

United States Court of Appeals For the First Circuit

No. 11-1674

SAMUEL BARTLEY STEELE

Plaintiff – Appellant

STEELE RECORDZ; BART STEELE PUBLISHING

Plaintiffs

v.

JOHN BONGIOVI, Individually, d/b/a Bon Jovi Publishing; SCOTT D. BROWN;
CHRISTOPHER G. CLARK; MAJOR LEAGUE BASEBALL PROPERTIES, INC.;
MATTHEW JOSEPH MATULE; KENNETH A. PLEVAN; RICHARD SAMBORA,
Individually, d/b/a Aggressive Music; SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP &
AFFILIATES; CLIFFORD M. SLOAN; TURNER BROADCASTING SYSTEMS, INC.

Defendants – Appellees

ON APPEAL FROM THE U.S. DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

BRIEF OF APPELLANT SAMUEL BARTLEY STEELE

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Appellant Steele has four appeals pending in this Court. Left intact, the District Court's decisions will leave a scar on First Circuit jurisprudence and undermine the faith of counsel, litigants, and, indeed, all citizens in the ability of our courts to fully and fairly redress meritorious claims. Appellant Steele has yet – after nearly three years, as many federal lawsuits, and four appeals – to have his day in court. Steele's opponents executed a shameless, dishonest, and reprehensible scheme spanning all of his cases, committing fraud on the courts of this circuit at a *literally* unprecedented level (no published case even comes close). Steele respectfully submits that this is reason enough for oral argument to be heard and refers this Honorable Court to Steele's story, as told through this and his filings in his three other appeals.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Massachusetts had original jurisdiction over this claim pursuant under 28 U.S.C. §1338(a) because it arose under the United States Copyright Act, 17 U.S.C. §101, et seq., specifically 17 U.S.C. §§1202 and 1203 (part of the Digital Millennium Copyright Act).

The First Circuit Court of Appeals has jurisdiction over this appeal based on the District Court's final judgment, dismissing appellant's claim as a matter of law on May 17, 2011 and disposing of all parties' claims. Appellant timely filed a Notice of Appeal on June 13, 2011.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

PRIMARY ISSUE:

Steele presented the Court with undisputed evidence of Appellees' unprecedented fraud on the court and abusive tactics during a prior related copyright infringement case that corrupted the entire proceedings and led to flawed discovery and procedural orders and, ultimately, a decision spawned from the poison of Appellees' offensive and reprehensible tactics in that case. The District Court nonetheless determined, retrospectively – taking Steele's facts showing fraud and misconduct as true – that because Appellees' conduct in the earlier proceeding "would not have affected" its "substantial similarity" analysis, which compared the works' "lyrics, melody, and rhythm," Steele was not injured by Appellees' fraud and misconduct or their influence on the proceedings. The District Court specifically held that because it found that "no infringement took place," Appellees' submission of false evidence and other fraud on the court "would not have changed that determination." Therefore, the District Court concluded, Steele was not harmed by

Appellees' acts and lacked constitutional standing to pursue his Digital Millennium Copyright Act claim.

Was this an error of law? Alternatively, was this an abuse of discretion?

SECONDARY ISSUE:

The District Court further ruled Steele's case claim precluded by his earlier copyright infringement case, which was dismissed as a matter of law (appeal pending).

The District Court found that Steele's case arose from the "same facts" as his earlier infringement case, despite the chronological "bright line" separating the facts giving rise to each case; namely, the facts of infringement – which occurred *prior* to filing his infringement case – and the facts of Appellees' DMCA violations, which occurred *during* the litigation of his infringement case.

Was the District Court's application of claim preclusion based on the cases' arising from the "same facts" an error of law, given that the facts of each case were not the same and were, in fact, mutually exclusive and logically and legally entirely discrete?

OTHER ISSUES:

Did the District Court err in finding that Steele did not – but “should have” - raised allegations of misconduct during the infringement case, “rather than filing a separate lawsuit 19 months later” when Steele unequivocally and unambiguously *did* raise Appellees’ misconduct in the infringement case, in a sworn affidavit filed with the District Court?

Did the District Court err in allowing Appellees’ motion for Rule 11 sanctions where Appellees were unable to provide a *single* basis for such sanctions, despite Steele’s request, during the Rule 11 “safe harbor” period, for such information and where Steele made two good faith attempts to obtain information *from Appellees* that, upon receipt, Steele promised to *voluntarily dismiss this case*, but where Appellees refused to provide that information?

STATEMENT OF THE CASE

a. Nature of the Case

This is a claim brought under the Digital Millennium Copyright Act, specifically 17 U.S.C. §§1202 and 1203.

b. Course of Proceedings

Steele filed his Amended Complaint on August 11, 2010 against ten defendants alleging illegal removal of copyright management information in violation of 17 U.S.C. §§1202 and 1203. Defendants moved to dismiss on November 24, 2010. Steele moved to stay this case – *Steele v. Bongiovi*, No. 10-11218-NMG - and consolidate it with his other pending (at the time) and related District Court case, *Steele v. Ricigliano*, No. 10-11458-NMG. Finally, defendants moved for Rule 11 sanctions against Steele and the undersigned counsel.

c. Disposition Below

The District Court denied Steele's motion to stay and consolidate and allowed defendants' motions to dismiss on May 17, 2011. The District Court further allowed defendants' motion for sanctions, describing this case as "an attempt to circumvent

this Court's holding in Steele I," but limited sanctions to an admonishment to Steele and the undersigned unless "plaintiff hereafter persists in filing frivolous pleadings."

STATEMENT OF FACTS

a. THE PARTIES AND MLBAM

i. Appellant/Plaintiff Steele

Plaintiff and Appellant Samuel Bartley Steele, also known as Bart Steele ("Steele"), is a professional musician and music producer. App-9. Steele does business as Bart Steele Publishing and Steele Recordz, sole proprietorships owned by Steele. App-9.

ii. Defendants-Appellees

Defendants-Appellees Major League Baseball Properties, Inc. ("MLB Properties"), Turner Broadcasting System, Inc. ("TBS"), John Bongiovi ("Bongiovi"), and Richard Sambora ("Sambora"), are represented in *Steele v. Turner Broadcasting System, Inc.*, et al., No. 08-11727-NMG, (D. Mass. 2008) ("*Steele I*") (appeals pending, First Circuit Nos. 09-2571 ("*Appeal I*") and 10-2173 ("*Appeal II*")) by Defendant-Appellees Skadden, Arps, Slate, Meagher, & Flom LLP ("Skadden"), Scott D. Brown ("Brown"), Christopher G. Clark ("Clark"), Matthew J. Matule

(“Matule”), Kenneth A. Plevan (“Plevan”), and Clifford M. Sloan (“Sloan”) both in the District Court and in the First Circuit Court of Appeals.

Steele I was a copyright infringement suit against Appellees MLB Properties, TBS, Bongiovi, Sambora, and others, including Vector Management (“Vector”), and MLB Advanced Media, L.P. (“MLBAM”). App-31-32.

iii. MLBAM

MLBAM is a Delaware limited partnership with offices at 75 Ninth Avenue, 5th Floor, New York, NY 10011. App-22. MLBAM is in the business of ownership, administration, sales and promotion of Major League Baseball online and in the digital domain, MLB.com and baseball and non-baseball multimedia services to various baseball and non-baseball clientele, including Bon Jovi. App-22.

MLBAM is the ostensible copyright owner of the infringing commercial audiovisual advertisement at issue in *Steele I* (the “Infringing Audiovisual”). App-21.

*b. "THE SONG THAT BROKE THE CURSE OF THE BAMBINO"*¹

i. The Steele Song

In September 2004, during the Boston Red Sox ("Red Sox") run-up to their first World Series championship in 86 years, Steele composed, wrote, recorded, and published a 2:38:90-long Red Sox-centric country-rock and baseball-themed musical work entitled "Man I Really Love This Team" ("Steele Song"). App-11-13, 18-20.

The Steele Song became extremely popular as the Red Sox advanced in the playoffs: it was played on Boston Sports Radio 850 AM, Steele performed it live on local Boston television stations, and sing-alongs were held at the Cask 'n Flagon sports bar (among others) outside Fenway Park. App-12.

During the fall of 2004 Steele gave out thousands of CDs containing the Steele Song to fans and Red Sox officials at Fenway Park. App-13. Steele sent CDs of the Steele Song with lyric sheets to several Red Sox players and personnel App-13.

ii. The Red Sox Solicit the Steele Song

In October 2004, Irene Barr, a music agent acting on Steele's behalf, spoke with Jay Rourke, an employee of the Red Sox, about the Red Sox using the Steele

¹ In June 2005, Chelsea City Council member Ron Morgese honored Steele for writing the "Song that Broke the Curse of the Bambino." App-15.

Song as part of a baseball promotion. App-13. On October 20, 2004, Mr. Rourke informed Ms. Barr that the Red Sox were very interested in the Steele Song and he asked Ms. Barr to send the Steele Song to him, which she did that day by e-mail. App-13-14. The Red Sox have admitted, in court papers, receipt of the Steele Song from Ms. Barr's e-mail of October 20, 2004. App-14; Appeal I Appendix at 424 ("Appeal I App---")².

c. MLBAM RELEASES THE INFRINGING AUDIOVISUAL

On August 27, 2007, MLBAM released the Infringing Audiovisual: a 2:38:90-long Red Sox-centric country-rock and baseball-themed work entitled "I Love This Town," with Appellees Bongiovi and Sambora performing the soundtrack, on MLBAM's website, www.mlb.com. App-18-20.

The Infringing Audiovisual was part of a nationwide marketing plan to advertise that the TBS-owned television network "TBS" was broadcasting part of the playoffs that year. App-19.

² "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." Appeal I App-424.

The Infringing Audiovisual displays, in its final seconds, MLBAM's copyright notice, "© 2007 MLB Advanced Media." App-21.³

The Infringing Audiovisual (with its MLBAM copyright notice) may be viewed by clicking (or Ctrl-clicking) on the following link:

http://mlb.mlb.com/media/player/mp_tpl_3_1.jsp?wid=595113&w=/2007/open/commercial/082707_tbs_bonjovi_ps_promo_400.wmv&pid=gen_video&vid=1&mid=200708272173402&cid=mlb&fid=gen_video400&v=2. App-21.

d. TEMP TRACKING AND COPYRIGHT INFRINGEMENT

A temp track is a musical work that a film editor uses as a "reference" or "guide" in making preliminary video edits – matching video edits to the temp track's tempo or beat – without permission of the work's owner, in order to create a "draft" version of an audiovisual advertisement to present to a client. App-26-27.

Use of a temp track, as described and defined above, violates the temp track copyright owner's exclusive copyrights, pursuant to United States and International Copyright Laws. App-30.

³ Steele's Amended Complaint mistakenly denoted the notice "© 2007 MLBAM." App-21, 24 at ¶¶ 79, 97, respectively.

i. The Steele Song: the “Temp Track” for the Infringing Audiovisual

Steele’s Amended Complaint, and briefs in his primary appeal arising from *Steele I*, describe numerous visual, lyrical, and musical congruities between the Steele Song and the Infringing Audiovisual, including identical length and 96% ‘beat-matching.’ App-19; Appeal I Steele Opening Brief at 19, 24-27, 58-73 (“Appeal I Steele Brief”).

Given MLBAM’s access to the Steele Song between 2004 and 2006, both through the Red Sox – which have admitted access since October 2004 - and directly from Steele’s numerous mailings, e-mails, and online submissions of his Song directly to MLBAM, Appellees’ use of Steele’s Song as a temp track is not only plausible, but consistent with routine industry practices. App-20. This includes the routine industry practices of several *Steele I* defendants, including Appellees. Appeal I App-26-27, 300-303, 311, 592, 594-595, 600-602, 609.

e. STEELE I: COPYRIGHT INFRINGEMENT

On October 8, 2008 Steele, *pro se*, filed a copyright infringement lawsuit against Appellees Bongiovi, Sambora, MLB Properties, and TBS, and others. App-31-32. Steele alleged use of the Steele Song as a temp track during the creation of the

Infringing Audiovisual in violation of Steele’s Copyright. *Id.*; Appeal I Steele Brief at 20-22, 24-28; and Appeal I App-27-32, 145-147, 151-163.

At no point before, during, or since the *Steele I* proceedings has any *Steele I* defendant - or any Appellee here - denied or disputed that Steele’s Song was used as a temp track for the Infringing Audiovisual. App-31; Appeal I Steele Reply at 24, n.14, 31, 33-35; Appeal II Steele Reply at 11, n.4.

In *Steele I*, Steele also sued MLBAM, also known as “MLB.com,” the claimed copyright owner of the Infringing Audiovisual, which, in whole or in substantial part, created, produced, distributed, promoted, and displayed the Infringing Audiovisual nationally and worldwide. App-32-33; Appeal I App-24, 27-32, 145-147, 151-163.

On December 8, 2008, the *Steele I* defendants filed notices of appearance and moved to dismiss Steele’s Complaint. Appeal I App-37. In support of their motion, under pains of perjury, they filed a sworn-to purported “true and correct *copy*” of the Infringing Audiovisual; however, the audiovisual defendants filed (the “Altered Audiovisual”) was missing MLBAM’s copyright notice – i.e., its copyright management information (“CMI”) as defined by 17 U.S.C. §1202 (c). Appeal I App-46, n.3; Add-15

The Altered Audiovisual differed in other material ways and was no longer the identical length of the Steele Song. *Id.* Appellees' have since admitted their filing – the Altered Audiovisual - was a not a *copy*, but a “version,” of the Infringing Audiovisual. Appeal I App-46, n.3; Add-15.

By late December, 2008 defendants MLBAM (and Vector) had defaulted, unbeknownst to the District Court and Steele. *Turner Broadcasting System, Inc.*, 746 F.Supp.2d 231, 236 (D.Mass 2010).

On January 30, 2009 Steele filed his Amended Complaint. Appeal I App-141, 150.

Appellees filed motions to dismiss Steele's Amended Complaints on February 18, 2009, in support of which they again filed CMI-lacking Altered Audiovisual. Appeal I App-174, n.4; Add-13-22.

On March 31, 2009, at Steele's first and only appearance before the District Court, the Court defined the singular dispositive issue: “prov[e] to me the substantial similarity of these two songs... convince me that your song and the Bon Jovi song are ‘substantially similar.’” Appeal I App-414; Add-6-7 (addressing the scope of discovery to be allowed).

The District Court allowed several defendants' motions to dismiss for failure to state a claim on April 3, 2009. *Steele v. Turner Broadcasting System, Inc.*, 607 F.Supp.2d 258, 263-265 (D.Mass., April 3, 2009).

At the same time, the District Court ordered 60 days for discovery limited to the issue of "substantial similarity" and exchange of expert reports on that issue, after which it would consider the remaining defendants' motions for summary judgment. *Id.* at 265. The District Court, without comment, did not enforce any Rule 26 required disclosures, before or after the parties' Rule 26(f) conference and filing of their joint discovery plan. *Id.*

On June 10, 2009 Appellees moved for summary judgment, and for the third time filed the Altered Audiovisual. Appeal I App-459, n.7.

On August 19, 2009 the District Court allowed the defendants' summary judgment motions. *Steele v. Turner Broadcasting System, Inc.*, 646 F.Supp.2d 185, 193-194 (D.Mass., August 19, 2009).

On October 13, 2009 the District Court denied Steele's motion for reconsideration. *Steele v. Turner Broadcasting System, Inc.*, 2009 WL 3448698, at *1 (D.Mass., October 13, 2009) (unpublished).

On November 6, 2009 Steele, now with counsel, filed his appearance and Notice of Appeal to this Court, which remains pending. App-32, Appeal I App-822-823.

Steele was *pro se* throughout the District Court proceedings, obtaining counsel after entry of judgment. Appeal I App-22.

i. The Altered Audiovisual

On each of the three occasions defendants filed the Altered Audiovisual, it included a sworn declaration, signed by Appellee Scott D. Brown, a Skadden attorney at the time (“Brown Declarations”).⁴ Appeal I App-64-66 (¶ 2); 221-223 (¶ 2); 475-478 (¶ 10); App-33; Appeal I App-46, 174, 459.

Each of Brown’s three Declarations stated “under pain and penalty of perjury” - yet incorrectly - that the Altered Audiovisual was a “true and correct copy” of the Infringing Audiovisual. *Id.*

⁴ Brown left Skadden’s employ on Friday, June 17, 2011 and on the same afternoon filed a motion to withdraw as counsel from Nos. 09-2571 and 10-2173 (1st Cir.), which motion was granted. Skadden has not denied that Brown’s departure from Skadden was related to his false Declarations. Appellees’ Reply to Steele Response to Motion to Withdraw and Motion for Affirmative Relief at 2, n.1 (No. 09-2571) (1st Cir.) (“Appeal I Appellees’ Reply Supporting Motion to Withdraw”).

The Altered Audiovisual – unlike the Infringing Audiovisual - was never broadcast, displayed, or otherwise distributed publically, and was not the work at issue in *Steele I*. App-36. The three filings of the Altered Audiovisual in the District Court and once in the First Circuit Court of Appeals were the only times the Altered Audiovisual was made public. App-36.

The District Court – on each of the three occasions Steele unambiguously raised the issue – failed to make any determinations regarding, or to even address, the Altered Audiovisual. Add-6-9; *TBS*, 746 F.Supp.2d at 238-239; *Steele v. Ricigliano*, -- F.Supp.2d ----, 2011 WL 2260485, at *4 (D.Mass. 2011).

Attorney Brown’s Declarations were knowingly false *when filed*, as Steele has shown in several briefs and other filings in this Court. Add-13-22; Appeal I Steele Brief at 18-19; Appeal I Steele Reply at 8-19; Appeal I Steele Motion for Sanctions at 7-8; Appeal II Steele Brief at 28-30; Appeal II Steele Reply at 16-17, 27-28.

Skadden has not denied that Attorney Brown’s sworn statements were false, that Skadden knew they were false, and that the Altered Audiovisual was *not* a “true and correct copy” of the infringing work. App-32-39; Add-13-22; Appeal I Steele Reply at 8-19; Appeal I Steele Motion for Sanctions at 6-8; Appeal I Steele Reply

Supporting Motion for Sanctions at 1-5;⁵ Appeal II Steele Brief at 28-30; Appeal II Steele Reply at 17-18, 27-28, 32-33.

ii. The Missing MLBAM Copyright Notice

The Altered Audiovisual was missing the MLBAM copyright notice (and accompanying portion of its soundtrack) from its closing seconds. App-33-34, 37.

The Altered Audiovisual instead ends displaying the TBS logo rather than the MLBAM Copyright Notice as in the Infringing Audiovisual. App-34.

The Altered Audiovisual thereby gave the false impression that TBS, rather than MLBAM, created the Infringing Audiovisual. App-34; Appeal I App-395. The *Steele I* defendants, including Appellees, omitted any reference to MLBAM during *Steele I*. App-35. Appellee Sloan at oral argument identified the Infringing Audiovisual as “what we’ll call the Turner promo.” Appeal I App-395. In their *Steele I* filings, defendants, including Appellees here, also referred to the Infringing Audiovisual as the “TBS Promo,” which nomenclature the District Court adopted in its subsequent opinions. App-34; *TBS*, 646 F.Supp.2d at 188, 193-194; Add-2.

⁵The undersigned incorrectly titled Steele’s appellate reply brief “Appellants’ Response to Appellees’ *Reply* to Appellants’ Motion for Sanctions,” whereas Appellees’ brief was titled “Appellees’ *Response* to Appellants’ Motion for Sanctions” (emphasis supplied).

iii. The 12 Seconds of “Dead Air”

The Altered Audiovisual also contains 12 seconds of “dead air” at its beginning, unlike the Infringing Audiovisual. App-34. The extra 12 seconds rendered the Altered Audiovisual 2:46-long, longer than both the Steele Song and Infringing Audiovisual, each of which clock in at *exactly* 2:38:90 to fade ending. App-34.

During the silent 12 seconds of at the beginning the Altered Audiovisual, the following text is displayed on a black screen: “Version: FINAL 2.” App-36.

iv. Steele’s Request for Audiovisual “Version FINAL 1”

While preparing his opposition to summary judgment, Steele in writing requested a copy of “Version: FINAL 1” from Appellees on June 28, 2009. App-37; Appeal I App-46, 174, 459; Appeal II App-516, 555, 563.

Appellees rejected Steele’s request and have additionally rejected several subsequent requests from Steele’s counsel for an *unaltered* copy of the Infringing Audiovisual. App-37. Appeal II App-516, 523, 555, 563; Appeal I Steele Response to Motion to Withdraw at 5.

Appellees Skadden, Brown, Clark, Matule, Plevan, and Sloan have, at various times, asserted: (1) the Altered Audiovisual was not altered, App-83-84, Add-15-16;

(2) no other versions of the Altered Audiovisual exist (labeling any earlier draft version “speculative” and a “phantom ‘working copy’”), Appeal I Appellees’ Response at 23, n.14; (3) the alterations were immaterial, App-84-86, Add-15-16, 22, Appeal I Appellees’ Response at 47-48; (4) that Steele waived his right to challenge the Altered Audiovisual, App-37, 77, 87-88, Appeal I Appellees’ Response at 47-48; and, most recently (5) that the existence of different versions does not mean that Appellees altered the version – the Altered Audiovisual - filed the District Court. App-83.

As to the last point, the Altered Audiovisual was and remains the *only* “version” the use and publication of which was limited to appellees’ filing it with the United States District Court and First Circuit Court of Appeals in defending against Steele’s claims. App-36. Any and all other “versions” were publically released, displayed, and promoted as part of the 2007-2008 “Major League Baseball on TBS” worldwide advertising campaign. App-18-19, 21; Appeal II Steele Brief at 20.

Appellees Skadden, Brown, Clark, Matule, Plevan, and Sloan have yet to file a copy of the Infringing Audiovisual with the District Court or First Circuit Court of Appeals. App-37; Appeal II App-516, 555, 563.

v. Steele Raises Allegations of Misconduct in Steele I

The District Court held that “[t]he fact that Steele was a *pro se* litigant...does not excuse his failure at least to raise the possibility of misconduct [during *Steele I*].” Add-9. Steele, however, did raise more than just “the possibility of misconduct” misconduct during *Steele I* in a four page sworn affidavit filed with the District Court on September 15, 2009. Appeal I App-815-818.

Steele’s September 15, 2009 Affidavit described several specific instances of misconduct, including procedural misrepresentations, contradictory statements regarding “access” to Steele’s song, inconsistent characterization of Bon Jovi’s soundtrack with respect to baseball, and improper attempts to legally divorce the subject audiovisual into “audio” and, separately, “visual” material elements. Appeal App-817.

vi. MLBAM’S Default in Steele I

MLBAM was Steele’s primary “target” defendant in *Steele I*. App-32-33; Appeal I App-24, 27-32, 145-147, 151-163; Appeal I App-157.

MLBAM was properly served on November 17, 2008, but failed to appear or defend. App-33; *Steele v. TBS*, 746 F.Supp.2d at 236. MLBAM, accordingly, defaulted in *Steele I. Id.*

MLBAM's default was concealed by Appellees' removal of its CMI from the Infringing Audiovisual, which was first filed with Skadden's appearance on behalf of the named – but unserved – MLB Properties, whose appearance falsely represented that the *Steele I* Complaint had “misidentified” MLB Properties as MLBAM. Appeal II App-43-44. Skadden's appearance for MLB Properties was knowingly false, a fact never disputed by Skadden, MLB Properties, or the District Court.⁶ Appeal II App-156, 440-441, 446-448, 451-452; Appeal II Steele Brief at 21-24; Appeal II Steele Reply at 18-20, 25-26.

⁶ The District Court would later take note of MLB Properties' curious filings on behalf of the unrelated and distinct corporate defendant MLBAM: “It is unclear from the facts presented in the pleadings what the relationship is between MLB [Properties] and MLBAM... Indeed, it is worth noting that MLB [Properties] filed the opposition to Steele's motion to default MLBAM and yet claims that MLBAM is a separate entity... MLBAM did technically default, although it remains unclear why MLB [Properties] has (figuratively) picked up its banner.” *Steele v. TBS*, 746 F.Supp.2d at 236.

Steele – *pro se* at the time – took Skadden’s appearance for MLB Properties at face value, believing that Skadden’s appearance for MLB Properties constituted an appearance for the “misidentified” MLBAM. Appeal II App-243-250.

On June 12, 2010 Steele – now with counsel – discovered MLBAM’s default and MLB Properties’ concurrent false appearance and, on June 18, 2010 moved for entry of default as to MLBAM in *Steele I*. Appeal II App-155-157. Steele alleged MLBAM’s default was willful and was intended to illegally remove MLBAM from *Steele I* and to conceal MLBAM’s infringement, consistent with removal of MLBAM’s copyright notice from the Infringing Audiovisual. Appeal II App-156-157.

Steele alleged that Appellees’ acts were fraudulent and “corrupting the entire judicial process.” Appeal II App-450-452.

The District Court agreed with Steele that MLBAM was properly served and had defaulted. *Steele v. TBS*, 746 F.Supp.2d at 236. Nevertheless, the District Court denied Steele’s Motion for Entry of Default as to MLBAM on the basis of the “futility” of entering default post-judgment. *Id.* at 237-239. The District Court made no specific findings or rulings as to Steele’s detailed and unchallenged facts showing fraud on the Court. *Id.* at 238-239. The District Court stated only that

“Steele does not...explain how his allegations have any bearing on the Court’s decision...and offers no evidence of bad faith on the part of the Defendants.” *Id.*

Steele’s appeal arising from that decision, Steele’s second *Steele I* appeal, First Circuit No. 10-2173, has been briefed and is pending in this Court. Appeal II Steele Brief and Reply.

f. STEELE II: REMOVAL OF MLBAM’S COPYRIGHT NOTICE FROM THE INFRINGING AUDIOVISUAL IN VIOLATION OF §1202 OF THE DMCA

On July 20, 2010 Steele filed his Complaint and on August 11, 2010 his Amended Complaint against Appellees, alleging violation of the Digital Millennium Copyright Act, 17 U.S.C. §§1202 and 1203. App-4-5, 8. That case, *Steele v. Bongiovi, et al.*, No. 10-11218-NMG (D.Mass. 2010) (“*Steele II*”) (appeal pending, First Circuit No. 11-1674 (“*Appeal III*”)), is the underlying case to this appeal.

Steele’s Amended Complaint alleges injuries arising from Appellees’ § 1202 violations, including: (1) unlawful concealment of copyright infringement, (2) fraud on the court, (3) substantial interference in Steele’s ability to fairly litigate, and (4) improper dismissal of Steele’s copyright claims in *Steele I*. App-35-39. Steele’s Amended Complaint sought equitable relief pursuant to §1203(b)(1), (b)(2), and

(b)(6) in the form of preliminary injunctions enjoining Appellees from further use of the altered audiovisual for any purpose, and an Order that Appellees remediate the altered audiovisual by filing un-altered copies of the infringing audiovisual with the Court. App-40, 53-55.

Steele further sought, pursuant to §1203(b)(3), damages, including Steele's actual damages as well as profits accruing to Appellees from the ongoing exploitation of the infringing audiovisual during the time since Appellees first filed the altered audiovisual. App-40, 53-55.

One of the factual bases for filing *Steele II* was Skadden's claim during *Steele I* that MLBAM had been unaware of *Steele I* until June 18, 2010 (despite being served on November 17, 2008). *Steele v. TBS*, 746 F.Supp.2d at 236; App-38. Based on MLBAM's purported ignorance of *Steele I* until after judgment, Steele reasonably inferred that any use of the Infringing Audiovisual, including any alteration of copyright management information, during *Steele I*, was undertaken without MLBAM's authority, in violation of 17 U.S.C. §1202. App-31.

i. Steele I and II: Different Facts; Distinct Factual Burdens

Steele I was a copyright infringement claim. *Steele v. TBS*, 646 F.Supp.2d at 187; Appeal I App-31. *Steele I* arose from a “nucleus of operative facts” which commenced October 20, 2004 with the Boston Red Sox’s Jay Rourke receiving a digital copy of the Steele Song, and concluded October 8, 2008 when Steele filed his first complaint in *Steele I*. App-13-14, 31-32.

Steele II is a removal of CMI claim. App-8, 39-40, 53-55. The operative facts of *Steele II* arose from the litigation of *Steele I*, and commenced December 8, 2008 when defendants and counsel removed CMI in connection with copies of the Infringing Audiovisual submitted to the District Court. App-31-39, 100-101, 103-104, 113-114. *Steele II* operative facts likely concluded on March 29, 2010 when appellees filed their Response Brief in the first appeal of *Steele I*. App-31-39, 114; Appeal I Appellees’ Response.

The *Steele I* operative facts – which concluded October 8, 2008 - and *Steele II* operative facts – which commenced two months later December 8, 2008 – are naturally and chronologically mutually exclusive. App-13-14, 31-39. The District Court, however, found – without analyzing any facts – that “the allegations in the

instant action arise from the *same facts* as the other cases.” Add-2, 6-9 (emphasis supplied).

ii. Appellees Reject Steele’s Offer to Dismiss Steele II

On September 27, 2010, the *Steele I* District Court found that “MLBAM was adequately served with process” in *Steele I* on November 17, 2008, contrary to Skadden’s representation that MLBAM had been unaware of *Steele I* until June 18, 2010. *TBS*, 746 F.Supp.2d at 236; App-33; Appeal II App-265.

Steele recognized that the District Court’s holding was inconsistent with Skadden’s claim of MLBAM’s ignorance of *Steele I* prior to June 18, 2010 and could fatally undermine Steele’s claim that the *Steele II* defendants removed the Infringing Audiovisual’s CMI without MLBAM’s authority. Add-13.

Accordingly, on October 11, 2010, Steele wrote to Skadden in good faith and offered to unilaterally dismiss *Steele II* upon confirmation that MLBAM had authorized removal of its copyright notice from the Infringing Audiovisual. Add-13-14.

Steele wrote: “Given the [District Court’s September 27, 2010 Order], Steele decided that, without providing MLBAM the opportunity to clarify its authority or lack thereof, Steele could not pursue *Steele II* in good faith.” Add-14.

Skadden’s October 14, 2010 letter response rejected Steele’s offer and failed to say whether MLBAM had authorized removal of the MLBAM copyright notice. Add-15-16; Steele III Steele Opposition to Defendants’ Motion to Dismiss the Verified Complaint at Exhibit 1.

iii. Appellees Acknowledge Submitting the Altered Audiovisual – not a “True and Correct Copy” in Steele I

Skadden’s October 14, 2010 letter also confirmed that the *Steele I* defendants – including Appellees here – did not submit a “true and correct” *copy* of the Audiovisual in *Steele I*, despite the sworn Declaration of Appellee Brown. *Id.*; Add-15-20.

Specifically, Skadden’s October 14, 2010 letter omitted the word “copy,” and referenced only the “version” it filed with the *Steele I* Court. Add-15-16. Steele noted this discrepancy – the Altered Audiovisual Brown had sworn-to as a “copy” in *Steele I* had become a “version” in *Steele II* – and addressed it in a October 20, 2010 letter to Skadden. Add-17-21.

Steele's October 20, 2010 letter immediately noted Skadden's wording: a "version" of the Audiovisual being self-evidently different from a "copy," particularly one previously sworn-to as "true and correct." Add-17-21. Steele explained that Skadden's submission of a "version" of the Infringing Audiovisual missing the MLBAM copyright notice could not logically or legally be a "copy" of the Infringing Audiovisual. Add-17-21.

Steele noted: "that Defendants' [Altered] Audiovisual conveyed false and/or removed copyright management information 'in connection with copies' of the [Audiovisual] is incontrovertible," and Skadden's "attempt to improperly reframe the issue as one of different 'versions' rather than one of 'copies' merely confirms this fact." Add-20.

Skadden's reply denied nothing. Add-22.

iv. Appellees Reject Steele's Second Offer to Dismiss Steele II

Steele's October 20, 2010 letter nonetheless made a *second* offer to withdraw *Steele II* if MLBAM stated in writing they had authorized filing the Altered Audiovisual in *Steele I*. Add-20.

Steele added: “if MLBAM did authorize the filing of [the Altered Audiovisual], but for whatever reason you are unwilling to provide proof of that authorization now – and such evidence is later discovered – you will have forced unnecessary litigation upon the Steele II Defendants and the Court and wasted judicial resources, which is sanctionable conduct.” Add-20 (emphasis original).

Skadden replied the same day, rejecting Steele’s second offer, but still failing to dispute *any* of Steele’s facts. Add-22.

v. Defendant-Appellees’ Motion to Dismiss Steele II

Defendants moved to dismiss Steele’s Amended Complaint as a matter of law on the following grounds: (1) Steele has no “legal interest” in the Audiovisual or its CMI, therefore he lacks standing; (2) no plausible facts to suggest that any Defendant altered the Audiovisual, or that any alteration was intended to facilitate infringement; (3) claim preclusion based on the same nucleus of operative facts at issue in *Steele I*; and (4) issue preclusion based on *Steele I* adjudication and dismissal of “predicate” infringement claim. App-69.

g. THE DISTRICT COURT'S DISMISSAL OF STEELE II BASED ON ITS DISMISSAL OF STEELE I

The District Court's dismissal of *Steele II* relies entirely on its earlier dismissal of *Steele I*. Add-6-9. The District Court relied upon its *Steele I* dismissal for each of its three bases for dismissal of *Steele II*: (1) standing, Add-6-7; (2) failure to state a claim, Add-7; (3) claim preclusion, Add-7-9.

i. No Substantial Similarity, No Standing

The District Court noted that, in order to pursue his § 1202 claim, "Steele must show that he was injured by [the § 1202] violation" (citing 17 U.S.C. §1203(a)). Add-6. The District Court found that Steele's claimed injury "appears to be" that defendants' "violation of the DMCA caused him to lose [Steele I];" but because the "alleged alteration would not have affected" the District Court's dismissal of *Steele I* in August 2009 based on its song-to-song substantial similarity analysis, Steele "was not injured by the alleged acts" and therefore "cannot, as a matter of law, prevail on his DMCA claim because he does not have standing to bring such an action." Add-6-7.

The District Court's *Steele I* analysis was, in its own words, restricted to "substantial similarity" in a "[s]ong... [to] ...song" comparison. *Steele v. TBS*, 607

F.Supp.2d at 265; Add-6-7; Appeal I App-394, 414. The District Court in *Steele I* found “no infringement” of Steele’s Song based strictly on a comparative *song-to-song* substantial similarity analysis. Add-6-7; *contra TBS*, 646 F.Supp.2d at 193-194.

Steele’s pleadings in *Steele I*, however, alleged copyright infringement by song *and* audiovisual, including infringement by reproduction, or actual copying. Appeal I App-27, 28, 31, 32, 145-146, 151-158, 160, 162, 591. The District Court’s confusion as to the works’ legal definitions and distinctions, i.e., as to “song,” “audiovisual,” and “soundtrack” - as mischaracterized by the *Steele I* defendants and counsel – resulting in flawed opinions, has been fully briefed in Steele’s earlier appeals.⁷

The District Court’s dismissal of *Steele II* recently mistook, again, the infringing audiovisual as “featuring” a song, a legal impossibility and factually inaccurate, as Steele has previously noted; audiovisuals and songs are discrete works of authorship and audio put to a visual is a “soundtrack,” *not* a “song.” Add-2; *Raquel v.*

⁷ Appeal I Steele Brief at 36-38, 45-48, 50-53, 57-58, 60, 64-66, 69-70, 72-76; Appeal I Steele Reply at 11-19, 22-25, 33-37; Appeal I Steele Motion for Sanctions at 7-10.

Education Mgmt. Corp., 196 F.3d 171, 177 (3rd Cir. 1999), quoting 17 U.S.C. § 101, 102(a)(2); Appeal I App-785-786.

The District Court cited no cases or other authority, other than the DMCA, for its standing determination. Add-6-7.

ii. No Substantial Similarity, No Intent to Conceal Infringement

The District Court held that even if Appellees made the alterations to the Infringing Audiovisual with the requisite intent to conceal copyright infringement, such alterations “were immaterial to this Court’s opinion in [Steele I].” Add-6-7.

The District Court accepted as true that Appellees, in a copyright infringement case, repeatedly submitted – under pains of perjury - a materially-altered version of the infringing work that was missing the copyright notice of the primary defendant, which helped conceal the willful default of that primary defendant. App-31-39, Add-7. The District Court nonetheless found Steele unable to prove Appellees’ intent to infringe and conceal: “Because the Court found that no infringement took place...Steele cannot prove that the defendants knew the alterations would facilitate copyright infringement.” Add-7.

iii. Claim Preclusion Despite Mutually Exclusive Facts

The District Court stated that “[t]he allegations in the instant action arise from the *same facts* as the other cases.” Add-2, 7-9 (emphasis supplied). The Court, however, also recognized that the *Steele II* allegations arose from Appellees’ conduct *during litigation of Steele I*. Add-3, 6, 8-9.

The District Court failed to notice its contradictory – mutually exclusive, in face - findings: Facts occurring *prior to* litigation, and facts occurring *during* litigation, are not – cannot be - the “same facts.” Add-3; App-113-114.

iv. Claim Preclusion – “Waiving” Misconduct

As to Appellees’ misconduct during litigation, the District Court ruled Steele had waived the issue: “Steele...could have raised the current claims [of wrongdoing] in *Steele I*... [t]he fact that Steele was a *pro se* litigant...does not excuse his failure at least to raise the possibility of misconduct.” Add-8-9.

Steele, however, *did* raise defendants’ misconduct during *Steele I* in his September 15, 2009-filed affidavit: “The defendants have demonstrated a pattern of deception and contradiction in an attempt to mislead the Court, and have shown contempt for...the Court in their dishonest procedural maneuvers and

misrepresentations... The defense...purposely misled the Court... the defendants' assertions were intentionally dishonest... [t]heir underhanded scheming and disrespect for me and the Court should not go unnoticed." Appeal I App-815-818.

h. RULE 11

On December 21, 2010, Appellees-defendants moved for Rule 11 Sanctions for Steele's "Filing of This Lawsuit" ("Rule 11 Motion"). App-138. The Rule 11 Motion asserted identical arguments as Appellees-defendants' earlier-filed Motion to Dismiss without providing any basis for Rule 11 sanctions. App-68, 138, 183-200.

During the Rule 11 "Safe Harbor" period – Steele wrote to Appellees' counsel to determine Appellees' factual or legal bases for the Rule 11 Motion "in a good faith effort to reasonably determine whether" Steele should "withdraw this complaint." App-179.

Steele's letter – eighteen single-spaced pages – meticulously addressed and refuted each of the alleged bases for sanctions contained in the Rule 11 Motion, with citations to both the factual record and governing caselaw. App-183-200.

Appellees' response to Steele's December 14, 2010 letter was nonresponsive, stating only that Appellees "respectfully disagree with the assertions in [Steele's] letter

and will proceed with the Rule 11 motion, the basis for which is set forth in the supporting memorandum.” App-202.

The District Court held that Steele’s lawsuit “appears frivolous and vexatious,” and concluded that “sanctions are warranted here,” but that it would “limit its sanctions to an admonition this time.” Add-10. The District Court “abate[d]” an award of “costs and fees” to defendants “unless [Steele] hereafter persists in filing frivolous pleadings.” Add-10.

SUMMARY OF ARGUMENT

Appellees obtained a fraudulent judgment in *Steele I*. The undisputed record before the District Court and now before this Court confirms this *fact* beyond a shadow of a doubt. Skadden's – and their counsel's – inability to dispute the literally dozens of brazen acts of dishonesty, abuse, and gaming of the District Court and Steele during *Steele I* and, indeed, ongoing, says more than the hundreds of pages of evidence against them ever could.

A simple, if rhetorical, question: what would a reasonable attorney do if *falsely* accused of such heinous acts? From Skadden: *not a peep*.

The arguments set forth below address the District Court's basic assumption in dismissing this case: that *Steele I* was unaffected by Appellees' grandiose and illegal plot to "win at all costs" against the *pro se* Steele; after all, what can he do – he can't find a lawyer. Worse, Skadden acted on the assumption – which was correct – that the District Court would essentially allow Skadden to run the proceedings, given the complexity of the case on the one hand and the existence of a very smart – and persistent – *but pro se* litigant on the other.

Steele I was Skadden’s show, and any determination – the District Court’s dismissal of this case definitely included – that looks to, and relies upon, *Steele I* as a proper legal basis, injury for standing purposes, claim preclusion, or divining “intent to conceal,” requires extreme scrutiny, if not disregard for *Steele I* in its entirety.

Here, the District Court based its entire decision on *Steele I*. Fortunately, *Steele I* was appealed and is now pending with this appeal. When *Steele I* is reversed, the District Court’s decision here simply crumbles. Even absent this Court’s determination of *Steele I*, the facts are such that anything other than reversal of this case would amount to tacit approval of a large firm’s illicit takeover of a First Circuit court’s proceedings.

ARGUMENT

a. STANDARD OF REVIEW FOR DISMISSAL OF DMCA CLAIM

Appellate review of a District Court’s allowance of a motion to dismiss is *de novo*. *Martin v. Applied Cellular Technology*, 284 F.3d 1, 5-6 (1st Cir. 2002).

A complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009), (citing Fed.R.Civ.P. 8(a)(2)).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S.Ct. at 1949, quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)”.

On a motion to dismiss, doubt resolves in the plaintiff’s favor. *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993).

Novel claims for relief should not be hastily dismissed before being tested with actual, rather than alleged facts. *Branch v. F.D.I.C.*, 825 F.Supp. 384, 397-98 (D.Mass. 1993).

Determining the plausibility of a claim for relief is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

i. §1202’s Intent and Knowledge Elements at Motion to Dismiss Stage

Section 1202(b)(1)’s intent and knowledge elements, i.e., intentional removal or alteration of CMI to knowingly conceal infringement, are fact issues not suitable

for determination as a matter of law at the motion to dismiss stage.⁸ *Agence France Presse v. Morel*, 769 F.Supp.2d 295, 305 (S.D.N.Y. 2011) (location of CMI on photograph may go to defendants' intent, "but that fact issue cannot be resolved on a motion to dismiss") (citing *BanxCorp v. Costco Wholesale Corp.*, 723 F.Supp.2d 596, 610-611 (S.D.N.Y. 2010)). "Courts must be 'lenient in allowing scienter issues . . . to survive motions to dismiss.'" *Morel*, 769 F.Supp.2d at 306 (quoting *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 693 (2d.Cir. 2009)). Cf. *Keough v. Big Lots Corp.*, 2006 WL 1129375, at *2 (M.D.Tenn.) (unpublished) (§1202 claim dismissed where plaintiff admitted he could not prove "actual knowledge" of defendants' removal of CMI and failed to allege "any facts to support the conclusion" that defendant had such knowledge).

ii. Failure to Provide Original Digital Work

As to plausibly alleging intent and knowledge in the 1202(b) context, "[p]roviding an actual example of the allegedly infringing ad is obviously more than a conclusory allegation." *Morel*, 769 F.Supp.2d at 306 (plaintiff's attachment of several

⁸ Section 1202(b)(1) prohibits the *intentional* removal or alteration of CMI "knowing, or . . . having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement." 17 U.S.C. §1202(b)(1).

photos with CMI missing to his complaint sufficient to survive a motion to dismiss) (citing *BanxCorp*, 723 F.Supp.2d at 610).

In addition, where a DMCA defendant fails to produce the original version of a work, “[t]he Court infers” that the original version would demonstrate removal or alteration of CMI in violation of §1202(b)(1). *Gregerson v. Vilana Financial, Inc.*, 2008 WL 451060 at *7 (D.Minn.) (unpublished) (citing *Goldie v. Cox*, 130 F.2d 695, 719 (8th Cir. 1942)).

Steele’s Amended Complaint included a link to a website displaying the Infringing Audiovisual. App-21.

b. §1202 OF THE DIGITAL MILLENIUM COPYRIGHT ACT

The Digital Millennium Copyright Act (“DMCA”) provides relief to “*Any* person injured by a violation of section...1202” resulting from unlawful removal of “*any* copyright management information... in connection with copies.” 17 U.S.C. §§1202 (b), (c), 1203 (a) (emphasis supplied); *Murphy*, 2011 WL 2315128 at *2-6. Copyright management information includes, among other things, the copyright notice and name of the copyright owner. 17 U.S.C. § 1202 (c).

The text of §1202 is not ambiguous, difficult, or unclear. *Murphy*, 2011 WL 2315128 at *4. Section 1202 “simply establishes a cause of action for the removal of (among other things) the name of the author of a work when it has been “conveyed in connection with copies of” the work.” *Id.* The statute “appears to be extremely broad” and any “difficulty” therein “is a problem of policy, not of logic.” *Id.* Interpreting the breadth of §1202 might well “provide an additional cause of action under the DMCA in many circumstances in which only an action for copyright infringement could have been brought previously.” *Id.*

As one Circuit Court recently noted, “it is undisputed that the DMCA was intended to expand – in some cases [] significantly – the rights of copyright owners.” *Id.* *Steel is* a copyright owner, whose work was infringed and the infringement was concealed in violation of §1202.

The statutory elements of Steele’s §1202(b) claim are, therefore, the 1) intentional 2) unauthorized removal of CMI 3) reasonably knowing removal will enable, facilitate, or conceal copyright infringement. *See* 17 U.S.C. §1202(b).

c. ARTICLE III STANDING

“The requisite elements of Article III standing are well-established: ‘A plaintiff must allege personal injury fairly traceable to the defendants allegedly unlawful conduct and likely to be redressed by the requested relief.’” *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 106 (1st Cir. 2008) (at summary judgment stage, plaintiff must set forth affidavit or other evidence with specific facts showing standing).

Injury, for constitutional standing purposes – or “injury-in-fact” – is “an invasion of a legally protected interest which is (a) concrete and particularized. . . and (b) actual or imminent, not conjectural or hypothetical.” *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The requirement of “actual or imminent” means “not conjectural or hypothetical.” *CoxCom* 536 F.3d at 107 (quoting *Lujan*, 504 U.S. at 560).

d. STANDING AT MOTION TO DISMISS STAGE

Steele’s burden to demonstrate constitutional standing at the motion to dismiss stage is less onerous than at the summary judgment or directed verdict stages. *Lujan*, 504 U.S. at 561; *Adams v. Watson*, 10 F.3d 915, 921-922 (1st Cir. 1993) (“injury in fact” at the pleading stage “need not entail currently *realized* economic loss, Article III

standing in the commercial context must be premised, at a minimum, on particularized future economic injury which, though latent, nonetheless qualifies as ‘imminent’” (citing *Lujan*, 504 U.S. at 560-561) (emphasis original); *Garret v. Cassity*, Slip Copy, 2010 WL 5392767 (E.D.Mo. 2010) (facts as alleged in complaint sufficient to show standing for RICO plaintiffs).

e. STANDING UNDER THE DIGITAL MILLENNIUM COPYRIGHT ACT AT MOTION TO DISMISS STAGE

The First Circuit has set the bar relatively low with respect to DMCA standing. *CoxCom* 536 F.3d at 110, as cited in *Bose BV v. Zavala*, 2010 WL 152072 at *2 (D.Mass. 2010) (unpublished) (“The DMCA gives a cause of action to ‘any person injured by a violation of section 1201.’ 17 U.S.C. § 1203(a)... the First Circuit’s decision in *CoxCom, Inc. v. Chaffee* sets a relatively low bar with respect to constitutional standing under the DMCA.”).

As with any statutory claim, analysis must “begin, as always, with the text of the statute.” *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. ---, 129 S.Ct. 1436, 1443 (2009).

To state a plausible claim of injury – and constitutional standing - under the DMCA, “plaintiffs seeking to demonstrate injury-in-fact need not establish a

particularly damaging injury; they need only show that they were directly affected by the conduct complained of, and therefore have a personal state in the suit.” *CoxCom*, 536 F.3d at 107 (quoting *Libertad v. Welch*, 53 F.3d 428, 436 (1st Cir. 1995)).

Where an injury under the DMCA depends on a “chain of events unfolding as plaintiff[] alleged,” a complaint’s allegations of “particularized future economic injury,” despite being “latent, nonetheless qualifies as ‘imminent.’” *Cf. CoxCom*, 536 F.3d at 107 (quoting *Adams*, 10 F.3d at 920-921 (affirming standing under §17 U.S.C. 1201 at summary judgment stage)).

Where the DMCA claimant “has been or will be injured” from loss attributed to a DMCA violation, claimant has “introduced sufficient evidence of harm.” *CoxCom*, 536 F.3d at 108; *Textile Secrets Int’l. v. Ya-Ya Brand Inc.*, 524 F.Supp.2d 1184, 1201 (C.D. Cal. 2007) (“At the time of defendants’ Motion to Dismiss, the Court found it premature to make any determination as to the applicability of §1202 to the instant case as the facts had not yet been developed through discovery”); *Fox v. Hildebrand*, 2009 WL 1977996, at *3 (C.D.Cal.) (unpublished) (factual dispute over meaning of copyright notices in §1202 claim was “a factual dispute not amenable to determination on a motion to dismiss”).

The plain unambiguous language of §1202 of the DMCA – that a civil cause of action is provided to *any person injured* by removal of *any* CMI – should complete a Court’s inquiry as to its meaning. *See U.S. v. Lewis*, 554 F.3d 208, 214 (1st Cir. 2009) (courts “must presume that a legislature says in a statute what it means... When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.”) (quotation omitted).

That the extent of Steele’s injury was not easily discernible at the motion to dismiss stage, should have weighed towards *denying* defendants’ motion to dismiss Steele’s already novel – but plausible, in fact *provable* - claim. Dismissal on this basis was premature, particularly given the novelty of Steele’s claim. *See Branch*, 825 F.Supp. at 397-98. Appellees agree Steele’s claim is novel. App-82.

STEELE’S COMPLAINT ALLEGED PLAUSIBLE FACTS OF STANDING AS A §1202 CLAIMANT

a. The District Court Failed to Act When Confronted With Fraud on the Court

The District Court abused its discretion in allowing substantial similarity to trump fraud on the court. *See McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 503 (1st Cir. 1996) (abuse of discretion “occurs when a material factor deserving significant

weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them”) (citation omitted).

The District Court acknowledged Steele’s allegations of fraud on the court.⁹ The Court also accepted – nominally, at least - Steele’s facts as true, yet held, retrospectively, those facts were immaterial to the Court’s song-to-song substantial similarity analysis in August, 2009 and therefore Steele was not injured by defendants’ fraud on the court, i.e., filing the Altered Audiovisual. Add-6-7.

The District Court failed to analyze Steele’s allegations – and facts - in their proper legal context, i.e., *as* fraud on the *Steele I* court, undermining its preclusive effect. The District Court instead saw – and hence filtered - Steele’s injury analysis through the lens of its substantial similarity infringement. Add-6-7.

Such a narrow legal construct for determining injury from fraud on the court – i.e., no song infringement, no fraud, no harm, no standing – has no precedent or basis

⁹ “[Steele] contends that the defendants committed fraud on the Court in Steele I by removing the [MLBAM] copyright notice from the TBS Promo it filed with the Court. That allegation is the subject of Steele II and, therefore, will not be addressed [in Steele III].” *Ricigliano*, 2011 WL 2260485, at *4 (deferring adjudication of Steele’s fraud on the court claims from *Steele III* to *Steele II*).

in logic, law, or equity. The District Court’s highly unusual legal framework and its application so as to find no injury and standing was an error of law. *Id.*

Injury arising from fraud on the court – which is injury *to* the court – cannot be determined by a substantial similarity infringement test. Fraud on the court is an affront to the judiciary and a threat to its integrity, which transcends a particular litigants’ merits. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-246 (1944) (finality of judgment inapplicable “where enforcement of the judgment is ‘manifestly unconscionable’”) (quotation omitted).

As fraud on the court inflicts distinct and particularly odious institutional and individual harm, the District Court’s blind eye to acts constituting fraud on the court based on whether those acts “affected” the District Court’s substantial similarity analysis was a legal error.

* * *

Steele’s injuries arising from Appellees’ § 1202 violation included defendants’ improper concealment of copyright infringement during litigation, leading to the erroneous dismissal of *Steele I*’s infringement claims. App-31-39. The District Court explicitly acknowledged – and took as true - Steele’s allegations of fraud on the court,

whose injury is borne by *all*. *Hazel-Atlas Glass Co.*, 322 U.S. at 245-246; *Ricigliano*, 2011 WL 2260485, at *4; App-35-36, 39.

Steele's injuries also extend to the currently pending appeals arising from *Steele I*. Specifically, just as the District Court never viewed the Infringing Audiovisual – it has never been filed – the First Circuit's record also lacks a true copy of the Infringing Audiovisual.

Additionally, defendants' fraud on the *Steele I* District Court proceedings was so all-encompassing that, as a result, the record created from the totality of defendants' misconduct is tainted in its entirety. That record is now the First Circuit's record for the two *Steele I* appeals – indeed, it may likely be considered during review of Steele's other two appeals (this being one) as well – and the damage wrought by defendants in the District Court thereby now extends to Steele's appeals to the First Circuit.

There can be no doubt but that defendants' actions that hurt Steele in the District Court will continue to hurt Steele in the First Circuit. Defendants' misconduct and fraud - either arising directly from, or related directly to, the Altered Audiovisual – were part of a chain of events, i.e., willful defaults, false appearances, limited discovery, misstatements of fact and law, which have each left their blotch on

the proceedings and are embedded permanently in the record now under review by the First Circuit.

Steele’s Complaint, while alleging §1202 violations, also spelled out the underlying facts and elements of fraud on the court, including Appellees’ filing of “false evidence... intentionally designed to mislead [] this Court and the First Circuit Court of Appeals during the ongoing Steele I case... in an attempt to defeat Steele’s infringement claims.” App-35-36; App-31-39.

Indeed, fraud on the court is factually concomitant with Steele’s § 1202 claim, since officers of the court removed CMI in court proceedings during copyright infringement litigation. App-31-32, 35-36, 39. Specifically, Appellees removed CMI from *primary evidence* sworn to as “true and correct” and filed by defendants’ counsel upon their first appearance in *Steele I* (and repeatedly thereafter). App-33, 35-36, 39.

Appellees’ removal of CMI concealed not just infringement, but the *infringer*, by concealing MLBAM’s willful default. App-33-35, 38.

The removal of MLBAM’s copyright notice – clipped right off of the end of the commercial – also altered *material elements* bearing on copyright infringement; indeed, bearing on substantial similarity, including the works’ previously identical lengths and

sounds and images that should have properly been part of any substantial similarity analysis. App-25-26, 34.

In the span of four sentences, the District Court decided Steele was not injured by defendants' fraudulent filings, even if done with the requisite intent to conceal copyright infringement, because the "alleged alterations" to the Infringing Audiovisual would not have affected the Court's *Steele I* song-to-song "substantial similarity" ... opinion in August, 2009."¹⁰ Add-6-7.

¹⁰ Steele's "alleged" facts are hewn from years of litigation driven by Skadden's unremitting bad faith and fraud, and are 'allegations' in name only; now routinely unchallenged, Steele's facts are more accurately undisputed facts, sometimes referred to as simply "the truth." Appeal I Steele Reply at 33-35; Appeal I Steele Reply Supporting Motion for Sanctions at 2-4; Appeal I Appellees' Reply Supporting Motion to Withdraw at 2, n.2 ("Appellees do not attempt to address every allegation"); Appeal II Steele Reply at 3-6; Appellees' Response Brief at 23-24 (No. 10-2173) (1st Cir.) ("Appeal II Appellees' Response") ("Appellees will not attempt to exhaustively address Steele's assertions"); Appellees' Reply to Steele Response to Motion to Withdraw and Motion for Affirmative Relief at 2, n.2 (No. 10-2173) (1st Cir.) ("Appeal II Appellees' Reply Supporting Motion to Withdraw"); Defendant Fenway Sports Group a/k/a FSG f/k/a New England Sports Enterprises, LLC's Opposition to Plaintiff's Motion for Sanctions Pursuant to Rule 11(a) and the Court's Inherent Authority at 2, n.1 (Docket Entry 59) (No. 10-3418-E) (Mass. Superior Ct. 2010) ("Steele IV FSG Opposition to Steele's Motion for Sanctions") ("this opposition does not (and, indeed, could not) exhaustively address every inaccuracy or mischaracterization in [Steele's] filings").

Setting aside the holding's *non sequitur* - and the holistic insufficiency of a "Song...song" analysis applied to an *audiovisual*¹¹ - the District Court improperly analyzed CMI removal out of context; that being, of course, litigation, where removal of CMI - through false evidence knowingly sworn to, filed and uncorrected by counsel - *also* happens to constitute spoliation and fraud on the court. *Hazel-Atlas Glass Co.*, 322 U.S. at 246-247.

The question of whether defendants' CMI removal affected the District Court's song-to-song substantial similarity opinion in August 2009 frames the proper issue far too narrowly; more to the point, however, where fraud on the court unquestionably affected the entire course of proceedings such a question is simply not of the moment. *See Id.* at 246.

¹¹ *Steele I*'s primary allegation of copyright infringement by an *audiovisual* was acknowledged by the District Court. *TBS*, 646 F.Supp.2d at 188. Yet the Court here explicitly states its *Steele I* decision was based on a *song-to-song* substantial similarity analysis. Add-6-7. Settled First Circuit caselaw dictates that a work of authorship - such as an *audiovisual* - is properly examined *holistically* during a copyright infringement analysis. *Johnson v. Gordon*, 409 F.3d 12, 18 (1st Cir. 2005). The *Steele I* Court abused its discretion in restricting its substantial similarity test to *songs*, thereby excluding from its analysis the *audiovisual*, which the Court itself recognized as the primary work at issue. *TBS*, 646 F.Supp.2d at 188; Add-2, 6-7; Appeal *Steele I* Brief at 34-38, 46-48, 54, 64-66; Appeal I *Steele* Motion for Sanctions at 9-10; Appeal I App-394, 414.

The District Court, by the time *Steele III* came around, was – or should have been - intimately familiar with Steele’s seasoned volume of unchallenged facts of defendants’ malfeasance.¹² The District Court also accepted as true all properly alleged facts as to fraud. The District Court’s tortured logic at this juncture – narrowly analyzing whether Steele was injured by the court’s substantial similarity analysis - ignored the clear harm defendants’ fraud brought on the *Steele I* proceedings in their entirety, including harm to the court itself *and*, of course, to Steele.

The District Court’s proceedings were teeming with fraud: false appearances, multiple defaults, repeated spoliation, false representations of fact and law.¹³

The District Court’s integrity was at risk, if not damaged already, and it was incumbent upon the Court to do *something* – if not at Steele’s urging, than pursuant to its inherent power and duty *to defend itself* - to put a stop to, or at least recognize

¹² Appeal I Steele Motion for Sanctions at 6-7, 11-14, attached as Exhibit A to Defendants’ Notice of Recent Activity Providing Supplemental Grounds to Oppose Steele Request for a Belated Extension of Time (Docket No. 14) (No. 10-11458-NMG) (D.Mass. 2010) (“Steele III Defendants’ Notice of Recent Activity”); Steele III Steele Opposition to FSG and NESE’s Motion to Dismiss at 6, 9-12; Appeal I App-789-791, 794-795; Appeal II App-439-440, 887-888, 890-892.

¹³ Appeal I Steele Brief at 18-19, 38-43; Appeal I Steele Reply at 8-19, 24-25, 31-32, 36; Appeal I Steele Motion for Sanctions; Appeal II Steele Brief at 21-33, 48-54, 65-75; Appeal II Steele Reply at 3-6, 7-10, 16-25, 27-33.

the harm from, defendants' actions. The District Court should not have been "so impotent" as to helplessly countenance deception and fraud. *Hazel-Atlas Glass Co.*, 322 U.S. at 246 (fraud on the court "cannot complacently be tolerated consistently with the good order of society"); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir. 1989) (courts "cannot lack the power to defend their integrity against unscrupulous marauders...").

The District Court – just as *all* courts - has the authority *and* responsibility to sanction and deter fraud on the court. *Hazel-Atlas Glass Co.*, 322 U.S. at 246, 249-250 (circuit court had "duty and power" to vacate judgment based in part on willfully submitted false documents); *see John's Insulation, Inc. v. L. Addison and Assoc.*, 156 F.3d 101, 109 (1st Cir. 1998) ("[t]he purpose of sanctions...is not merely to penalize violations of court procedures, but also to deter future violations by other parties").

This is not ivory tower rhetoric or philosophic argument; my client has endured real injury during the nearly three years of unrelenting bad faith and abuse from Skadden and its clients, most of which, quite frankly, would have been avoided

had the District Court not been so completely derelict in its most basic of duties – to ensure proceedings are fair and litigants are honest.¹⁴

As victims of fraud on the court, both Steele *and the District Court* were injured: both suffered corruption of the judicial process resulting from Skadden’s “sordid scheme.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 37 (1991) (defendant part of a “sordid scheme of deliberate misuse of the judicial process” designed to “defeat [plaintiff’s] claim”); *Hazel-Atlas Glass Co.*, 322 U.S. at 246-247.

The District Court failed to punish and, accordingly, *deter* Appellees’ fraud on the court.¹⁵ The District Court’s opinion *does not even mention* fraud on the court.

¹⁴ The District Court, over the course of its several decisions – all in Skadden’s favor – has, by abstention, tacitly approved of Skadden’s unprecedented run of fraudulent and dishonest attacks on not only Steele, but the judiciary itself. With the utmost respect for the institution, Steele submits that if Skadden’s actions – and the District Court’s inaction – are not corrected, the judiciary will be forever damaged.

¹⁵ Emboldened by the District Court’s failure to redress and deter fraud on the court based in *Steele I*, Skadden plied the same tricks in *Steele III* and *Steele IV*, willfully defaulting and concealing defendants Fenway Sports Group a/k/a FSG f/k/a New England Sports Enterprises, LLC (“FSG”) and New England Sports Enterprises, LLC f/d/b/a Fenway Sports Group f/a/k/a FSG (“NESE”). Steele III Steele Opposition to FSG and NESE’s Motion to Dismiss at 4-9; Steele IV Steele Motion for Sanctions at 2-5, 7-11; Steele IV Steele Opposition to Defendants’ Emergency Motion for Stay at 1-2, 6-7, 11-12.

Other than the occasional passing reference, the District Court has ignored fraud on the court throughout Steele's several cases – even as Steele has raised the issue at on at least *seven* occasions.¹⁶ The District Court's decisions appear to actually go out of their way to avoid weighing the matter, all the while ignoring Steele, who has been all but *begging* for some basic refereeing from the judiciary; some equity; some *fairness*.

Most recently the Court deferred adjudication of fraud on the *Steele III* court, writing that it was the subject of its decision in *Steele II* - yet its *Steele II* decision in no way addressed fraud on the court.¹⁷ *Indigo America, Inc. v. Big Impressions, LLC*, 597 F.3d 1, 3 (1st Cir. 2010) (*de novo* review where district court leaves paucity of findings) (citation omitted); Add-6-9.

Steele's injury from Appellees' fraud on the Court is self-evident; such misconduct corrupts the judicial process and prevents Steele from duly and fairly litigating his claim. *Aguiar-Carrasquillo v. Agosto-Alicea*, 445 F.3d 19, 28 (1st Cir.

¹⁶ Add-21; and subsequently Steele III Steele Opposition to 12(b)(6) Defendants' Motion to Dismiss at 2-4 (Docket No. 52); Steele III Steele Opposition to FSG and NESE's Motion to Dismiss at 9-10 (Docket No. 73).

¹⁷ “[F]raud on the Court in Steele I... is the subject of Steele II and, therefore, will not be addressed here.” *Ricigliano*, 2011 WL 2260485, at *4.

2006) (“knowing or deliberate... misconduct substantially interfere[s] with [movant’s] ability fully and fairly to prepare for, and proceed at, trial”) (citation omitted); *Hazel-Atlas Glass Co.*, 322 U.S. at 246-247.

Here, the District Court deferred, then failed to address fraud on the court; dismissed as irrelevant defendants’ fraud on the court because it believed fraud did not affect the District Court’s song-to-song substantial similarity opinion in August 2009. Add-6-7. *Non sequitur* notwithstanding, the District Court legally erred and abused its discretion in analyzing substantial similarity while failing to forthrightly – or ever – adjudicate Steele’s claims and their mutual injuries arising from Appellees’ unchallenged fraud on the court.

b. Appellees’ Ongoing Spoliation of Primary Evidence and Refusal to Correct the Record Substantially Interfered With Steele’s Ability to Fairly Litigate His Case

The countless procedural and equitable dynamics, inherent in any litigation, leading up to the District Court’s song-to-song substantial similarity analysis at the summary judgment stage were unquestionably influenced by Appellees’ removal of CMI and the accompanying fraud on the court. It could not be otherwise: Litigation

does not occur in a vacuum and every piece of evidence, every argument, every filing shapes the course of proceedings.

It goes without saying that this is doubly so where the influencing factors arise from false evidence and representations. The variety of substantial injury to Steele resulting from Appellees' removal of CMI in *Steele I* was briefed in Steele's two pending appeals, Nos. 09-2571 and 10-2173 (First Circuit).¹⁸ Steele refers to those arguments and to Appellees' demonstrated inability to challenge his facts.¹⁹

One legal injury from the *Steele I* defendants' CMI removal arises from spoliation of the Infringing Audiovisual. See *McKinnon*, 83 F.3d at 503; App-35-37, 39. Given the paucity of findings on this issue – none – the First Circuit will “proceed to examine the relevant factors” itself. See *Indigo America, Inc.* 597 F.3d at 3.

¹⁸ Appeal I Steele Brief at 18-20, 37-43, 75-82; Appeal I Steele Reply at 8-19, 24, 26-29; Appeal I Steele Motion for Sanctions at 7-11; Appeal I Steele Reply Supporting Motion for Sanctions at 2-5; Appeal II Steele Brief at 21-23, 28-30; and Appeal II Steele Reply at 7-14, 16-20, 27-29, 32-33.

¹⁹ See Appeal I Steele Reply at 33-35; Appeal I Steele Reply Supporting Motion for Sanctions at 2-4; Appeal I Appellees' Reply Supporting Motion to Withdraw at 2, n.2; Appeal II Steele Reply at 3-6; Appeal II Appellees' Response at 23-24; Appeal II Appellees' Reply Supporting Motion to Withdraw at 2, n.2; and Steele IV FSG Opposition to Sanctions at 2, n.1.

Appellees' evidentiary now-you-see-it-now-you-don't gambit - i.e., *CMI* on MLBAM's *original*, *no-CMI* on Appellees' *version* - represents textbook spoliation.²⁰ *Booker v. Mass. Dept. of Public Health*, 612 F.3d 34, 45 (1st Cir. 2010) (inference from deliberate spoliation that withheld evidence unfavorable to spoliator) (citation omitted). The adverse inference arising from spoliation is based on both commonsense evidentiary principles and "prophylactic and punitive rationales." *Id.* at 45-46.

Injury from spoliation is shown by evidence that the spoliator knew (1) of a claim or potential litigation, and (2) of the spoliated item's relevance to the claim. *Id.* at 46.

Appellees' removal of CMI in connection with copies filed with the District Court is a matter of fact established by Appellees' own admission to three sworn-to, CMI-less, court-filed *versions* of the Infringing Audiovisual: "the *version* of the 'Turner Promo' submitted by defendants to Judge Gorton in '*Steele I.*'" Add-15 (emphasis supplied); *see also* 17 U.S.C. §§ 1202(b), (c), 1203(a); *Hazel-Atlas Glass Co.*, 322 U.S.

²⁰ A graphic display and annotation of Appellees' removal of CMI can be found in Steele's prior Briefs. *See* Appeal I Steele Brief at 38-41; Appeal I Steele Reply at 8-19; Appeal II Steele Brief at 19-24.

at 246 (“Proof of the scheme, and of its complete success up to date, is conclusive.”); Appeal I App-46, 174, 459. Appellees swore to be filing a “copy” for the Court’s benefit; and yet swore twice more in false filings; yet all the while, in truth, handing the Court spoliated “versions.” *Id.*

Appellees’ actions satisfy the first element of spoliation naturally, through simple circumstance: CMI removal occurred *during litigation*. Appellees’ not only had *knowledge* of the litigation; their actions were specifically designed to *subvert* it. *Booker*, 612 F.3d at 46.

Relevance of the tainted audiovisual is shown by Appellees’ own actions in filing the Altered Audiovisual in support of each of their three dispositive motions. App-46, n.3; 174, n.4; 459, n.7. Applying “judicial experience and common sense,” *Iqbal*, 129 S.Ct. at 1949, the relevance of the *primary defendant’s infringing work* in a copyright infringement case, upon which Appellees based their defense, Steele his claim, and the Court its Order, is clear.²¹

The District Court’s retrospective finding that the “alterations were immaterial to this Court’s opinion in August, 2009,” answers the wrong question. Add-7. The

²¹ Appeal I App-46, n.3; 27, 31; *TBS*, 646 F.Supp.2d at 187-188, 190 (District Court has “carefully...viewed...the original TBS Promo”), respectively.

proper question before the District Court was whether the CMI alterations could plausibly have affected Steele’s ability to fairly litigate his claim. As an act of spoliation, the answer is unequivocally yes, particularly at the motion to dismiss stage. *See Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (1st Cir. 1988). The District Court’s paucity of findings – indeed, *no findings* as to Steele’s injury *during* litigation – leaves this determination to this Court *de novo*. *See Indigo America, Inc.*, 597 F.3d at 3.

Spoliation – and willful failure to correct it – gives rise to an adverse inference of substantial interference. *Anderson*, 862 F.2d at 928 (“Appellees “neither amended nor supplemented [their] representations at any time. This was an outright breach.”) (citing Fed.R.Civ.P. 26(e)(2)(A) – now Rule 26(e)(1)). Accordingly, this Court’s review need not even reach the effect of Appellees’ spoliation – or “determine how many angels danced on the head of that particular pin” – because Appellees’ failure to correct the record “was unarguably in dereliction of appellee’s duty.” *Id.* at 927.

c. The District Court’s Standing Analysis Improperly Limited Injury to August 2009

The District Court limited any injury to a date-certain – August, 2009 - ignoring injuries sustained *before* that date and foreclosing any “latent” or “imminent” harm *after* that date. *Adams*, 10 F.3d at 921-922; Add-6-7. However, Appellees’

scheme spanned the *entire proceedings* of *Steele I*, beginning December 8, 2008 with Skadden's first fraudulent filing of the Altered Audiovisual and false appearance for MLBAM and *persists today* with their refusal to take corrective action. App-35-36, 39.

August 2009 represents a high - or rather, low - point in the proceedings, i.e., the apex of Appellees' continuous fraud since first fraudulently appearing and first filing false evidence on December 8, 2008, i.e., their summary judgment victory. But that ruling was not *the* injury, per se; rather, it was the culmination of the continuous harm inflicted upon the Court and Steele since December 8, 2008. *See Chambers*, 501 U.S. at 51 (sanctioned party's "entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court").

Furthermore, the injury determined by the District Court in 2009 was very specific, and did not include spoliation or fraud on the court or, for that matter, injury under the DMCA; only copyright infringement was decided (and, as Steele's appeals assert, erroneously so). *See I.M.S. Inquiry Mgt. Systems Ltd. v. Berkshire Information*, 307 F.Supp.2d 521, 530, n.9 (S.D.N.Y. 2004) (DMCA and copyright claims are "separate and distinct") (quotation omitted); Add-6-7. The District Court

obviously did not analyze *fraud on the court* by comparing “lyrics, melody and rhythm?” Add-6-7.

The District Court’s analysis, if upheld, would preclude *any* standing for injury sustained *during* litigation, based solely on the *final result* of the litigation, i.e., since there was no infringement at the end, there could not have been injury along the way (*see* Add-6-7)). This “outcome determinative” logic is contrary to the basic policy and purpose of litigation and rule-based procedure, and, if upheld, would eviscerate the DMCA, whose plain language states its purpose: to punish and deter CMI-related *concealment* of infringement, *regardless of the outcome of any related or underlying infringement litigation* (and which, for obvious reasons, does not exempt concealment during litigation). 17 U.S.C. § 1202, 1203.

By the District Court’s reasoning, therefore, only the *unsuccessful* infringement concealers – those who lose the underlying infringement case - would be liable under the DMCA; meanwhile, the *successful* concealers – like Appellees here - will have defeated the underlying infringement claim, which, applying the District Court’s reasoning, would absolve them of illegal concealment under the DMCA. Add-6-7.

In other words, in the District Court's view, the end justifies – and more troublingly, conceals - the means.

Such a judicial construct is untenable, not to mention a perversion of our system of justice and its procedural mechanisms to ensure fairness. Affirming such a standard would create precedent for an unconscionable system wherein a fraudulently obtained judgment would forbid inquiry into its illegal procurement. The District Court's finding was an abuse of discretion. *See McKinnon*, 83 F.3d at 503.

Appellees' submission of the Altered Audiovisual with the First Circuit via joint appendix (No. 09-2571) constitutes continuing spoliation and *additional* fraud on the court – *this* Court, plausibly resulting in imminent harm. *See CoxCom* 536 F.3d at 107 (*imminent* means “not conjectural or hypothetical”); Appeal II Steele Reply at 16-18, 27-28.

The imminent threat of injury to Steele on appeal is hardly “conjectural or hypothetical,” given the primary relevance of the Infringing Audiovisual. *See Booker*, 612 F.3d at 45. Whereas the District Court was, with all due respect, derelict in its duty to address spoliation and fraud, Steele anticipates *this* Court shall not shy away from these grave issues. *Hazel-Atlas Glass Co.*, 322 U.S. at 249-250.

In any event, where some willful misconduct is discovered – as here – there is a presumption of additional unrevealed misconduct. *Anderson*, 862 F.2d at 925 (“It seems...logical that where discovery material is deliberately suppressed, its absence can be presumed to have inhibited the unearthing of further admissible evidence adverse to the withholder, that is, to have substantially interfered with the aggrieved party’s trial preparation.”).

Accordingly, the District Court’s determination of standing by the outcome of its earlier infringement analysis creates a ‘judicial black hole,’ foreclosing the possibility of injury during litigation and therefore arising prior to – and affecting the outcome of - the infringement analysis. Worse, by presuming, without inquiry, no possibility of latent injury occurring *on appeal*, it precludes *any* redress for a litigant victimized by his or her opponents’ unscrupulous tactics.

Finally, the scenarios discussed here are, to be sure, speculative, but that is only because the District Court made *no findings* as to spoliation or fraud and has issued all of its post-*Steele I* judgment decisions without benefit of oral argument.²²

d. 02:38:90 – 02:38:90: Subject Work’s Identical Length is Altered by Appellees’ Fraudulent Removal of CMI, Yet the District Court Does Not Address Identicality, Even Where Appellees Admit Access to Steele’s Song

Appellees’ removal of CMI resulted in alterations to the Infringing Audiovisual’s *length* and *fade* ending, both of which had been identical to Steele’s Song, and should have been considered in a proper substantial similarity analysis, even a retrospective one.²³ The Court’s opinion was opaque as to *any* facts the might have affected its retrospective song-to-song substantial similarity analysis; accordingly this

²² In Steele-related cases, the District Court has opined on *two* claims of fraud on the court, *three* defaults, *four* Rule 11 Motions, and *four* motions to dismiss *without a single hearing* (save Steele’s *pro se* appearance on March 31, 2009). *Ricigliano*, 2011 WL 2260485, at *4; *Id. and TBS*, 746 F.Supp.2d at 236; Add-9-11 and *Ricigliano*, 2011 WL 2260485, at *4-5 and *TBS*, 746 F.Supp.2d at 239-240; Add-11 and *Ricigliano*, 2011 WL 2260485, at *5 (Docket Nos. 7, 38, 68), respectively.

²³ Duration, as a linear "dimension," is a protectable element. *See Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 69 (1st Cir. 2009). Similarly, a "fade" ending, as part of an original arrangement, merits copyright protection. *Three Boys Music v. Michael Bolton*, 212 F.3d 477, 482 (9th Cir. 2000); Appeal I Reply Brief at 11-12, 17; Appeal II Reply Brief at 16-18; Appeal I App-645, 662-665.

Court owes no deference on review as to this point. *See Indigo America, Inc.*, 597 F.3d at 3 (citation omitted).

Throughout the Steele proceedings, the District Court has remained inexplicably silent as to the central works' identical lengths, precise *to the tenth-second*.²⁴ Would not *identity* properly be a Court's first order of business in any "similarity" analysis, being – at 2:38:90, 2:38:90 - facially expedient, likely probative, and potentially dispositive? Even more so in light of defendants' admitted access to the Steele Song?

Whereas identical length might elsewhere be *bombshell* evidence, the District Court here remained studiously silent. That Appellees' changed the duration of one of the works – the Infringing Audiovisual - by fraudulently removing MLBAM's copyright notice therefrom is certainly one plausible reason for the Court's silence on this issue. Nonetheless, once made aware of the works' identical lengths and Appellees' actions to conceal that fact, the District Court's failure to consider this factor in its hindsight analysis was an abuse of discretion. Otherwise, what of this Court's requirement of "articulable similarities" if such similarities are to be ignored?

²⁴ Appeal I App-777-781, Add-6-7; Steele III Memorandum & Order at 5-9.

Concrete Machinery Company, Inc., v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 608 (1st Cir. 1988).

Furthermore, the District Court’s decision to adjudicate copyright infringement while denying Steele discovery on probative similarity – or *anything* other than song-to-song substantial similarity, *TBS*, 607 F.Supp.2d at 265 – especially given Steele’s persuasive facts at-hand, is not conventional in the First Circuit, and in this case was an abuse of its discretion. *Yankee Candle Company, Inc. v. Bridgewater Candle Company, LLC*, 259 F.3d 25, 33 (1st Cir. 2001) (“This Court conducts a two-part test to determine if illicit copying has occurred.”).

THE DISTRICT COURT MISAPPLIED CLAIM PRECLUSION

a. OPERATIVE FACTS ARISING BEFORE OCTOBER 8, 2008 AND OPERATIVE FACTS ARISING AFTER OCTOBER 8, 2008 CANNOT BE THE “SAME FACTS”

The District Court applied preclusion by *Steele I*, in part because it mistakenly found that Steele’s “allegations in the instant action arise from the same facts as the other cases.” Add-2, 7-9. The District Court, however, confused facts *alleged* in Steele’s first lawsuit, with facts *occurring during* that lawsuit. Specifically, the *Steele I* “nucleus of operative facts” commenced October 20, 2004 - when the Red Sox

concede gaining access to Steele's Song, Appeal I App-424 - and concluded October 8, 2008, when *Steele I* was filed.

To *Steele I*'s mutual exclusion, *Steele II*'s operative facts arise *after* October 8, 2008, i.e., after *Steele I* was filed and during the course of its litigation. Appellees' alteration and filing of the MLBAM Audiovisual *was part of the Steele I proceedings* and therefore logically, chronologically, and self-evidently were not "the same facts" that occurred prior to the proceedings in which the *Steele II* facts occurred. Facts derived *prior to* litigation, and facts derived *from* litigation, are not the "same facts." Add-3; App-113-114.

This chronological "bright line" between the underlying facts of *Steele I* and *Steele II* renders untenable the *Steele II* Decision's "same facts" preclusion finding. See *Steele II* Opposition to Motion to Dismiss at 5-6, 14-17.

The Court's mistaken finding is to the "same facts" vis-à-vis the "identity requirement," therefore, was clearly erroneous. Add-8-9.

Hughes v. McMenamon, cited by the District Court, is inapposite. *Hughes v. McMenamon*, 379 F.Supp.2d 75, 78 (D.Mass. 2005); Add-8. In *Hughes*, plaintiff was precluded from filing an independent Rule 60(b)(3) action founded upon "precisely

the same allegations” made in a prior Rule 60(b)(3) motion. *Id.*

Steele’s allegations of CMI removal – born of and occurring during the *Steele I* litigation itself – are necessarily *not* the “same allegations” as his infringement allegations in *Steele I*, which arose from facts occurring *prior* to *Steele I*. Just as a claim filed under §1202 is not the same as a claim of infringement, the facts – temporally and otherwise – supporting these two distinct causes of action necessarily involve very different *allegations*.

**FRAUD ON THE COURT IS AN INJURY SHARED BY THE JUDICIARY
AND CANNOT BE WAIVED BY A LITIGANT**

- a. The District Court Ignored Steele’s Affidavit Raising Appellees’ Misconduct, Then Dismissed Steele’s Complaint on Grounds Steele Did Not Raise Misconduct*

As to Steele’s injury arising from Appellees’ misconduct during litigation, the District Court denied Steele relief on grounds he had waived the issue: “Steele...could have raised the current claims [of wrongdoing] in *Steele I*... Steele should have raised any allegations of misconduct at that time... [t]he fact that Steele was a *pro se* litigant...does not excuse his failure at least to raise the possibility of misconduct.”

Add-8-9.

On the contrary, during *Steele I*, on September 15, 2009, with his Motion for Reconsideration pending, after having in good faith attempted to clarify Appellees' false filings with a written request for FINAL 1, after being rebuffed, and having endured Appellees' procedural abuse and fraud on the court long enough, Steele unequivocally raised the issue of misconduct in an affidavit filed with the District Court: "The defendants have demonstrated a pattern of deception and contradiction in an attempt to mislead the Court, and have shown contempt for me...and the Court in their dishonest procedural maneuvers and misrepresentations... The defense...purposely misled the Court... the defendants' assertions were intentionally dishonest... [t]heir underhanded scheming and disrespect for me and the Court should not go unnoticed." Appeal I App-815-818.

This stark contradiction between unambiguous record evidence in the form of Steele's unopposed affidavit raising the issue of misconduct, and the District Court's finding that Steele "fail[ed]...to raise the possibility of misconduct," requires no argument or clarification: Steele did precisely what the Court faulted him for not doing. Add-9; Appeal I App-815-818.

b. FRAUD ON THE COURT EXCEEDS PARTIES' INTERESTS AND ISSUES' MERITS, CANNOT BE WAIVED BY LITIGANTS, AND MUST NOT BE SUFFERED IN SILENCE BY THE COURTS

The District Court disregarded Steele's claims of injury due to fraud on the court, in part, based on Steele's supposed waiver of misconduct in *Steele I*. Add-9.

The District Court accepted as true all facts as alleged, and credited Steele's claims of Appellees' fraud on the court. *Ricigliano*, 2011 WL 2260485, at *4; Add-6-7. Then the District Court barred Steele's claim for relief from fraud on grounds that he waived it for lack of diligence. Add-8-9.

However, fraud on the court - being an affront to both the party *and* the judiciary - is simply not in Steele's purview to waive. *Hazel-Atlas Glass Co.*, 322 U.S. at 246. Notwithstanding the fact that Steele *did* inarguably raise the issue in *Steele I*, the burden was not his to timely unmask his adversary's counsel-induced fraud on the Court. *Id.* It was Appellees' duty to follow the Rules and professional ethics, and *not* commit fraud on the court in league with their clients.

In a closely analogous case in which counsel foisted fraudulent evidence on the court, *Hazel-Atlas*, the Circuit Court denied petitioner's claims for relief from fraud on the court based *not* on the merits, but because the aggrieved "had not exercised

proper diligence in uncovering the fraud.” *Hazel-Atlas Glass Co.*, 322 U.S. at 246.

The Supreme Court rejected this reasoning - as Steele respectfully suggests this Court should reject that of the District Court - stating:

We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence Hartford’s fraud cannot be condoned for that reason alone.

Id. The Court went on to explain how fraud on the court exceeds the scope of quotidian law, as it threatens the integrity of “institutions set up to protect and safeguard the public.” *Id.* Courts “must [not] always wait upon the diligence of litigants” to preserve judicial integrity. *Id.*

Here, Steele *was* diligent *and* laudable as a good faith litigant: after Appellees’ thrice-filed fraudulent evidence, Steele requested from Appellees a copy of unaltered audiovisual; he was rebuffed. Appeal App-516-555. Steele then took the next reasonable step: he notified the District Court of Appellees’ misconduct, by affidavit.

Steele did not – could not - waive injury caused by fraud on the court. The District Court’s finding in this regard is a legal error.

**THE DISTRICT COURT’S ORDER IMPOSING RULE 11 SANCTIONS
WAS AN ABUSE OF DISCRETION AND MISCARRIAGE OF JUSTICE**

Bereft of facts and law, Appellees’ Rule 11 Motion did not simply pound the proverbial table, rather, it upended it. Appellees’ motion was born of tactical bad faith advocacy, as should be clear at this point, the District Court’s untenable and egregiously unjust ruling notwithstanding. Steele’s evidence of good faith – and Appellees’ show of bad faith – is self-contained in Steele’s Rule 11 “safe harbor” letter to Appellees and their meek “response.” App-183-203

Appellees’ motion was intended to distract the Court with utterly false charges of misconduct – Appellees were essentially projecting – where Appellees’ merits were nil. Unfortunately they succeeded.

RELIEF REQUESTED

Steele requests a mandate reversing the District Court’s dismissal of this case and Rule 11 admonition of Steele and the undersigned, and remanding the case to the District Court for further proceedings.

Steele further requests that, upon remand, a Master be appointed to oversee discovery and otherwise oversee the case and assist the District Court. Steele makes

this request based upon his experience to date litigating against Skadden, whose nefarious tactics have not relented and certainly are likely to continue on remand.

While Skadden is not Appellees' counsel – they are Appellees – their actions to date have shown no bounds and, indeed, a Master's involvement would protect Skadden's counsel insofar as it would act to prevent that Skadden does not place their own counsel in an untenable ethical position.

CONCLUSION

WHEREFORE, Steele respectfully requests that this Honorable Court reverse the District Court's Order dismissing this case and provide the above-described relief sought by Steele.

/s/Christopher A.D. Hunt
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Dated: August 14, 2011

CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that on August 14, 2011, I caused this Brief of Appellant Samuel Bartley Steele, filed through the ECF system, to be served electronically by the Notice of Docket Activity upon the ECF filer listed below. On August 8, 201, copies of the appendix were sent to the clerk of the First Circuit Court of Appeals and to counsel for appellees, Ben T. Clements, at the address listed below.

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Dated: August 14, 2011

/s/ Christopher A.D. Hunt
Christopher A.D. Hunt

United States Court of Appeals For the First Circuit

No. 11-1674

SAMUEL BARTLEY STEELE

Plaintiff – Appellant

STEELE RECORDZ; BART STEELE PUBLISHING

Plaintiffs

v.

JOHN BONGIOVI, Individually, d/b/a Bon Jovi Publishing; SCOTT D. BROWN;
CHRISTOPHER G. CLARK; MAJOR LEAGUE BASEBALL PROPERTIES, INC.;
MATTHEW JOSEPH MATULE; KENNETH A. PLEVAN; RICHARD SAMBORA,
Individually, d/b/a Aggressive Music; SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP &
AFFILIATES; CLIFFORD M. SLOAN; TURNER BROADCASTING SYSTEMS, INC.

Defendants – Appellees

ON APPEAL FROM THE U.S. DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

ADDENDUM TO BRIEF OF APPELLANT SAMUEL BARTLEY STEELE

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United States District Court
District of Massachusetts

<hr/>)	
SAMUEL BARTLEY STEELE,)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	10-11218-NMG
JOHN BONGIOVI, individually and)	
d/b/a Bon Jovi Publishing, SCOTT)	
D. BROWN, CHRISTOPHER G. CLARK,)	
MAJOR LEAGUE BASEBALL)	
PROPERTIES, INC., MATTHEW J.)	
MATULE, KENNETH A. PLEVAN,)	
RICHARD SAMBORA, individually)	
and d/b/a Aggressive Music,)	
SKADDEN, ARPS, SLATE, MEAGHER &)	
FLOM LLP & AFFILIATES, CLIFFORD)	
M. SLOAN and TURNER BROADCASTING)	
SYSTEM, INC.,)	
Defendants.)	
<hr/>)	

MEMORANDUM & ORDER

GORTON, J.

Plaintiff Samuel Bartley Steele ("Steele") brings this case against numerous defendants for unlawful removal or alteration of copyright management information in violation of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §§ 1202(b), (c) and 1203. This is the second lawsuit brought by Steele relating to his copyright of a song he wrote about the Boston Red Sox and will be referred to as "Steele II".

I. Factual Background

In a previous case, Steele brought claims for copyright infringement against some of the same defendants. Steele v. Turner Broad. Sys., Inc. et al, Civ. A. No. 08-11727-NMG ("Steele I"). He claimed that a song he wrote about the Boston Red Sox ("the Steele Song") was unlawfully copied and used to create a video advertisement featuring the allegedly infringing song ("the TBS Promo"). In August, 2009, this Court found that there was no substantial similarity between the Steele Song and the defendants' productions and granted the defendants' motion for summary judgment. Steele v. Turner Broad. Sys., Inc., 646 F. Supp. 2d 185 (D. Mass. 2009). In October, 2009, the Court denied Steele's motion for reconsideration. Steele v. Turner Broad. Sys., Inc., Civ. A. No. 08-11727-NMG, 2009 WL 3448698 (D. Mass. Oct 13, 2009). Steele appealed this Court's orders to the United States Court of Appeals for the First Circuit and that appeal remains pending. Steele also has cases pending in this Session (Steele v. Ricigliano, et al., Civ. A. No. 10-11458-NMG) ("Steele III") and in the Massachusetts Superior Court (Steele v. Boston Red Sox Baseball Club L.P., No. 10-3418E) ("Steele IV").

The allegations in the instant action arise from the same facts as the other cases. Here, Steele sues some of the same defendants but adds as defendants the attorneys for the defendants in Steele I: Matthew J. Matule, Kenneth A. Plevan,

Scott Brown, Christopher G. Clark, Clifford M. Sloan and Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates ("the Attorney Defendants"). Steele alleges that the Attorney Defendants, in violation of 17 U.S.C. § 1202, intentionally 1) concealed acts of copyright infringement, 2) altered the TBS Promo by, among other acts, deleting the MLBAM copyright notice from the end and adding 12 seconds of silence at the beginning, and 3) submitted false evidence to the federal courts in the form of that altered TBS Promo. Steele seeks, inter alia, an injunction enjoining all of the defendants from further using the altered audiovisual, compensatory damages, costs and attorney's fees.

II. Procedural History

Steele filed his complaint on July 20, 2010 and amended it in August, 2010. The case was originally assigned to Judge Woodlock, but was transferred to this Session because it relates to Steele's two other cases filed in this Session.

The defendants moved to dismiss on November 24, 2010, arguing that 1) Steele lacks standing to bring a claim for alteration of the TBS Promo because the copyright in that material is owned by MLB Advanced Media, L.P. ("MLBAM"), 2) Steele fails to allege sufficient facts to support his claims and 3) Steele's claims are issue and claim precluded because they arise from the same facts as Steele I and his allegations are predicated on a finding of copyright infringement. In addition

to dismissal, the defendants also request attorneys fees under the Copyright Act, 17 U.S.C. §§ 505, 1203 and the vexatious litigation statute, 28 U.S.C. § 1927. On December 21, 2010, the defendants also filed a motion for Fed. R. Civ. P. 11 sanctions. They allege that this action was filed to harass and to force a settlement in Steele I. Steele opposed that motion and, on January 3, 2011, moved to stay the action pending the First Circuit's decision in Steele I and to consolidate Steele II and Steele III. Defendants oppose the motion to stay and consolidate.

III. Plaintiff's Motion to Stay

Steele moves to consolidate this action with Steele III and to stay both proceedings until the First Circuit issues a decision with respect to the Steele I appeals.

Deciding whether to stay proceedings involves balancing the interests of the parties and the Court. Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936). "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward." Id. at 255. The Court finds that Steele has not set forth any convincing grounds for staying this action. The fact that Steele I is currently on appeal in the First Circuit does not undermine its validity or preclusive effect. See, e.g., In re Belmont Realty Corp., 11 F.3d 1092, 1095-96, 1099 (1st Cir. 1993). Unless that decision is reversed by the First Circuit, it

is a valid and binding determination and the Court need not stay this action pending a resolution of the appeal in Steele I. See id.; Solis-Alarcon v. Abreu-Lara, 722 F. Supp. 2d 157, 161 (D.P.R. 2010) (finding that the possibility that a prior judgment adverse to the plaintiff might be reversed on appeal did not justify staying a subsequent related action).

IV. Defendants' Motion to Dismiss

A. Legal Standard

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). In considering the merits of a motion to dismiss, the Court may look only to the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the complaint and matters of which judicial notice can be taken. Nollet v. Justices of the Trial Court of Mass., 83 F. Supp. 2d 204, 208 (D. Mass. 2000) aff'd, 248 F.3d 1127 (1st Cir. 2000). Furthermore, the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000). If the facts in the complaint are sufficient to state a cause of action, a motion to dismiss the complaint must be denied. See Nollet, 83 F. Supp. 2d at 208.

Although a court must accept as true all of the factual allegations contained in a complaint, that doctrine is not, however, applicable to legal conclusions. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Threadbare recitals of the legal elements, supported by mere conclusory statements, do not suffice to state a cause of action. Id. Accordingly, a complaint does not state a claim for relief where the well-pled facts fail to warrant an inference of any more than the mere possibility of misconduct. Id. at 1950.

B. Application

In order for Steele to have standing to bring a civil action for the removal or alteration of Copyright Management Information pursuant to 17 U.S.C. § 1202, Steele must show that he was injured by that violation. 17 U.S.C. § 1203(a). In this case, Steele alleges that the defendants altered the TBS Promo by adding 12 seconds of "dead air" with the text "Version: FINAL 2" at the beginning and removing the MLBAM copyright notice and accompanying sounds at the end. Steele's claim of injury appears to be that the defendants' violation of the DMCA caused him to lose his copyright infringement case (Steele I) and that, but for their violation, he would have prevailed.

Even if the defendants did make the alleged alterations with the requisite intent to conceal copyright infringement, however, those alterations were immaterial to this Court's opinion in

August, 2009. The Court's holding in Steele I was based on the lack of a "substantial similarity" between the lyrics, melody and rhythm of the Steele Song and the defendants' song. Steele I, 646 F. Supp. 2d at 190-92. The alleged alteration would not have affected the Court's analysis. Thus, even accepting all factual allegations in the complaint as true and drawing all reasonable inferences in Steele's favor, the Court finds that he was not injured by the alleged acts. Consequently, the Court concludes that Steele cannot, as a matter of law, prevail on his DMCA claim because he does not have standing to bring such an action.

In addition, Steele cannot prevail in this action because he cannot show that the defendants' removed or altered the TBS Promo "knowing, or . . . having reasonable grounds to know, that it [would] induce, enable, facilitate, or conceal [copyright] infringement[.]". 17 U.S.C. § 1202(b). Because the Court found that no infringement took place, and the alleged alterations would not have changed that determination, Steele cannot prove that the defendants knew the alterations would facilitate copyright infringement. Thus, for that reason also, Steele has failed to state a claim upon which relief can be granted.

Finally, Steele's claims in this case are claim precluded by this Court's decision in Steele I. The doctrine of res judicata provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues

that were or could have been raised in that action.” Allen v. McCurry, 449 U.S. 90, 94 (1980). Accordingly, res judicata applies if

(1) the earlier suit resulted in a final judgment on the merits, (2) the causes of action asserted in the earlier and later suits are sufficiently identical or related, and (3) the parties in the two suits are sufficiently identical or closely related.

Airframe Sys., Inc. v. Raytheon Co., 601 F.3d 9, 14 (1st Cir. 2010).

In an analogous case, Hughes v. McMenammon, the plaintiff sued the defendant’s attorney for actions taken on behalf of the defendant in a prior, related litigation against the plaintiff. 379 F. Supp. 2d 75, 79 (D. Mass. 2005). This Court held that there was a sufficient relationship between the attorney and the client such that the identity of parties requirement was met. Id. Additionally, in that case, this Court held that there was sufficient identity between the earlier and later suits because the later action alleged wrongdoing in the earlier litigation by the defendants and their attorneys. Id.

The Court finds that, here, for the same reasons as in Hughes, the identity requirements are met. First, Steele himself acknowledges that the claims asserted in this case are intimately related to those raised in Steele I. Second, Steele, like the plaintiff in Hughes, could have raised the current claims in Steele I. See id. Steele claims that he did not

discover the alteration until after the judgment in Steele I but acknowledges that the altered version was first filed on December 8, 2008. That was well before the Court's summary judgment order in August, 2009 and Steele should have raised any allegations of misconduct at that time, rather than filing a separate lawsuit 19 months later. The fact that Steele was a pro se litigant at that time does not excuse his failure at least to raise the possibility of misconduct.

For all of those reasons, Steele fails to state a claim upon which relief can be granted and the defendants' motion to dismiss will be allowed.

V. Defendants' Motion for Sanctions

Defendants request attorney's fees and costs related to their motion to dismiss pursuant to Fed. R. Civ. P. 11. The First Circuit has stated that Fed. R. Civ. P. 11

prohibits filings made with any improper purpose, the offering of frivolous' arguments, and the assertion of factual allegations without evidentiary support or the likely prospect of such support.

Roger Edwards, LLC v. Fiddes & Son Ltd., 437 F.3d 140, 142 (1st Cir. 2006) (internal quotations omitted). Rule 11 sanctions are intended to "protect parties and the Court from wasteful, frivolous, and harassing lawsuits." Jones v. Social Sec. Admin., Civ. A. No. 03-12436, 2004 WL 2915290, at *3 (D. Mass. Dec. 14, 2004).

As explained above, Steele's claims in this action are

meritless and appear to be an attempt to circumvent this Court's holding in Steele I. Thus, this lawsuit appears frivolous and vexatious, and the Court concludes that sanctions are warranted. See Hughes, 379 F. Supp. 2d at 81. Moreover, Steele has filed two additional actions arising from the same nucleus of operative facts, one in federal court (Steele III) and one in the Massachusetts Superior Court (Steele IV).

Despite the fact that sanctions are warranted here and that Steele's proliferating lawsuits against essentially the same group of defendants border on harassment, the Court will limit its sanctions to an admonition this time. Steele is forewarned, however, that any future filing of abusive, frivolous or vexatious cases in this Court will result in the imposition of sanctions, including an order enjoining him from filing further proceedings in this Court arising from the same nucleus of operative facts. Although the defendants are entitled to an award of the costs and fees that they have incurred in responding to this action, the Court will abate any such award unless plaintiff hereafter persists in filing frivolous pleadings.

ORDER

In accordance with the foregoing,

- 1) plaintiff's motion to stay and consolidate (Docket No. 18) is **DENIED**;
- 2) defendants' motion to dismiss (Docket No. 9) is **ALLOWED**;
- 3) defendants' motions for sanctions (Docket Nos. 9 and 15) are held in abeyance during the pendency of the appeal of the Court's decisions in Steele v. Turner Broad. Sys., Inc., Civ A. No. 08-11727-NMG, and unless and until plaintiff files any further frivolous pleadings, in which event the Court will impose monetary sanctions and/or an order enjoining plaintiff from filing further proceedings in this Court.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated May 17, 2011

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Samuel Bartley Steele
Plaintiff

V.

Bongiovi et al
Defendants

CIVIL ACTION

NO. 10-11218-NMG

ORDER OF DISMISSAL

GORTON, D. J.

In accordance with the Court's Memorandum & Order dated 5/17/2011, granting Defendants' Motion to Dismiss (Document No. 23), it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

5/17/2011
Date

/s/ Diep Duong
Deputy Clerk

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VIA ELECTRONIC MAIL

October 11, 2010

Clifford M. Sloan, Esq.
Skadden Arps Slate Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005-0000

Re: Steele II Status Following Court's September 27, 2010 Order
Steele v. Bongiovi, et al., No. 1:10-cv-11218-DPW (Steele II)

Dear Attorney Sloan:

I write about a fact issue relating to Steele II arising from to the Court's September 27, 2010 Order ("Order") in Steele I (08-11727). Steele II is based on 17 U.S.C. §§ 1202 and 1203, prohibiting removal or alteration of copyright management information, e.g., a copyright notice. The factual basis of Steele II is defendants' unauthorized removal of MLBAM's copyright notice from the MLB Audiovisual:

Defendant[s], without the authority of the copyright owner or law, intentionally removed or altered, or knowingly and materially contributed to the intentional removal or alteration of, copyright management information from the MLB Audiovisual, including information set forth in MLBAM's notice of copyright... See, generally, Steele II Complaint (emphasis supplied).

The Order found that "MLBAM was adequately served with process," Order at 9, leaving open the possibility that MLBAM was aware of, and authorized, removal of the MLBAM copyright notice from the MLB Audiovisual filed with the Court. If MLBAM did, in fact, authorize removal of the copyright notice, Steele, in good faith, would have no choice but to dismiss Steele II.

However, as the record stands, MLBAM's authority or lack thereof is an open question. If MLBAM will confirm in writing that it authorized the removal of its copyright notice from the MLB Audiovisual filed in Steel I, Steele will dismiss Steele II. Out of an abundance of caution, dismissal of Steele II would be without prejudice. However, barring new or newly discovered evidence contrary to MLBAM's confirmation that it authorized removal of the copyright notice (if provided), Steele will not re-file or otherwise assert §§1202 and 1203 violations arising from the MLB Audiovisual filed in Steele I.

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Accordingly, I ask that you provide confirmation that MLBAM authorized removal of its copyright notice from the MLB Audiovisual, if possible, at which point Steele will immediately dismiss Steele II. If, on the other hand, MLBAM did not authorize removal of its copyright notice or if you are unwilling or unable to determine whether MLBAM gave such authorization, please so advise. In that event, Steele will have no choice but to maintain Steele II.

At this point, the Steele II summonses have not yet been forwarded to the U.S. Marshal's office for service of process. Given the Order, Steele decided that, without providing MLBAM the opportunity to clarify its authority or lack thereof, Steele could not pursue Steele II in good faith.

Accordingly, I request that you respond at your earliest convenience. If we do not hear from you by Thursday, October 14, 2010, we will have no choice but to assume MLBAM did not authorize removal of its copyright notice and will proceed with service of process. If you need additional time to procure MLBAM's written confirmation, please so advise as soon as possible and we will endeavor to accommodate any reasonable request.

In the meantime, if you need any further clarification or have any questions, please do not hesitate to contact me.

Thank will you for your attention to this matter.

Very truly yours,



Christopher A.D. Hunt

cc: Kenneth A. Plevan, Esq. (via e-mail)
Scott D. Brown, Esq. (via e-mail)
Matthew J. Matule, Esq. (via e-mail)
Christopher G. Clark, Esq. (via e-mail)

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October 14, 2010

BY EMAIL AND FIRST CLASS MAIL

Christopher A.D. Hunt, Esq.
The Hunt Law Firm LLC
10 Heron Lane
Hopedale, Massachusetts 01747

RE: Steele II

Dear Mr. Hunt:

This letter responds to your October 11, 2010 letter, addressed to my colleague Clifford M. Sloan, regarding *Steele v. Bongiovi*, No. 10-11218-DPW (D. Mass. filed July 20, 2010) (Woodlock, J.) ("*Steele II*").

While your letter purports to outline a course of action that could result in the withdrawal of *Steele II* without prejudice, in our view your letter was not sent in good faith. This is because the letter repeatedly *assumes* that a copyright notice was removed from the version of the "Turner Promo" submitted by defendants to Judge Gorton in "*Steele I*."¹ Indeed, your two-page letter employs the word "removal" ten times. However, as we have previously advised you,² no copyright notice was in fact removed from said version of the Turner Promo,

¹ *Steele v. Turner Broadcasting System, Inc.*, No. 08-11727-NMG (D. Mass. filed Oct. 8, 2008) (Gorton, J.)

² *See, e.g.*, Letter dated September 13, 2010 from Kenneth Plevan to Christopher A.D. Hunt at 2 ("[N]either this firm, nor any of its attorneys, removed an MLBAM copyright notice, or any other copyright notice, from what we had referred to as the 'Turner Promo' submitted to and considered by the Court in granting summary judgment dismissing Plaintiffs' copyright claim. Nor, to the knowledge of this firm and its attorneys, did any defendant 'remove' any copyright notice from the Turner Promo.").

Christopher A.D. Hunt, Esq.
October 14, 2010
Page 2

notwithstanding your repeated and baseless assertions to the contrary. Accordingly, having not removed any copyright notice, there was no occasion for any defendant in *Steele II* to have considered whether the consent of a copyright owner should be solicited or was required.

We note next that in connection with the series of *Steele* lawsuits, you have sent numerous such letters to one or more defendants. You then place each, and their responses, in the public record, leading us to conclude that (i) none have been sent in good faith, but in an effort to seek to gain a tactical advantage, and (ii) the letters are part of the effort by you and Mr. Steele to harass defendants with baseless litigation tactics.

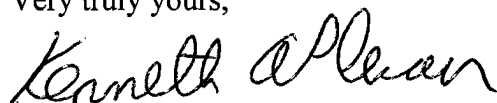
Next, we note that the so-called alteration/removal issue has been raised by plaintiffs in *Steele I* no less than *five times*. (See, e.g., Motion for Entry of Default as to MLBAM at 7-8; Reply Memorandum of Law in Support of Motion for Entry of Default as to MLBAM at 6; First Circuit Opening Brief at 18-19; First Circuit Reply Brief at 8-9; First Circuit Motion for Sanctions at 7-8.) You have never provided any proper rationale for using that allegation as the basis for an independent lawsuit.

Next, as you also know, after considering several of your filings raising the removal/alteration issue, the *Steele I* District Court concluded that although “Steele alleges that the Defendants . . . have made a number of misrepresentations to the Court Steele does not, however, explain how his allegations have any bearing on the Court’s decision with respect to these motions and offers no evidence of bad faith on the part of the Defendants.” (Memorandum & Order dated September 27, 2010 (Docket No. 136). That express rejection of Steele’s baseless removal/alteration allegation further confirms that *Steele II* is on its face meritless as a matter of law.

In conclusion, we note that there are several additional grounds for the dismissal of *Steele II* on the face of the Complaint as a matter of law, however, no useful purpose would be served by outlining them here.

You note that process in *Steele II* has not been served. You should withdraw *Steele II* with prejudice, as it is completely without merit and constitutes the kind of improper conduct regarding which you and Mr. Steele have now been “forewarned” by Judge Gorton. Defendants reserve the right to seek sanctions if the lawsuit is not promptly withdrawn with prejudice.

Very truly yours,



Kenneth A. Plevan

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VIA ELECTRONIC MAIL

October 20, 2010

Kenneth A. Plevan, Esq.
Skadden Arps Slate Meagher & Flom LLP
Four Times Square
New York, NY 10036-6522

Re: Steele v. Bongiovi, et al., No. 1:10-cv-11218-DPW (Steele II)

Dear Mr. Plevan:

This will respond to your October 14, 2010 letter replying to my offer to conditionally withdraw Steele II.

Steele II does not allege that the MLBAM copyright notice was removed from "the version of the 'Turner Promo' submitted by defendants to Judge Gorton in '*Steele I*,'" or that a "copyright notice was in fact removed from said version of the Turner Promo," or that the notice was removed "from what [you] had referred to as the 'Turner Promo' submitted to and considered by the Court." See October 14, 2010 letter, 1-2, and 1 n.2 (emphasis supplied). Obviously, that "version" did not contain the MLBAM copyright notice, so there was nothing to "remove;" denying that the copyright notice was "removed" from a "version" that did not contain the copyright notice is meaningless.

The infringing audiovisual at issue in Steele I, and therefore in Steele II, is the actual final, published, and public audiovisual that Steele (and millions of others) saw beginning on August 27, 2007 at MLB.com and that was played at thousands of theaters, ballparks, and other public venues nationally and around the world. It displays the MLBAM copyright notice.

The infringing audiovisual at issue is not, and by definition could not be, the draft, unpublished, and non-public audiovisual dated August 20, 2007 and titled "VERSION: FINAL 2," which did not contain the MLBAM copyright notice, and which Defendants filed - and represented to the Court as a "true and correct" copy of the infringing audiovisual - with the Court in Steele I.¹

¹ For clarity, I will refer to the infringing work at issue in Steele I and Steele II as the "MLB Audiovisual" and to the audiovisual Defendants filed in Steele I as "Defendants' Audiovisual."

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The issue in Steele II, therefore, is simple: whether Defendants submitted an accurate ("true and correct") copy of the infringing work at issue, i.e., the MLB Audiovisual, which, by definition, includes the MLBAM copyright notice. The answer is clearly no, which you now concede by referring only to the "version" (not copy) Defendants filed with the Court.

However, at the time of filing, Defendants represented - in Declarations (made under penalty of perjury) and in numerous other Court filings - that their Audiovisual was a "true and correct" copy of the MLB Audiovisual. Defendants never once represented to the Court that their Audiovisual was a "version" rather than a copy of the MLB Audiovisual, as Defendants now argue.

For example, In your December 8, 2008 filings in support of Defendants' Motion to Dismiss, Defendants refer to Steele's allegations that "Turner allegedly created an 'ad,'" and state that because "Steele has not included a copy of the allegedly infringing Turner Promo in his Complaint exhibits, it is submitted with the Brown Declaration as Exhibit 1 thereto." See Defendants Memorandum of Law in Support of Motion to Dismiss (Docket entry 18) at 3 and at 3 n.3.

The February 18, 2009 Declaration of Scott D. Brown in support of Defendants' Motion to Dismiss (Docket entry 50), states the following:

A true and correct copy of an audiovisual file of the promotional video (referred to by plaintiffs in the Amended Complaint as an "ad") that Defendant Turner Broadcasting System Inc. is alleged in paragraph 27 of the Amended Complaint to have created to promote the 2007 postseason (the "TBS Promo") is contained in the DVD submitted herewith as Exhibit 1.

See February 18, 2009 Brown Declaration at 2, ¶ 2.

Paragraph 27 of Steele's Amended Complaint (Docket entry 41) refers to the announcement of the "full length promo" of the audiovisual. See Steele Amended Complaint at ¶ 27. The "full-length promo" of the audiovisual as described in Paragraph 27 of Steele's Amended Complaint is, of course, the MLB Audiovisual, which contains the MLBAM copyright notice.

The June 10, 2009 Declaration of Scott D. Brown contains nearly identical language, identifying the enclosed DVD- Exhibit 6 - as containing a "true and correct copy" of the "promotional video" identified by Steele in paragraph 27 of his Amended Complaint to have been

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created by "Defendant Turner Broadcasting System, Inc." See June 10, 2009 Brown Declaration, ¶11.

The same June 10, 2009 Brown Declaration states that Exhibit 1 to Steele's original Complaint "comprised of an overlay of the TBS Promo visuals with Steele's song." See Id. at ¶12 (emphasis supplied). The "visuals" to the "TBS Promo" (as defined by Defendants), contained in Exhibit 1 to Steele's original Complaint and referenced in the June 10, 2009 Brown Declaration, were visuals of the MLB Audiovisual, which contained the MLBAM copyright notice.

Defendants' Audiovisual would necessarily have to include all elements of the MLB Audiovisual, including the MLBAM copyright notice, in order to be a copy, rather than merely a "version."²

Defendants' Audiovisual, therefore, was not a "true and correct" copy of the MLB Audiovisual. The lack of MLBAM's copyright notice on Defendants' Audiovisual is the primary basis of Steele II. Whether the MLBAM copyright notice was deleted, omitted, or never a part of Defendants' Audiovisual is irrelevant to Steele II.³

What is relevant is that Defendants' Audiovisual did not contain the copyright management information "conveyed in connection with [a copy]" of the MLB Audiovisual, pursuant to §1202(c). Accordingly, the copyright management information (or lack thereof) conveyed in Defendants' Audiovisual was *de jure* removed and otherwise false. See 17 U.S.C. §§1202(a)(1), (b)(1), (c), (c)(1), (c)(3).

Accordingly, Steele rejects your attempt to sidestep the issue by referencing different "versions" of the audiovisual. Putting aside the inherent fraud of filing a materially different "version" with the Court - which you now not only explicitly acknowledge (in direct contradiction to your false representations of it as a "true and correct copy"), but brazenly attempt to use your false filing to defend Steele II - 17 U.S.C. §1202 is concerned with "copies," not "versions."

² Section 1202(c) defines the term "copyright management information" as information "conveyed in connection with copies" of a work identifying the work or the copyright owner of the work, including information contained in a copyright notice. See 17 U.S.C. §§1202(c), (c)(1), 1202 (c)(3).

³ Though it certainly would have been relevant during the litigation of Steele I.

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In sum, that Defendants' Audiovisual conveyed false and/or removed copyright management information "in connection with copies" of the MLB Audiovisual is incontrovertible. Your October 14, 2010 letter's attempt to improperly reframe the issue as one of different "versions" rather than one of "copies" merely confirms this fact.

Nonetheless, I now reiterate my offer to withdraw Steele II without prejudice if you provide a written statement from MLBAM confirming their authorization of Defendants' filing of Defendants' Audiovisual without MLBAM's copyright notice in Steele I. I am sure you realize that if MLBAM did authorize the filing of Defendants' Audiovisual, but for whatever reason you are unwilling to provide proof of that authorization now - and such evidence is later discovered - you will have forced unnecessary litigation upon the Steele II Defendants and the Court and wasted judicial resources, which is sanctionable conduct.

Conversely, if MLBAM did not authorize Defendants' filing of Defendants' Audiovisual, then the Steele II Defendants violated 17 U.S.C. §1202, and Steele II will be pursued in good faith.

If I do not hear from you by 5:00 p.m. today, I will assume MLBAM did not authorize Defendants' filing of the MLB Audiovisual and will commence service of process in Steele II.

The remaining issues raised in your letter of October 14, 2010 have little or no relevance to Steele II or my request, but nonetheless compel a response.

First, I take issue with your assertion that my letter and offer are not made in good faith. As with each and every prior correspondence to you requesting information, my purpose is to avoid unnecessary litigation, whether in the form of a new claim, as here, or attempting to avoid

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unnecessary motion practice, as with my prior letters. I will continue, where appropriate, to seek information from you that may help avoid or minimize litigation, now or in the future.⁴

Second, as you point out, Steele has raised the issue of the missing MLBAM copyright notice several times ("no less than *five times*," according to your October 14 2010 letter). Defendants, of course, have also failed to explain the absence of the MLBAM copyright notice each of the "no less than *five times*" Steele has raised the issue.⁵

Finally, as to the Court's September 27 2010 Order, you are simply wrong. The Court made no "express" findings as to the issue of the removed MLBAM copyright notice whatsoever.

Thank you for your attention to this matter.

Very truly yours,



Christopher A.D. Hunt

cc: Clifford Sloan, Esq. (via e-mail)
Scott D. Brown, Esq. (via e-mail)
Matthew J. Matule, Esq. (via e-mail)
Christopher G. Clark, Esq. (via e-mail)

⁴ As to any "tactical advantage" to Steele I can only say that any such advantage gained by Steele is the result of Defendants' inability or unwillingness to provide information in support of Defendants' claims and defenses, which Steele seeks solely to move this litigation to an expedient - but fair - conclusion. As to your claim of "harassment," you have the right - and have exercised the right - to ignore Steele's good faith requests; you also have the reciprocal right to request information or clarification from Steele. Seeking to avoid unnecessary litigation or motion practice is not "harassment," but is, in fact, lauded by the Courts.

⁵ Steele has also explained in detail in previous court filings the significance the omitted MLBAM copyright notice. in particular that it is consistent with MLBAM's default (confirmed by the Court's September 27, 2010 Order) and other facts showing an effort to improperly remove MLBAM from Steele I and to otherwise conceal infringement.

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October 20, 2010

BY EMAIL

Christopher A.D. Hunt, Esq.
The Hunt Law Firm LLC
10 Heron Lane
Hopedale, MA 01747

RE: Steele, et al. v. Turner Broadcasting System, Inc., et al., No. 08-11727-NMG (D. Mass.)

Dear Mr. Hunt:

Responding briefly to your letter of today, October 20, 2010, you still have failed to explain how a copyright notice is either (i) part of a work of authorship protected by copyright, or (ii) would have in any way impacted Judge Gorton's analysis of the copyright infringement claim in *Steele I*. We can only surmise that the "removal" issue is one contrived by you post-dismissal, in a misguided effort to try to make an "end-run" around Judge Gorton's complete dismissal of Mr. Steele's copyright claims. The *Steele II* Complaint remains, in our view, meritless as a matter of law.

Very truly yours,


Kenneth A. Plevan

United States Court of Appeals For the First Circuit

No. 11-1674

SAMUEL BARTLEY STEELE

Plaintiff – Appellant

STEELE RECORDZ; BART STEELE PUBLISHING

Plaintiffs

v.

JOHN BONGIOVI, Individually, d/b/a Bon Jovi Publishing; SCOTT D. BROWN;
CHRISTOPHER G. CLARK; MAJOR LEAGUE BASEBALL PROPERTIES, INC.;
MATTHEW JOSEPH MATULE; KENNETH A. PLEVAN; RICHARD SAMBORA,
Individually, d/b/a Aggressive Music; SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP &
AFFILIATES; CLIFFORD M. SLOAN; TURNER BROADCASTING SYSTEMS, INC.

Defendants – Appellees

ON APPEAL FROM THE U.S. DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
FOR APPELLANT’S BRIEF

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This Brief complies with the type-volume limitations of Fed.R.App.32(a)(7)(B) because this brief contains 13,836 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

/s/Christopher A.D. Hunt
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CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, 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 August 14, 2011.

Dated: August 14, 2011

/s/ Christopher A.D. Hunt
Christopher A.D. Hunt