBS Promo, and the Bon Jovi Song, separately, throughout this litigation. (See Complaint ¶¶ 28-31 (Docket No. 1); Amended Complaint ¶¶ 30-31 (Docket No. 41).) Moreover, the Court clearly understood that the TBS Promo constituted an audiovisual work when rendering its decision. (See August 19 Order at 2 (“The TBS Promo features a song by the popular band Bon Jovi entitled ‘I Love This Town’ (‘the Bon Jovi Song’) along with baseball video footage.”).)

### 2. Copying

As Steele himself concedes, “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.’” (Reconsideration Mem. at 4 (citing April 3 Order at 11).) This is because, as Steele also concedes, “[t]o succeed here, ‘a plaintiff must prove that the copyrighted and infringing works are “substantially similar.”’” (Id. at 3 (citing April 3 Order at 11 (citing Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005))).) Therefore, because the Court has ruled that the works at issue here are not substantially similar -- an essential element of a copyright infringement claim -- issues of access and copying are wholly irrelevant.

### 3. Proof of Copying

See the discussion in section II.B.2 immediately above.

#### 4. Proof of Wrongful Copying

In this section (and its subsections, collectively), Steele appears to be addressing the issue of substantial similarity. However, again, his arguments present nothing by way of manifest error or newly discovered evidence. Steele does make up a new, and erroneous argument out of thin air in the subsection titled “Style” -- namely, that “Defendants followed/copied Plaintiffs’ uncharacteristic selection of country-rock for their playoff baseball anthem featuring the Boston Red Sox.” (Reconsideration Mem. at 9.) However, both musicologists involved in this case, Stewart and Ricigliano, concluded that Steele’s song follows the basic “12 bar blues” pattern, whereas the Bon Jovi Song does not. (See Stewart Report at 1; Ricigliano Report at ¶¶ 22-23 (attached as Exhibit 12 to the Declaration of Scott D. Brown (Docket No. 94).) Clearly, then, Steele’s assertion that both songs were of the same genre is baseless and controverted by the undisputed facts of record.

Similarly, in the subsection titled “Heart of the Matter,” Steele rehashes previously submitted arguments, and misconstrues the record evidence. For example, Steele points out that “the title phrase ‘I Love This Team’ is recognized by Dr. Stweart [sic] . . . as ‘one of the most distinctive harmonic figures [in the song].’” (Reconsideration Mem. at 11 (alteration in original) (quoting the Stewart Report).) However, Steele leaves out the fact that Stewart went on to state that this harmonic figure “is not found in [the Bon Jovi Song].” (Stewart Report at 2.) Thus, this “distinctive harmonic figure” in no way supports Steele’s claim of substantial similarity.

#### 5. Synchronization Rights

The Court squarely and accurately addresses the issue of synchronization rights in its August 19 Order at pages 15-16.

\* \* \*

In sum, Plaintiff Steele has already had his day in Court. His lawsuit asking for \$400 billion in damages was filed on October 8, 2008, naming approximately 20 defendants. In the face of a motion to dismiss, Steele sought and obtained several extensions to file opposition papers (e.g., Docket No. 39) (notwithstanding that he had refused to grant one defendant an extension of time within which to answer the Complaint). With his opposition to the first motion to dismiss, Steele served an Amended Complaint, changing legal theories and adding more defendants, and later arguing that the Amended Complaint did not replace the initial Complaint, but simply added to it. (See April 3 Order at 5.) In response to Defendants' second motion to dismiss, Steele filed extensive opposition papers, and appeared personally in Court to present oral argument. Following a period of discovery limited to the issue of substantial similarity, the Defendants filed a motion for summary judgment. On July 17, 2009, Steele filed almost two dozen supporting statements and analyses in support of his opposition to Defendants' motion for summary judgment on the issue of substantial similarity. This Court's Order of April 3, 2009 had given Steele clear notice of the issues that he had to address on summary judgment, and thus provided Steele with almost four months within which to gather support for his position. Additionally, because Defendants filed their motion earlier than required, Steele had five weeks in which to specifically respond to Defendants' motion. There is no basis here whatsoever for reconsideration or amendment of the Court's August 19 Order.

### **CONCLUSION**

For the foregoing reasons, the Court should deny in its entirety Plaintiffs' motion to reconsider or amend the order allowing summary judgment.

Dated: September 2, 2009  
Boston, Massachusetts

Respectfully submitted,

/s/ Matthew J. Matule  
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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 September 2, 2009.

Dated: September 2, 2009

/s/ Matthew J. Matule  
Matthew J. Matule



# **EXHIBIT A**

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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

BEFORE: THE HONORABLE NATHANIEL M. GORTON

HEARING ON MOTIONS TO DISMISS

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

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

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On behalf of the Defendant Kobalt Music Publishing  
America, Inc.

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

5 MR. STEELE: Thank you.

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

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

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

18 THE COURT: Okay.

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

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

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

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

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

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

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C E R T I F I C A T E

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

/s/ Cheryl Dahlstrom

Cheryl Dahlstrom, RMR  
Official Court Reporter