

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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No. 11-1674

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SAMUEL BARTLEY STEELE; STEELE RECORDZ; BART STEELE PUBLISHING

*Plaintiffs-Appellants*

v.

JOHN BONGIOVI, Individually and 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 and 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 UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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**BRIEF OF DEFENDANTS-APPELLEES**

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Dated: September 12, 2011

**CORPORATE DISCLOSURE STATEMENTS  
PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1**

**MAJOR LEAGUE BASEBALL PROPERTIES, INC.**

Major League Baseball Properties, Inc. is wholly owned by Major League Baseball Enterprises, Inc., which is not a publicly traded company. No publicly held corporation owns 10% or more of the stock of Major League Baseball Properties, Inc.

**TURNER BROADCASTING SYSTEM, INC.**

Turner Broadcasting System, Inc. is jointly owned by Historic TW Inc. and Warner Communications Inc. Turner Broadcasting System, Inc. is ultimately wholly owned by Time Warner Inc., a publicly traded company. No publicly traded company has a 10 percent or greater stock ownership in Time Warner Inc.'s issued outstanding common stock.

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**REASONS WHY ORAL ARGUMENT NEED NOT BE HEARD**

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and First Circuit Local Rule 34.0(a), Appellees respectfully submit that no oral argument is necessary because the district court applied settled principles in dismissing this action that it described as “frivolous and vexatious,” and because the facts and legal arguments are adequately presented in the briefs and record. Accordingly, Appellees believe that the decisional process would not be significantly aided by oral argument.



## **STATEMENT OF THE ISSUES**

1. Whether the district court properly dismissed the Plaintiff-Appellant Samuel Bartley Steele's ("Steele") Complaint under the Digital Millennium Copyright Act ("DMCA") for failure to state a claim and on claim preclusion grounds, where the Complaint failed to plausibly allege several essential elements of a DMCA claim and arose out of the same nucleus of operative facts as Steele's earlier copyright infringement action which the district court had already dismissed on summary judgment.

2. Whether the district court properly exercised its discretion under Federal Rule of Civil Procedure 11 in admonishing Steele and his counsel for filing this "frivolous and vexatious" lawsuit.

## **STATEMENT OF THE CASE**

This is an appeal from the second of four separate lawsuits, three in federal court and one in state court, brought by Steele against a series of closely related defendants concerning alleged copyright infringement of a song written by Steele in 2004 about the Boston Red Sox ("the Steele Song"). (Addendum to Brief of Appellant Steele ("Add.") 2.) All three of Steele's federal suits have been dismissed by the district court (Gorton, J.) and Steele's appeals in all three actions are now pending before this Court. *Steele v. Turner Broad. Sys., Inc.*, 646 F. Supp. 2d 185 (D. Mass. 2009), *appeals pending*, No. 09-2571 (1st Cir. docketed Nov. 18,

2009) and No. 10-2173 (1st Cir. docketed Oct. 8, 2010) (“*Steele I*”); *Steele v. Bongiovi*, (Add. 1-11), *appeal pending*, No. 11-1674 (1st Cir. docketed June 14, 2011) (“*Steele II*”); *Steele v. Ricigliano*, No. 10-cv-11458-NMG, 2011 WL 2260485 (D. Mass. May 18, 2011), *appeal pending*, No. 11-1675 (1st Cir. docketed June 15, 2011) (“*Steele III*”).

In *Steele I*, the district court granted summary judgment in favor of the defendants on the ground that Steele’s copyright claim failed as a matter of law because there was no “substantial similarity” between the Steele Song and either of the allegedly infringing works, a song by the band Bon Jovi (“the Bon Jovi Song”) and an audiovisual combining portions of the Bon Jovi Song and images associated with Major League Baseball (“the Audiovisual”). 646 F. Supp. 2d at 193.

Not satisfied with the result in *Steele I*, and not content to simply seek relief through post-judgment motions and appeal, on July 20, 2010, Steele filed this action, *Steele II*, against several of the *Steele I* defendants and their attorneys, seeking damages for the same alleged harm – the purported infringement of the Steele Song. (Joint Appendix (“App.”) 8-67.) The only material difference between the two lawsuits was the addition in *Steele II* of the allegation that, in connection with dispositive motion practice in *Steele I*, the defendants and their attorneys (now named as defendants in *Steele II*) submitted to the district court an allegedly “altered” copy of the Audiovisual that purportedly: (i) removed a Major

League Baseball Advanced Media (“MLBAM”) copyright notice at the end of the Audiovisual, and (ii) added 12 seconds of lead-in “dead air.” (See App. 33-34.) Based on those alleged “alterations,” Steele claimed that the Defendants violated Section 1202 of the DMCA by allegedly removing copyright management information (“CMI”) from the Audiovisual to facilitate or conceal infringement of the Steele Song. (*Id.* at 38-65.)

On November 24, 2010, the Defendants moved to dismiss the *Steele II* Complaint on the grounds that: (1) Steele lacked standing to assert a claim for any purported removal of MLBAM’s copyright notice; (2) Steele failed to allege sufficient facts to show that any Defendant in fact removed or altered CMI, or that the alleged alteration would conceal or infringe any copyright violation; and (3) Steele’s Complaint was barred by claim preclusion and issue preclusion. (*Id.* 68-93.) The Defendants also moved for attorneys’ fees and sanctions pursuant to Federal Rule of Civil Procedure 11 on the ground that the Complaint was frivolous and vexatious and constituted an improper attempt to relitigate the very issues decided against Steele in *Steele I*. (*Id.* at 90-92, 138-53.)

On May 17, 2011, the district court granted the Defendants’ motion to dismiss. (Add. 9, 11.) The court held that even if Steele’s allegations were true, the alleged alterations were “immaterial” to the court’s substantial similarity analysis in *Steele I* and therefore could not have affected the court’s conclusion

that there was no copyright violation. (*Id.* at 6-7.) The court accordingly ruled that Steele had failed to sufficiently allege any injury and, as such, had no standing to assert a claim under the DMCA. (*Id.* at 7.) The court further concluded that Steele’s Complaint failed because, in the absence of an underlying copyright violation, Steele’s allegations could not establish that the Defendants knew or had “reasonable grounds to know” that the alleged alteration would conceal or facilitate a copyright violation. (*Id.*) Finally, the court ruled that Steele’s claims were precluded by the judgment in *Steele I* because they were “intimately related to those raised in *Steele I*” and could have been raised in *Steele I*. (*Id.* at 7-9.)

With respect to the Defendants’ Rule 11 motion, the district court held that “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.” (*Id.* 9-10.) Nonetheless, the court limited its sanction at that time to an admonition and warned that “any future filing of abusive, frivolous, or vexatious cases in this Court will result in the imposition of [further] sanctions.” (*Id.* at 10.)

The district court’s well-reasoned decision follows clearly established principles of claim preclusion and a straightforward application of the DMCA. Accordingly, this Court should summarily affirm the decision below. *See* 1st Cir. L. R. 27.0(c) (“[T]he court may dismiss the appeal or other request for relief or

affirm and enforce the judgment or order below . . . if it shall clearly appear that no substantial question is presented.”)

## **STATEMENT OF FACTS**

### **A. The Allegations in *Steele I***

In *Steele I*, Steele initially sought \$400 billion in damages from more than 20 defendants, including all of the non-attorney defendants named in this lawsuit. (App. 31; *Steele I* Docket Nos. 1 and 41.) Steele alleged that the Bon Jovi Song and the Audiovisual infringed the copyright in the Steele Song. (*Steele I*, 607 F. Supp. 2d 258, 261 (D. Mass. 2009); *see* App. 33.) In support of his allegations in *Steele I*, Steele submitted as an exhibit to his complaint a version of the Audiovisual in which Steele had replaced the Bon Jovi Song audio with the Steele Song audio (the “Steele Audiovisual Exhibit”). (*Steele I* Docket No. 1, Ex. I.) The Steele Audiovisual Exhibit does not have the lead-in “dead air” at the start of the Audiovisual, and at the end of the Steele Audiovisual Exhibit, the following image is displayed:



(the “MLBAM Copyright Notice”). (*Id.*)<sup>1</sup> Thus, Steele knew before he filed his complaint in *Steele I* that there was a version of the Audiovisual that included the Copyright Notice, and did not have any lead-in “dead air.”

**B. Steele I is Dismissed on the Merits**

In December, 2008, the *Steele I* defendants moved to dismiss the complaint (and later the amended complaint) and in support of each motion filed the version of the Audiovisual that the *Steele II* Complaint now alleges was “altered.” (*Steele I* Docket Nos. 17, 18, 24, 29, 33, 48, 49, 52, 53, 58, 64, 71, 76, 50 at Ex. 1.) On April 3, 2009, the district court granted in part the motion to dismiss, dismissing as a matter of law Steele’s Lanham Act and Massachusetts Consumer Protection Act claims. *Steele I*, 607 F. Supp. 2d at 262. The district court denied the motions to dismiss Steele’s copyright infringement claim, explaining that it wanted to afford Steele an opportunity to conduct discovery and submit expert analyses on the issue of substantial similarity. *Id.* at 264-65. The court scheduled a two-month period for that discovery, to be followed by summary judgment briefing. *Id.* at 265.

After the discovery period concluded, the *Steele I* defendants moved for summary judgment on the copyright infringement claim, supported again by the allegedly “altered” Audiovisual. (*See Steele I* Docket No. 94, Ex. 6.) On August

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<sup>1</sup> In resolving the *Steele II* motion to dismiss, the district court properly considered the court filings in *Steele I*. *See Airframe Sys., Inc. v. Raytheon Co.*, 601 F.3d 9, 11-12 (1st Cir. 2010) (“Other undisputed documents about the [plaintiff’s first copyright lawsuit] were . . . properly before the district court . . . .”)

19, 2009, the district court granted the motion for summary judgment, holding that, as a matter of law, the Steele Song on the one hand, and the Bon Jovi Song and the Audiovisual on the other, were not substantially similar. *Steele I*, 646 F. Supp. 2d at 193-94. Both the Steele Audiovisual Exhibit (containing the MLBAM Copyright Notice) and the allegedly “altered” Audiovisual (without the MLBAM Copyright Notice and with the “dead air” at the beginning) were before the district court and reviewed by the court in adjudicating the copyright and substantial similarity issues. *Id.* at 190. Nonetheless, at no point before the entry of final judgment in *Steele I* did Steele protest the content of the Audiovisual submitted by the *Steele I* defendants.

On November 6, 2009, Steele filed a notice of appeal to the First Circuit. (*Steele I* Docket No. 112.) Following the appearance of his counsel, Steele raised the alleged “alteration” of the Audiovisual with the district court in *Steele I* in post-judgment motions. (See, e.g., Brief of Appellant Steele (“Br.”) at 82 (“during *Steele I* . . . Steele unequivocally raised the issue” of the alleged alterations “in an affidavit filed with the District Court.”))

**C. The Allegations in *Steele II***

Steele’s First Amended Verified Complaint in this action re-pleaded the facts asserted in *Steele I*, and added allegations that, in connection with their motions in *Steele I*, certain of the defendants and their attorneys submitted to the

court an allegedly “altered” version of the Audiovisual that omitted the MLBAM Copyright Notice and added 12 seconds of lead-in “dead air.” (App. 33-34.) Steele alleged that those purported alterations were made “for the purpose of filing false evidence – the Altered Audiovisual – with this Court and the First Circuit Court of Appeals in the ongoing Steele I.” (*Id.* at 35; *see also id.* at 36.)

### **SUMMARY OF ARGUMENT**

This Court should affirm the dismissal of *Steele II* for the reasons set forth in the district court’s opinion, as well as for several independent reasons, and should affirm the admonishment against Steele and his counsel for pursuing this frivolous action.

First, as the district court properly concluded, because the alleged alterations to the Audiovisual were immaterial to the district court’s decision in *Steele I*, Steele has failed to plausibly allege any actual injury caused by the alleged alterations and, as such, he lacks standing to assert a claim under the DMCA.

Second, Steele also lacks standing to assert a claim under Section 1202 of the DMCA because he alleges no legal interest in the allegedly “altered” Audiovisual, or the allegedly “removed” MLBAM Copyright Notice.

Third, Steele failed to allege any plausible facts to suggest that CMI was in fact removed or altered and his own assertions demonstrate that there was no such removal or alteration.



Fourth, Steele failed to plausibly allege facts to show that the Defendants knew or had reason to know that the alleged removal or alteration of the MLBAM Copyright Notice would conceal an infringement of the Steele Song.

Fifth, as the district court correctly held, Steele's claim is barred by claim preclusion because it arises out of the same nucleus of operative facts as the claims in *Steele I* and raises issues that could have been, and indeed were, raised in *Steele I*.

Finally, Steele's claim fails as a matter of law under issue preclusion because it seeks to relitigate an issue already decided against him in the final judgment in *Steele I*: whether the Audiovisual infringed Steele's copyright.

For all of these reasons, the district court's conclusion that *Steele II* is a frivolous and vexatious lawsuit was proper, warranting the court's admonishment of Steele and his counsel.

## **ARGUMENT**

### **I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT**

#### **A. Standard of Review**

This Court reviews *de novo* the district court's dismissal of Steele's claims. *Artuso v. Vertex Pharms., Inc.*, 637 F.3d 1, 5 (1st Cir. 2011). In applying this standard, the Court is not limited to the reasons provided by the district court and

“may affirm on any basis apparent in the record.” *Hostar Marine Transp. Sys., Inc. v. U.S.*, 592 F.3d 202, 207 (1st Cir. 2010).

To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, a complaint must allege “a plausible entitlement to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Although the court must take the allegations in a complaint as true and make all reasonable inferences in favor of the plaintiff, there is no duty for “courts to conjure up unpleaded facts that might turn a frivolous claim . . . into a substantial one.” *Id.* at 562 (internal quotation marks omitted). Rather, “[t]o 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.” *Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted).

**B. Steele Lacks Standing to Assert a Section 1202 Claim Because He Failed to Allege Any Injury From the Purported Alteration of the Audiovisual**

As the district court correctly ruled, “[i]n 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.” (Add. 6); *see* 17 U.S.C. § 1203(a) (“Any person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation.”) The district court further explained:

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.

(Add. 6-7.)<sup>2</sup>

Steele attempts to manufacture "injury" by claiming that the absence of the MLBAM Copyright Notice was somehow intended to conceal MLBAM's identity as an owner of the copyright in the Audiovisual. (*E.g.*, Br. at 61 ("Appellees' removal of CMI concealed not just infringement, but the *infringer . . . .*") (emphasis Steele's).) This argument is unavailing for at least two reasons. First, MLBAM's asserted status as owner of the copyright had no conceivable bearing on the district court's decision on alleged substantial similarity and, as such, is irrelevant to Steele's failure to prevail in *Steele I*.

Second, the argument is refuted by Steele's own assertions and by the undisputed record in *Steele I*. As Steele has conceded, he was aware prior to filing *Steele I* of both the existence of the MLB.com version of the Audiovisual

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<sup>2</sup> In addition to having no possible bearing on the district court's decision in *Steele I*, the alleged addition of 12 seconds of "dead air" at the beginning of the Audiovisual also fails as a matter of law to support an alteration claim under the DMCA because the addition of "dead air" does not constitute the removal or alteration of "copyright management information" within the meaning of statute. *See* 17 U.S.C. § 1202(c) (defining "copyright management information" to include various types of "identifying information" and other specific content).

containing the MLBAM Copyright Notice and of MLBAM's ownership interest in the copyright. (*See* App. 133-34 (“One might argue that Steele already knew the owner – indeed, he did . . . and he properly named and served them.”)) As noted above, Steele submitted as an exhibit to the complaint in *Steele I* a version of the Audiovisual that included the MLBAM Copyright Notice (and that replaced the Bon Jovi Song audio with the Steele Song audio). (*Steele I*, Docket No. 1, Ex. I.) Thus, when the defendants later submitted their Audiovisual exhibit in support of their dispositive motions, a version containing the MLBAM copyright notice was already in Steele's and the district court's possession and there was no possibility that submitting a version of the Audiovisual without that notice could mislead anyone about MLBAM's status.

In short, Steele has failed to allege any facts or even a coherent argument to show how the alleged addition of dead air at the beginning of the Audiovisual or the alleged removal of the MLBAM Copyright Notice at the end could have affected the district court's decision in *Steele I* or otherwise harmed Steele. Rather, he has offered nothing but, in his own words, “speculative” scenarios. (*See* Br. at 77.) The district court properly found as a matter of law that Steele failed to allege any actual injury from the alleged alterations and therefore lacked standing under the DMCA.

**C. Steele Lacks Standing to Assert a Section 1202 Claim Because He Has No Legal Interest in the Audiovisual or the MLBAM Copyright Notice**

Steele also lacks standing to assert a Section 1202 because he asserts no legal interest in either the CMI he alleges was altered or in the copyrighted work that it protected. Section 1202 prohibits the alteration or removal of CMI only if there is knowledge or reason to know that the alteration or removal “will induce, enable, facilitate, or conceal an infringement.” 17 U.S.C. § 1202(b). Thus, the statute is intended to protect the interests of the copyright owners who rely on CMI to help prevent infringement of their copyrighted material. As one court has explained:

Congress intended the DMCA to modernize copyright protection as a response to the development of new technologies which both enabled new forms of copyright protection as well as new forms of copyright infringement. . . . Through scientific advances, we now have technological measures that can control access and reproduction of works, and thereby manage the rights of copyright owners and users. *Section 1202 operates to protect copyright by protecting a key component of some of these technological measures.*

*IQ Group, Ltd. v. Wiesner Pub., LLC*, 409 F. Supp. 2d 587, 597 (D.N.J. 2006)

(emphasis added), *rejected on other grounds by Murphy v. Millennium Radio*

*Group LLC*, \_\_\_ F.3d \_\_\_, 2011 WL 2315128, at \*5-6 (3d. Cir. June 14, 2011).

Steele’s claim is not based on the alteration of CMI on *his* copyrighted work or CMI that was designed to protect any rights in *his* copyrighted work. Rather,

his claim is based upon the alleged alteration of *another person's* CMI that was intended to protect copyright interests in *another person's* work – the Audiovisual.

Although there do not appear to be any cases specifically addressing the scope of standing to bring a Section 1202 claim, decisions discussing standing to bring claims for circumventing copyright protection systems in violation of Section 1201 support the conclusion that Steele lacks standing to assert a Section 1202 claim here. Claims under both Section 1201 and 1202 are governed by Section 1203, which allows a “person injured by a violation of section 1201 or 1202” to bring a civil action for damages and other relief. 17 U.S.C. § 1203(a). Courts interpreting Section 1203 as it applies to Section 1201 claims have generally required a plaintiff to allege and establish that it had a legal interest in the copyright protection system or in the copyrighted material protected by that system. *See, e.g., Echostar Satellite, L.L.C. v. Viewtech, Inc.*, 543 F. Supp. 2d 1201, 1205-06 (S.D. Cal. 2008) (plaintiff had standing under Section 1203 because it had legal “authority to control the measures protecting the [copyrighted] programming”); *Comcast of Ill. X, LLC v. Hightech Elecs., Inc.*, No. 03-C-3231, 2004 WL 1718522, at \*6 (N.D. Ill. 2004) (plaintiff had standing under Section 1203 where it “controlled access” to the copyrighted material protected by the copyright protection system).

Just as the courts interpreting the standing requirement to assert Section 1201 claims have required plaintiffs to establish a legal interest in the circumvented copyright protection system or the material it was intended to protect, a plaintiff seeking to assert a Section 1202 claim should be required to establish a legal interest in the allegedly altered or removed CMI or the copyrighted material to which it applies. Because Steele has not and cannot allege any such interest in either the MLBAM Copyright Notice or in the Audiovisual to which it was affixed, he lacks standing to assert a claim based on alleged removal or alteration of the CMI.

Steele fails to cite to any decision permitting a Section 1202(b) claim by a person having no interest in either the allegedly removed CMI or the copyrighted work it was intended to protect. To the contrary, *Bose BV v. Zavala*, No. 09-11360, 2010 WL 152072 (D. Mass. Jan. 14, 2010), relied on by Steele (*see* Br. at 55), specifically held: “[a] *party who controls* the technological measures that protect the copyrighted works” has standing under the DMCA to sue for circumvention of those copyright protection measures. *Bose BV*, 2010 WL 152072, at \*2 (emphasis added). In contrast, Steele neither controlled nor had any

other legal interest in the CMI that protected MLBAM's copyright and, as such, has no standing to assert a claim for alleged removal of that CMI.<sup>3</sup>

**D. Steele Failed to Allege Any Plausible Facts Suggesting That Copyright Management Information on the Audiovisual Was Removed or Altered**

While the Complaint contains conclusory allegations that the Defendants removed or altered CMI (App. 33), it lacks any specific factual allegations to support this conclusion. Indeed, the *only* factual support offered by Steele for this allegation was that the allegedly “altered” Audiovisual differs from the version relied on and submitted by Steele. (*See id.* at 36-37; Br. 25.) But Steele's own allegations demonstrate that the existence of two different versions cannot justify an inference that anyone – let alone the Defendants – removed or altered CMI in the Audiovisual. To the contrary, Steele's own allegations make clear that there are multiple different versions of the Audiovisual:

- Steele alleges that there are at least two different versions of the Audiovisual (a “FINAL 1” and a “FINAL 2” version), one of which he does not have in his possession. (App. 36-37; Br. 30.)
- In *Steele I*, Steele represented that “various different promo versions . . . were all released.” (Plaintiffs' Amended Complaint And Opposition To Motion To Dismiss at 10 (*Steele I* Docket No. 42).)

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<sup>3</sup> The other cases on which Steele relies, (*see* Br. at 55-56), likewise all involve claims asserted by persons having a legal interest in the CMI or the copyrighted work protected by it and therefore provide no support for Steele's position. *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 107-108 (1st Cir. 2008); *Textile Secrets Int'l. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1192-93 (C.D. Cal. 2007); *Fox v. Hildebrand*, 2009 WL 1977996, at \*1 (C.D. Cal. July 1, 2009).



- Steele alleges that the Audiovisual was “later edited to create ‘localized’ versions that were played in various ballparks in different cities, among other places.” (App. 19.)

In another prior court filing in *Steele I*, Steele represented that “[t]here are several versions of MLB ads, of varying lengths.” (Opposition To Motion To Dismiss at 19 (*Steele I* Docket No. 61).)

Thus, that the Audiovisual submitted by the Defendants differs (in meaningless ways) from one of the versions submitted by Steele provides no plausible basis to conclude that it was “altered” by the Defendants or, indeed, that it was altered by anyone. This failure to plead specific facts – instead of bare conclusions – provides an additional basis to support the district court’s dismissal of Steele’s Complaint. *See, e.g., Iqbal*, 129 S. Ct. at 1950.

Lacking any factual basis to claim actual removal or alteration of CMI, Steele instead claims that the Defendants misled the district court in *Steele I* by submitting, as a “true and correct *copy*,” a version of the purported “Infringing Audiovisual,” which is located on the MLB.com website, without the MLBAM copyright notice. (Br. at 24 (emphasis Steele’s).) This assertion is unavailing for at least three independent reasons.

First, even if the assertion were true (which, as explained below, it is not), it would provide no basis for a Section 1202(b) claim. To the contrary, by conceding that the Audiovisual submitted by the Defendants was a different “version” (a

“draft,” according to Steele (App. 122)), rather than a “copy” of the MLB.com version used by Steele, Steele has effectively conceded that no one “removed” or “failed to copy” CMI in preparing the version submitted by the Defendants.

Second, the suggestion that the Defendants represented the Audiovisual they submitted to the Court to be a “true copy” of the *MLB.com* version containing the MLBAM Copyright Notice is demonstrably false. Nowhere did the Defendants attest or suggest that the version they submitted was a “true copy” of the version used on the MLB.com website. Rather, the Defendants described their submission as follows:

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 attached hereto as Exhibit 6.

(Declaration of Scott D. Brown in Support of Motion for Summary Judgment ¶ 10, *Steele I*, Docket No. 94 (footnote omitted); *see also Steele I*, Docket No. 19 ¶ 2 (similar declaration submitted in connection with defendants’ motion to dismiss); *Steele I*, Docket No. 50 ¶ 2 (same).)

Paragraph 27 of the Amended Complaint, referenced in the Brown Declarations, likewise does not refer to an MLB.com version, but to TBS’s announcement of:

a full length promo featuring Grammy Award winning rock performer BonJ ovi [sic], featuring a “rollicking new spot” with the band performing “I Love This Town” from their new *Lost Highway* CD. This piece was part of TBS[’s] mult[i]-platform marketing to promote its first year of MLB post season coverage. . . . The TBS/MLB marketing campaign included radio buys, on line advertising, [and] print advertisement.

(*Steele I*, Amended Complaint, Docket No. 41 ¶ 27.) Moreover, in the original *Steele I* complaint, Steele identified the allegedly infringing video, by reference to a TBS “ad” that could be found on YouTube.com by searching “Google: ‘Bon Jovi MLB promo ad.’” (*Steele I*, Docket No. 1 ¶ 29.) That search leads to a version of the Audiovisual posted on YouTube on August 29, 2007, which, like the version submitted by the Defendants, does *not* contain the MLBAM copyright notice.<sup>4</sup>

Finally, Steele’s contention that “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” (Br. at 60) is misguided. In the *Steele II* Complaint (Complaint, Doc. No. 1, ¶ 78) and First Amended Verified Complaint (App. 21), Steele provided the district court with a weblink to what he described as the “MLB Audiovisual.” Further, the Steele Audiovisual Exhibit, in which Steele replaced the Bon Jovi song with the Steele Song, likewise did not have the “dead air” at the beginning and did include the MLBAM Copyright

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<sup>4</sup> Steele’s imaginative speculation that Mr. Brown’s departure from Skadden was connected to his allegedly “false Declarations” in *Steele I* is ludicrous. (See Br. at 27 n.4 (“Skadden has not denied that Brown’s departure from Skadden was related to his false Declarations”).)

Notice at the end. (*Steele I* Docket No. 1, Ex. I.) If Steele was not satisfied that any of the several versions of the Audiovisual submitted by the parties to the district court constituted an accurate depiction of the “Infringing Audiovisual,” as his appellate brief now suggests, he could of course have corrected the record at any time by submitting whatever he believes to be the “Infringing Audiovisual.”

**E. Steele Failed to Allege Facts to Show That the Defendants Knew or Had Reason to Know That the Alleged Removal or Alteration Would Conceal Infringement**

An essential element of an alteration or removal claim under Section 1202 is that the Defendants knew or had reasonable grounds to know that the alteration or removal of CMI would “induce, enable, facilitate, or conceal an infringement.” 17 U.S.C. § 1202(b). However, because the alleged alterations were immaterial to either the issues or the outcome of *Steele I* (*see* Part I.B, above), there is no possible basis from which to infer that any Defendant had knowledge or reason to know that the alleged alterations would conceal or facilitate an infringement of Steele’s copyright. Steele’s failure to point to a single factual allegation, or even theory, to show that the Defendants knew or had reason to know that any alleged removal or alteration of the CMI on the Audiovisual would conceal or facilitate a copyright infringement, provides an additional basis to affirm the district court’s decision.

**F. This Lawsuit is Barred by the Doctrine of Claim Preclusion**

**1. The District Court Correctly Ruled that Steele's Claims Were Precluded by the Judgment in *Steele I***

The district court correctly held that “Steele’s claims in this case are precluded by this Court’s decision in *Steele I*.” (Add. 7.) Claim preclusion 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).” (Add. 8.)

The district court properly applied these elements of claim preclusion to dismiss Steele’s Complaint. (*See id.* at 7-9.) First, the court’s summary judgment decision in *Steele I* was a final judgment on the merits. *See Steele I*, 646 F. Supp. 2d at 194. Second, the court correctly reasoned that “Steele himself acknowledges that the claims asserted in this case are intimately related to those raised in *Steele I*.” (Add. 8.) Third, the court properly recognized that the parties in *Steele II* were sufficiently identical or closely related to the parties in *Steele I* “because the later action alleged wrongdoing in the earlier litigation by the defendants and their attorneys.” (*Id.*)

**2. Steele II is Barred by Claim Preclusion Notwithstanding Steele's Claim that it is Based, in Part, on Alleged Conduct Occurring After the Filing of Steele I**

Steele cannot dispute that *Steele II* and *Steele I* both arise out of the alleged infringement of his copyright in the Steele Song and that both seek to recover for the same alleged injury. Instead, he argues that because *Steele II* asserts a different legal claim based on alleged conduct occurring after the filing of *Steele I*, claim preclusion cannot apply. (Br. at 79-81.) Not surprisingly, Steele cites no legal authority in support of this narrow interpretation of claim preclusion. (*See id.*) Moreover, contrary to Steele's temporal argument, *Steele II*, like *Steele I*, is expressly predicated on alleged conduct occurring prior to *Steele I*, namely, the Defendants' alleged infringement of Steele's copyright. (*See App.* 12-24.)

The district court properly rejected Steele's protestations concerning the timing of the alleged alterations, concluding that even if he did not raise the alteration claims in *Steele I*, he could have. (Add. 9); *see, e.g., Walsh Constr. Co. of Ill. v. Nat'l Union Fire Ins. Co. of Pitt., Pa.*, 153 F.3d 830, 832-34 (7th Cir. 1998) (claim preclusion applied to action based in part on conduct occurring during prior litigation where plaintiff could have raised claim in post-judgment motion in prior action). Moreover, as Steele concedes, and as the record reflects, he did in fact raise his misconduct allegations in *Steele I*. (*See, e.g., Br.* at 16, 32, 45-46, 82.)

**G. Steele’s Complaint is Barred By Issue Preclusion**

Issue preclusion prevents a party from relitigating issues already decided against it in a prior proceeding where the following elements are present: “(1) both proceedings involved the same issue of law or fact, (2) the parties actually litigated that issue, (3) the prior court decided that issue in a final judgment, and (4) resolution of that issue was essential to judgment on the merits.” *Global NAPs, Inc. v. Verizon New England, Inc.*, 603 F.3d 71, 95 (1st Cir. 2010). Because the final judgment in *Steele I* was based on the district court’s determination that there was no infringement of Steele’s copyright, Steele is precluded from relitigating that issue. Consequently, Steele cannot establish that the alleged alteration of CMI concealed or facilitated an actual “infringement” of his copyright, as is required to sustain a claim under Section 1202.

Each of the elements of issue preclusion is satisfied here. First, *Steele I* and *Steele II* both involve the essential issue of whether the Audiovisual infringed Steele’s copyright in the Steele Song. *See, e.g.*, (App. 26-31, 33, 35-36; *Steele I* Docket No. 41, ¶¶ 30, 39); *Steele I*, 646 F. Supp. 2d at 188; *see also* 17 U.S.C. § 1202(b) (removal or alteration of CMI violates statute only if the defendants knew or had “reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.”)

Second, the parties actually litigated that issue in connection with the *Steele I* defendants' motion for summary judgment. *See Steele I*, 646 F. Supp. 2d at 190 (“The defendants assert that Steele’s copyright infringement claim fails as a matter of law because there is no substantial similarity between his song and the alleged infringing works.”)

Third, the district court resolved the issue against Steele in a final judgment granting the motion for summary judgment. *Id.* at 193-94.<sup>5</sup>

Finally, resolution of that issue was the basis for the district court’s summary judgment ruling and was therefore essential to the judgment on the merits. *See id.* (“In sum, because no reasonable juror applying the correct standards could find that the original elements of the Steele Song are substantially similar to the Bon Jovi Song or the TBS Promo [referred to here as the “Audiovisual”], summary judgment will enter in favor of the defendants.”)

Accordingly, as the district court ruled in dismissing the Complaint, because the court in *Steele I* “found that no infringement took place, and the alleged alterations [to the Audiovisual] would not have changed that determination, Steele cannot prove that the defendants knew the alterations would facilitate copyright

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<sup>5</sup> As is the case with claim preclusion, the final judgment is preclusive on issues actually litigated and decided, notwithstanding the pendency of Steele’s appeal. *In re Kane*, 254 F.3d 325, 328 (1st Cir. 2001) (issue preclusion generally applies “even where the first, or issue preclusive, judgment is still on appeal when the second action occurs”).



infringement. Thus, for that reason also, Steele has failed to state a claim upon which relief can be granted.” (Add. 7.)

**H. Steele’s “Fraud-on-the-Court” Assertions are Baseless and Unavailing**

Unable to offer any legal or factual argument to challenge the district court’s finding that his Complaint failed to state a claim under the DMCA and was precluded by *Steele I*, Steele instead devotes most of his brief on appeal to making conclusory assertions of “fraud on the court,” without the benefit of any record citation other than to his own arguments, and without explanation as to how these assertions support his claim under the DMCA. (*E.g.*, Br. 62 n.10; *see also* Br. at 12, 14, 35, 48, 57-75, 77-78, 81-84.) Steele’s “fraud-on-the-court” assertions fail to salvage his Complaint for several independent reasons.

First, because Steele is seeking relief through a separate lawsuit purporting to assert an independent cause of action, the “fraud-on-the-court” incantation is not a substitute for alleging a viable cause of action. As set forth above, Steele has failed as a matter of law to allege facts sufficient to satisfy the elements of a DMCA claim and his high-decibel, but unsupported, assertions of fraud on the court do nothing to cure that deficiency.

Second, even if Steele’s Complaint were to be construed as a claim for relief from a prior judgment, rather than the claim under the DMCA that he purported to allege, Steele’s allegations fail to support such a claim. An action for fraud on the

court requires proof of “the most egregious conduct involving corruption of the judicial process itself” such as the “the bribery of a judge or the use of counsel to exert improper personal influence on the court.” *Roger Edwards, LLC v. Fiddes & Son Ltd.*, 427 F.3d 129, 133 (1st Cir. 2005) (internal quotation marks omitted). As is demonstrated in Parts I.C and I.D above, Steele’s factual allegations fail to suggest fraud or misconduct of any kind, let alone “the most egregious conduct.”

Finally, even if the submission of a version of the Audiovisual containing “dead air” at the beginning and omitting an MLBAM Copyright Notice at the end could somehow be considered fraud of the most egregious sort, Steele’s fraud-on-the-court theory would still fail, because he cannot show any prejudice from the alleged misconduct. To set aside a prior judgment based on purported fraud on the court, the alleged misconduct must have actually impacted the litigation and caused the plaintiff actual prejudice. *See, e.g., Roger Edwards*, 427 F.3d at 136 (relief from judgment will not be granted if the alleged misconduct had no impact on the litigation). As is demonstrated above (*see* Parts I.B and I.C), Steele has failed to articulate any coherent theory of prejudice. For this additional reason, his “fraud-on-the-court” allegations are unavailing and were properly rejected by the district court.

## **II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S MEASURED AWARD OF RULE 11 SANCTIONS**

This Court reviews a district court's award of Rule 11 sanctions, including the violation itself and the sanction imposed, for abuse of discretion. *Roger Edwards, LLC v. Fiddes & Son Ltd.*, 437 F.3d 140, 142 (1st Cir. 2006). Where a district court makes a finding of frivolousness, "some degree of fault is required, but the fault need not be a wicked or subjectively reckless state of mind." *Id.*

The district court properly found that *Steele II*, the second of four lawsuits arising out of a common nucleus of operative facts, was "frivolous and vexatious," and a "meritless . . . attempt to circumvent this Court's holding in *Steele I*." (Add. 10.) Accordingly, the district court properly concluded that "sanctions are warranted here." (*Id.*)

Rule 11 empowers federal courts to craft sanctions that deter repetition of vexatious conduct. Fed. R. Civ. P. 11(c)(4). If anything, the district court's award of a mere "admonition" (Add. 10), after having previously "forewarned" against further motion practice attempting to resurrect *Steele I*, was a restrained response. *See Steele I*, 746 F. Supp. 2d 231, 239 (D. Mass. 2010) ("Plaintiff and his counsel are . . . forewarned that any further motion practice in this regard will be looked upon askance.")

**CONCLUSION**

For the foregoing reasons, this Court should summarily affirm the judgment below.

Dated: September 12, 2011  
Boston, Massachusetts

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

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Typeface Requirements, and Type-Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,611 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 point.

Dated: September 12, 2011

/s/ Ben T. Clements

Ben T. Clements

**CERTIFICATE OF SERVICE**

I, Ben T. Clements, hereby certify that on September 12, 2011 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system: Christopher A.D. Hunt, The Hunt Law Firm LLC, 10 Heron Lane, Hopedale, Massachusetts 01747, cadhunt@earthlink.net, counsel of record for Plaintiff-Appellant Samuel Bartley Steele.

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