

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSSETTS

| | | |
|--------------------------------------|---|-----------------------|
| _____ |) | No. 1:10-cv-11218-NMG |
| SAMUEL BARTLEY STEELE |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| v. |) | |
| |) | |
| 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. |) | |
| _____ |) | |

**PLAINTIFF'S OPPOSITION TO THE DEFENDANTS' MOTION TO
DISMISS THE FIRST AMENDED VERIFIED COMPLAINT AND TO
RECOVER ATTORNEYS' FEES AND COSTS**

Plaintiff Samuel Bartley Steele ("Steele") opposes The Defendants' Motion to Dismiss The First Amended Verified Complaint And To Recover Attorneys' Fees And Costs ("Defendants' Motion") on the following grounds.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

First and foremost, this is not a copyright infringement case. See Plaintiff's First Amended Verified Complaint ("Complaint"). This is a civil action for removal or alteration

of Copyright Management Information ("CMI") pursuant to 17 U.S.C. §1202. Steele's factual and legal burdens in this case are entirely distinct from those he faced during his prior copyright infringement case, Steele v. TBS, et al., No. 08-11727-NMG (D.Mass.) (hereinafter "Steele I").

Defendants' overarching theme is that this case is Steele I *redux*. This is a red herring, one raised at every turn and in connection with every argument in Defendants' Motion.¹ As one District Court put it: "claims under the DMCA, however, are simply not copyright infringement claims and are separate and distinct from the latter." See Med. Broadcasting Co. v. Flaiz, 2003 W.L. 22838094, at *3 (E.D.Pa. 2003) (registration not prerequisite to §1202 claim).

¹ Unless otherwise noted, "Defendants' Motion" refers to Defendants' Memorandum in Support of their Motion.

Second, Defendants' Motion, lacking legal support as to §1202, focuses on facts. Unfortunately, the vast majority of the facts referenced are irrelevant to the matter at hand, seeking to confuse Steele I with this case. The single §1202 case Defendants' Motion cites, at page 8, IQ Group, Ltd. v. Wiesner Pub., LLC, 409 F.Supp.2d 587, 597 (D.N.J. 2006), has been widely criticized for its overly narrow interpretation of §1202.²

Defendants' Motion purports to set forth four arguments warranting dismissal: (1) standing, (2) insufficient factual allegations (3) claim preclusion, and (4) issue preclusion. Defendants further seek costs pursuant to the Copyright Act and vexatious litigation statute, 28 U.S.C. §1927. As further detailed below, Defendants' Motion fails on all points:

Standing

The DMCA provides a civil cause of action to “any person injured” by unlawful removal of “any copyright management information... in connection with copies.” See 17 U.S.C. §§ 1202 (b), (c), 1203 (a).

² See Interplan Architect, Inc. v. C.L. Thomas, Inc., 2009 WL 6443117 at *4 (S.D.Tex. 2009)(slip copy) (“the [‘technological measures’] rationale of [I.Q. Group] has since been rejected by other courts”); see also Fox v. Hildebrand, 2009 WL 1977996 at *3, n.3 (C.D.Cal. 2009) (“The Court in IQ Group, Ltd. Quotes – and then ignores – the Senate committee report that indicates that the Senate meant exactly what it said in the unambiguous text of §1202. See S.Rep. No. 105-190 at *16-17 (1998) (defining CMI broadly and noting that ‘CMI need not be in digital form, but CMI in digital form is expressly included’).”); Cable v. Agence France Presse, 2010 WL 2902074 at *3-4 (N.D.Ill. 2010) (finding “no textual support” for I.Q. Group’s restrictive interpretation of §1202; defendant’s motion to dismiss denied); McClatchey v. The Associated Press, 2007 WL 776103 at *5 (W.D.Pa. 2007) (expanding the narrow interpretation of I.Q. Group, court held §1202 defines CMI “broadly to include ‘any’ of the information set forth in the eight categories, ‘including in digital form’... [and] the statute must also protect non-digital information”).

The plain language of §1202 supports Steele's right to bring a claim. 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 and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."), quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). See also BanxCorp v. Costco Wholesale Corp., 2010 WL 2802153 at *9 (S.D.N.Y. 2010) (Courts apply §1202 in a straightforward manner; plaintiff need "only allege (1) the existence of CMI on the [subject work]; (2) removal and/or alteration of that information; and (3) that the removal and/or alteration was done intentionally").

Defendants acknowledge Steele's claim is unique in this regard. See Defendants' Motion at 9. As a general matter – as well in the §1202 context – courts are loath to dismiss novel claims for relief. See Branch v. F.D.I.C., 825 F.Supp. 384, 397-98 (D.Mass. 1993) (courts should be reluctant to dismiss claims asserting novel theories, which are "best tested for legal sufficiency in light of actual, rather than alleged facts."). Moreover, at the Rule 12(b)(6) stage, all reasonable inferences resolve in Steele's favor. See Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993).

Insufficient Factual Allegations

Defendants filed - and swore to the accuracy of - an audiovisual in this Court during Steele I without its CMI. This much is not disputed. The audiovisual is real evidence of a §1202 violation: what should have been there is not. Steele's Complaint clearly contains "factual allegations" meeting each §1202 element. With the facts "caught on tape" - literally

- and Defendants' statements, sworn-to and otherwise, Steele's Complaint alleges – and offers – more than enough facts to defeat Defendants' Motion.

In addition, defendants' "no actual removal" defense has been rejected by at least one Court. See Monotype Imaging, Inc. v. Bitstream, Inc., 2005 WL 936882 at *8 (N.D.Ill. 2005) (plain language of DMCA does not require plaintiff to show defendant physically removed copyright notice; defendant's omission of notice from copies enough to proceed).

Claim Preclusion

Steele's instant Complaint and the Steele I Complaint unquestionably contain similar factual allegations. Defendants' Motion, however, confuses facts with causes of action: Steele I's Complaint alleged facts of infringement to support an infringement cause of action. Here, Steele's Complaint lays out - as background - facts that are necessarily similar to those in Steele I, but alleges entirely distinct facts to support his §1202 cause of action, most significantly those events that occurred during the litigation of Steele I, and were not discovered until after judgment entered.

As detailed below – and largely due to Defendants' own deception and fraud – Steele neither could nor should have brought this action during Steele I.

Issue Preclusion

This Court's judgment in Steele I's infringement claim based on lack of substantial similarity is in no way determinative of, nor precludes, Steele's claim of CMI removal pursuant to his §1202 claim. See Jacobsen v. Katzer, Slip Copy, 2009 WL 4823021 (N.D.Cal. 2009) (summary judgment denied as to §1202 claim where defendant's "sole

basis” was “no underlying copyright infringement”); See also BanxCorp, above, 2010 WL 2802153 at *9 (infringement not listed as element of §1202 claim).

There is good policy behind this reasoning, given that one element of a §1202 claim is CMI removal or alteration to facilitate or conceal infringement; dismissing a §1202 claim for lack of infringement – without testing, with facts, whether infringement was concealed - rewards the conduct §1202 was designed to punish.

Costs

Defendants’ Motion seeks costs. Defendants have also a Motion for Rule 11 Sanctions on Steele and the undersigned. This is the first Rule 11 Motion filed by Mr. Clements – though, to be fair, it is also his first filing in this case. Mr. Clements’ clients, Skadden, Arps, previously filed two Rule 11 Motions, as well as several requests for sanctions and costs in connection with their recent filings in Steele I, each of which this Court denied.

Defendants’ request for costs – not to mention their Rule 11 Motion – is unconscionable, as I recently explained to Mr. Clements, in great detail. See December 14, 2010 Letter to Clements, attached as Exhibit 1. It is nothing less than a full display of the behavior it purports to condemn. Steele takes great offense to Defendants’ request and Rule 11 Motion and respectfully asks this Court to, once again, examine the parties’ conduct

closely and determine which side, if any, has acted – and continues to act – in good faith.

See Id.³

II. ARGUMENT

Steele's claim here is based on the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §§1202(b), (c); §1203(a). The DMCA provides a civil cause of action to "any person injured by a violation of section...1202" resulting from unlawful removal of "any copyright management information... in connection with copies." See 17 U.S.C. §§ 1202 (b), (c), 1203 (a). Copyright management information includes, among other things, the copyright notice and name of the copyright owner. See 17 U.S.C. § 1202 (c).

The elements of Steele's §1202(b) claim are 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).

A. Standing: Defendants' "Standing" Argument Lacks Legal Precedent and Conflicts with §1202's "Plain Language"

Defendants offer no statutory language, case law, or other authority to support their position that Steele lacks "legal interest" in the allegedly removed CMI or its underlying work. See Defendants' Motion at 9. Defendants acknowledge the absence of §1202 caselaw on the issue. See Defendants' Motion at 8-10. The Digital Millennium Copyright Act

³ Steele's appeal of this Court's September 27, 2010 Order denying Steele's Motions for Entry of Default as to Steele I defendants MLB Advanced Media, L.P. and Vector Management (No. 10-2173, 1st Cir.) places the issue of Defendants' misconduct – including their filing of the audiovisual with the missing copyright notice – squarely before the First Circuit. See December 6, 2010 Steele Appellate Brief, No. 10-2173, 1st Cir. (pending).

(“DMCA”) provides relief to “[a]ny person injured by a violation of section...1202” resulting from unlawful removal of “any copyright management information... in connection with copies.” See 17 U.S.C. §§ 1202 (b), (c), 1203 (a) (emphasis supplied).⁴

The First Circuit has set the bar relatively low to respect to DMCA standing. See CoxCom, Inc. v. Chaffee, 536 F.3d 101 (1st Cir. 2008), as cited in Bose BV v. Zavala, 2010 WL 152072 at *2 (D.Mass. 2010) (“The DMCA gives a cause of action to ‘any person injured by a violation of section 1201.’ 17 U.S.C. § 1203(a)... Perhaps because he cites no case law, [defendant] fails to recognize that the First Circuit’s decision in CoxCom, Inc. v. Chaffee sets a relatively low bar with respect to constitutional standing under the DMCA.”); citing CoxCom, Inc. v. Chaffee, 536 F.3d 101 (1st Cir. 2008).

The 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 this Court’s inquiry. 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 and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.”), quoting Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

Steele was injured by Defendants’ removal of the copyright notice of the primary defendant (MLBAM – in default at the time) from the primary infringing work from a

⁴ Defendants’ reference to a different section, §1203, See Defendants’ Motion at 9, omits the crucial beginning of that section: “Any person injured by a violation...” See 17 U.S.C. § 1203 (a) (emphasis supplied). Defendants’ replacement of “[a]ny person” with “a ‘person...” failed to distinguish between the singular “a” and the expansive “[a]ny,” which is particularly significant given they are attempting to deny Steele, by exclusion, standing.

version of the infringing work falsely sworn-to as a “true and correct copy” and filed with this Court during Steele I, a copyright infringement lawsuit.

Defendants concede there is no §1202 caselaw supporting their standing argument. See Motion at 9. Defendants cite two non-§1202 and non-First Circuit district court decisions (they are §1203 cases). However, a Massachusetts District Court recently considered Defendants’ two proffered cases and nevertheless noted the First Circuit’s “relatively low bar with respect to constitutional standing under the DMCA.” See Bose BV, 2010 WL 152072 at *2 (emphasis added).

Two additional factors weigh heavily in Steele’s favor: First, as Defendants acknowledge, Steele’s claim is unique. See Defendants’ Motion to Dismiss at 9. Courts are wary of prematurely dismissing claims or theories simply because they have not yet been tested; to the contrary. See Branch v. F.D.I.C., 825 F.Supp. 384, 397-98 (D.Mass. 1993) (“[C]ourts should generally be reluctant to grant a motion to dismiss when the claim in question asserts a novel theory of recovery. Novel theories of recovery are best tested for legal sufficiency in light of actual, rather than alleged facts.”).⁵

Second, in addition to the statute’s plain language, the absence of contrary authority, and a general avoidance of not hasty disposal of novel claims, on a rule 12(b)(6) motion, all

⁵ See also Electrical Construction & Maintenance Co. v. Maeda Pacific Corp., 764 F.2d 619, 623 (9th Cir.1985) (“The court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel... since it is important that new legal theories be explored and assayed in the light of actual facts.”); Baker v. Cuomo, 58 F.3d 814, 818-19 (2nd Cir. 1995) (“Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development”).

reasonable inferences further resolve in Steele's favor. See Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993) ("In considering a motion to dismiss, a court must take the allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiffs.").

B. Factual Allegations: Steele's Alleges Sufficient and Undisputed Facts and Evidence to state a §1202 Claim

1. Steele Alleges Removal or Alteration of CMI in Violation of §1202

Defendants claim Steele alleges only "conclusory allegations that the Defendants removed or altered any copyright management information." See Defendants' Motion at 10.

Steele's allegations reference the obvious differences between the infringing audiovisual and the CMI-missing version thereof filed by Defendants in Steele I. See Complaint, ¶157. There is nothing "conclusory" about this juxtaposition: indeed, it is self-evident evidence of Defendants' removal of CMI and §1202 violation. See Id.

To the extent Defendants claim Steele fails to allege no "actual removal" of MLBAM's copyright notice as contrasted with an "omission" thereof, they are simply incorrect. See Complaint at ¶157. In any event, defense against a §1202 claim on this basis has been rejected – for good reason: Irrespective of "removal" being *de facto* or *de jure*, §1202 (b) looks to results, not methods. See Monotype Imaging, Inc. v. Bitstream, Inc., 2005 WL 936882 at *8 (N.D.Ill. 2005) ("The Court agrees with Plaintiffs that the plain language of the DMCA does not require that [defendant] physically remove the copyright notices from the Plaintiffs' [work]... Therefore, the mere fact that [defendant] does not 'remove' the copyright notices, but instead makes copies of the [work] without including the copyright notice, does not preclude liability under the DMCA.").

2. Steele Alleges CMI Removal From the Sole Infringing Audiovisual at Issue in Steele I; The Existence of Other “Versions” is Irrelevant

Defendants argue Steele has failed to provide a “plausible basis to conclude that [the MLB Audiovisual] was ‘altered’” because “Steele’s allegations make clear that there are multiple different versions of the [MLB] Audiovisual.” See Motion at 10-11. This is a non-sequitur: the existence of multiple versions is neither a basis for Steele's claim nor is it germane to whether Defendants violated §1202 by removing or altering CMI on the “version” filed with the court (which was falsely sworn to as copy, not a version).⁶

There were not multiple “versions” at issue in Steele I, but only the full-length “true and correct” version, published then – and now – at MLB.com and containing MLBAM’s name and copyright notice.⁷

Steele II arises from Defendants’ improper insertion of a false copy – a “version” – into Steele I. Defendants’ attempt to muddy the waters by pointing to other published versions – something Steele has made clear numerous times – and implying we can never really know which “version” was “real” and which was “altered.” See Defendants’ Motion at

⁶ If there is any doubt whatsoever about what the Steele I Defendants purported to submit, they specifically cross-referenced Steele’s submission of the “full length promo” audiovisual (with the soundtrack replaced with his song), stating that theirs was “true and correct” thereof. See Steele I Docket No. 18 at 3, n.3; No. 49 at 3, n.4; No. 93 at 4, n.7. Steele’s submission was 2:38:90-long and included the MLBAM copyright notice. See Docket No. 1 ¶ 29, Ex. 1; No. 41 ¶ 27. There was no confusion as to the audiovisual - and only audiovisual – at issue in Steele I, just as now – as a result of their being a second version filed in Steele I – there is no doubt as to the two audiovisuals at issue here.

⁷ To see the actual MLB Audiovisual, including the copyright notice, see http://mlb.mlb.com/media/player/mp_tpl_3_1.jsp?w_id=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

10-11. Defendants attempt to blur irrelevant facts with relevant ones, but the simple issue – and fact – remains: only one audiovisual was – or should have been – before the Court and at issue in Steele I: the 2:38:90-long “full length promo.” See note 6, above.

Defendants effectively and legally removed CMI pursuant to § 1202 because the CMI was in the original but absent from defendants’ “version.” See Monotype Imaging, Inc. 2005 WL 936882 at *8.

Defendants’ assertion that Steele’s Complaint “lacks any specific factual allegations to support [his] conclusion” is nonsense. As already stated, the absence of the CMI from Defendants’ version is real, digital, empirical evidence of Defendants’ §1202 violation; moreover, Steele’s allegations are clear in this regard. Steele submits no further evidence or allegations are required to defeat Defendants’ Motion. See Complaint at ¶¶ 77, 95-97, 149, 152, 157-62.⁸

3. Defendants’ Filing of False Evidence Need Not Be – But is “Conceivably Relevant”

Defendants argue that their CMI removal had no “conceivable relevance to the issue raised and resolved in Steele I,” i.e., copyright infringement. See Defendants’ Motion at 2.

At the outset, Steele does not have the burden, in pleading his §1202 claim, to show

⁸ In addition, this Court may take judicial notice of court filings in related cases when resolving defendants’ motion to dismiss, including the “true and correct” MLB Audiovisual - with MLBAM copyright notice - cited throughout Steele’s pleadings, e.g., Appellant Brief at 18-19, Appellant Reply at 8-19 (No. 09-2571) (1st Cir.); and the Altered MLB Audiovisual, - devoid of copyright notice – in Steele I Docket No. 18 at 3, n.3; No. 49 at 3, n.4; No. 93 at 4, n.7. See Am. Glue & Resin, Inc. v. Air Prods. & Chems. Inc., 835 F. Supp. 36, 40 (D. Mass. 1993) (holding as “undoubtedly true” that the court may take judicial notice of court records in related proceedings on a Rule 12(b)(6) motion to dismiss).

Defendants' removal of CMI was relevant to this Court's substantial similarity holding in a prior case, i.e., Steele I. See BanxCorp, 2010 WL 2802153 at *9 (§1202 plaintiff need "only allege (1) the existence of CMI on the [subject work]; (2) removal and/or alteration of that information; and (3) that the removal and/or alteration was done intentionally").

Nonetheless, Defendants argument is worth examining. Defendants appear to argue that (1) removal of a the primary defendant and copyright owner's CMI from the central infringing work at issue, (2) during the litigation of a copyright infringement lawsuit, (3) in which defense counsel submits the CMI-lacking "version;" and where (4) the primary defendant and copyright owner defaults, (5) defense counsel conceals the primary defendant's default by appearing for an unserved and entirely different entity with a similar name; and where (6) defense counsel defends the case to judgment under these false pretenses, has no "conceivable relevance" to the issue of copyright infringement.

One "conceivable" effect the removal might have in a copyright infringement lawsuit would be plaintiff's – and the Court's - level of certitude when identifying the owner of the primary infringing work, particularly when the owner appears to have appeared, but didn't. In addition, it is well-established that a work's "dimensions" – e.g., length as a linear dimension of music and audiovisual works – may be material elements in an infringement analysis. See Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62, 69 (1st Cir. 2009). The infringing audiovisual and Steele's work are each 2:38:90-long to their similar fade endings

(fade ending being another element subject to an infringement analysis).⁹ See Three Boys Music v. Michael Bolton, 212 F.3d 477, 482 (9th Cir. 2000). The audiovisual filed by Defendants was 2:46-long and ends-abruptly (just before the MLBAM copyright notice normally appears).

C. Claim Preclusion: Steele II's Operative Facts Have Never Been Adjudicated

Claim preclusion bars relitigation of claims that were or could have been made in an earlier suit. See Airframe Systems, Inc. v. Raytheon Co., 601 F.3d 9, 14-15 (1st Cir. 2010). Courts use a “transactional approach” to determine the identity or relatedness of claims - specifically their shared “common nucleus of operative facts” – and “whether [those] facts are related in time, space, origin or motivation.” See Id. at 15.

1. Steele II “Nucleus of Operative Facts”

While the Steele I and II complaints contain similar factual allegations, the facts necessary to plead Steel's §1202 claim appeared nowhere in Steele I. In Steele's instant Complaint, any similar facts to those asserted in the Steele I complaints are contextual to the instant Complaint's allegations pertaining to Defendants' removal of CMI, which properly state a claim under §1202.

Steele I was a copyright infringement claim. Steele II is a removal of CMI claim. The contextual and additional facts alleged in Steele II – relating to the altered audiovisual – plead the required elements of Steele II's §1202 claim, but are not – and were not – germane to the Court's determination of infringement in Steele I.

⁹ See Steele I Docket No. 101, Ex. B-1, Chronology Study.

Steele I arose from a “nucleus of operative facts” commencing on or about October 20, 2004 with the Boston Red Sox’s Jay Rourke receiving a digital copy of the Steele Song; and concluding prior to October 8, 2008 when Steele filed his first complaint in Steele I. See Steele Complaint ¶¶ 33, 134.

Steele II alleges removal of a defaulting defendant’s CMI from the primary work at issue during the litigation of Steele I. The Steele II “operative facts” occurred during Steele I (and its Appeal), the “nucleus” of which commenced on or before December 8, 2008 with Defendants’ filing of a “version” of the infringing audiovisual lacking the original’s CMI and hopefully concluded on March 29, 2010 when Defendants filed their Appellee brief in the first appeal of Steele I.

Defendants fail to specify which of the “nucleus of operative facts” relating to Steele’s §1202 claim, which arose between December 8, 2008 and March 29, 2010 “could have” or “should have” been raised in Steele I. While Steele has repeatedly raised the altered audiovisual issue post-judgment – including the filing of this case – the issue has not been adjudicated.

3. Steele Did Not Waive His §1202 Claim

Defendants argue Steele waived any claim relating to Defendants’ misconduct, citing to Hughes v. McMnamon, 379 F.Supp.2d 75 (D.Mass 2005) as being “strikingly similar” to the instant case.” See Defendants’ Motion at 14-15.

Hughes affirmed the unremarkable proposition that a “Rule 60(b) motion has preclusive effect on subsequent independent Rule 60(b) action[s] based on same allegations.”

See Hughes, 379 F.Supp.2d at 79 (citation omitted). In Hughes, plaintiff was precluded from filing an independent Rule 60(b) action that was founded upon “precisely the same allegation upon which [plaintiff’s] Rule 60(b)(3) motion was based in the First Case.” See Id. at 78 (emphasis supplied).

Here, Steele’s Complaint is hardly based on “precisely the same allegation” as Steele I. More to the point, Steele’s post-Steele I allegations that Defendants and their counsel altered audiovisual evidence (among other things) in Steele I has never been adjudicated (though the issue, and others relating to Defendants’ misconduct in and after Steele I, is not before the First Circuit Court of Appeals, No. 10-2173).

D. Issue Preclusion: Steele I Did not Determine Any Steele II Issues

The doctrine of issue preclusion prevents a party from relitigating issues previously and unfavorably adjudicated in an earlier action. See Global NAPs, Inc. v. Verizon New England, Inc., 603 F.3d 71, 95 (1st Cir. 2010). Issue preclusion applies where: “(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.” See Id.

Defendants’ argue Steele II is precluded for its lack of “required” or “predicate” judgment of copyright infringement. See Motion at 16-17. As already noted, courts uniformly hold that a finding of copyright infringement is not a predicate of a §1202 claim nor a basis for dismissal, provided there “may be a copyright claim.” See Jacobsen, above, 2009 WL 4823021 (“Defendants move for summary judgment on Plaintiff’s Digital

Millennium Copyright Act ('DMCA') claim on the sole basis that there is no underlying copyright infringement. As the Court has determined that there may be a copyright claim, Defendants' motion for summary judgment of the DMCA claim is unavailing and is, accordingly, denied." (emphasis supplied).¹⁰

This is sound reasoning and good from a public policy standpoint insofar as dismissing a claim that alleges removal of CMI in order to concealment infringement - on the basis that infringement must first be shown - would vitiate §1202's purpose of protecting against CMI removal to conceal infringement.

Finally, Steele is plainly not, as Defendants argue, attempting to relitigate any issues dismissed from Steele I. Steele II alleges claims derived - not dismissed - from Steele I, as detailed above.

E. Costs

Defendants' request for costs and sanctions for "vexatious litigation" is uncalled for, improper, and offensive to Steele, the undersigned, and the integrity of the judicial system. See Exhibit 1. The undersigned's letter to Mr. Clements (Exhibit 1), while casual in style

¹⁰ See also BanxCorp v. Costco Wholesale Corp., 2010 WL 2802153 at *9 (S.D.N.Y. 2010) ("Courts have applied [the 1202] statute in a straightforward manner such that Plaintiffs here need only allege (1) the existence of CMI on the [subject work]; (2) removal and/or alteration of that information; and (3) that the removal and/or alteration was done intentionally."); Gordon v. Nextel Communications and Mullen Advertising, Inc., 345 F.3d 922 (6th Cir. 2003) (despite finding no copyright infringement, the court nevertheless analyzed §1202 claim and dismissed on other grounds); and Monotype Imaging, Inc. v. Bitstream, Inc., 376 F.Supp.2d 877 (N.D.Ill. 2005) (no copyright infringement, §1202 claim on its own merits); Thron v. HarperCollins Publishers, Inc., 2002 WL 1733640 (S.D.N.Y. 2002) (summary judgment against §1202 claim rested on merits, not lack of underlying infringement).

and in no way a legal document – nor was it meant to be – nonetheless outlines the unrelenting abuse Steele has suffered at the hands of Mr. Clements’ clients, Skadden, Arps, Slate, Meagher & Flom, LLP (“Skadden”).

The facts showing misconduct, dishonesty, and abuse are long undisputed, having been raised again and again with barely a peep from Skadden. Though I certainly do not accuse Mr. Clements of any misconduct and hold him harmless for any ignorance as to the extent of his clients’ misdeeds, it does appear that the pattern continues. This is Mr. Clements’ first filing and with it he seeks sanctions and served a truly baseless Rule 11 Motion against my client and myself personally that fairly screams “abusive motion practice.”

As this Opposition has shown, Steele’s §1202 is well-founded, both in fact and law. It may be novel in respects, but the weight of the existing law and procedural burden fall squarely on Steele’s side.

Either way – Steele fails to see any good faith basis for Defendants’ request for sanctions and Rule 11 Motion. Even a poorly plead complaint (which this is not) that ends up dismissed is not thereby automatically sanctionable.

Finally, a look at the big picture reveals that Steele II – as well as Steele III and IV and the two pending appeals – would all have been avoided had Skadden played by the rules in Steele I. For Defendants to move for sanctions to stop Steele from now asserting those rights improperly stolen from him by Defendants in Steele I is truly a sad commentary on the current state of litigation practice.

WHEREFORE, Plaintiff Samuel Bartley Steele requests that Defendants' Motion be denied, well as an award of attorney's fees and costs, and any other form of relief which the Court that this Honorable Court deems just and proper.

Dated: December 15, 2010

Plaintiff Samuel Bartley Steele,
by his counsel,

/s/Christopher A.D. Hunt
Christopher A.D. Hunt
MA BBO# 634808
THE HUNT LAW FIRM LLC
10 Heron Lane
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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 December 15, 2010.

Dated: December 15, 2010

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

EXHIBIT 1

THE HUNT LAW FIRM LLC

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(508) 966-7300
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VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

December 14, 2010

Ben T. Clements, Esq.
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24 Federal Street
Boston, MA 02110

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

Dear Mr. Clements:

I write to address your November 24, 2010 Motion for Rule 11 Sanctions related to the filing of “this lawsuit” (“Rule 11 Motion”). Your Rule 11 Motion offers no facts or authority in support of Rule 11 sanctions. It is, in fact, nothing more than a regurgitation of Defendants’ Motion to Dismiss (“Motion to Dismiss”), sprinkled with conclusory and baseless accusations of impropriety.

Below I address each purported instance of conduct you allege is sanctionable. At the outset, and after yet another thorough review of the statute itself and all available §1202 caselaw, it is clear that your Rule 11 motion is not only baseless, but is a clear violation of Rule 11 itself (if filed).

I have become accustomed to Skadden's improper “sanction brinkmanship.” Skadden has relentlessly - if futilely - requested sanctions on at least five separate occasions and filed two Rule 11 motions against my client and me personally. All have been denied. Justice Gorton denied Skadden’s two Rule 11 motions before I had even filed oppositions.

My client, on the other hand, despite strong grounds, never sought sanctions in the district court – not once – though finally he did so in the First Circuit, which has taken up the issue in Steele's recently filed appeal, and will finally and fully address the propriety of your client Skadden’s past and ongoing conduct. In the meantime, I was hoping for a more distinguished approach from you – rather than a continuation of Skadden’s bush league tactics and nonstop, utterly baseless requests and motions for sanctions.

Nevertheless, here we are: You have served my client and myself with a Rule 11 Motion; pursuant to Rule 11’s “safe harbor” provision, I have examined the complaint, your Motion to Dismiss, and your Rule 11 Motion. I have reviewed the law – sixty known cases pertaining to

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directly to §1202 and – Rule 11 and the facts – many of which are undisputed – from the voluminous factual record. I fear your review has not been as thorough.

Absent *specific facts* showing a Rule 11 violation, I will not withdraw the complaint. Your papers so far fail to offer *any* such specific facts. You rely solely on the facts cited in support of your Motion to Dismiss. Moving to dismiss and moving for Rule 11 sanctions, I'm sure you know, are not the same thing. Worse, your Motion to Dismiss not only fails to hint at sanctionable conduct, it is vaporous on the merits.

Accordingly, out of an abundance of caution, I explain my reasoning below and make one – and only one – request for any evidence of sanctionable conduct or authority for Rule 11 sanctions based on the current record. I make this request for the simple reason that, if I am wrong, I will withdraw the complaint, mooting both your Motion to Dismiss and Rule 11 Motion. But if you have nothing to offer beyond your current offerings, I will pursue Steele II and will take appropriate measures to protect the interests of both my client and myself.

1. Background

Your Rule 11's "Background" section's attempt to portray Steele (and myself) as out-of-control litigants bent on "harassing" Skadden is as inaccurate as it is transparent. Accordingly, a more complete and accurate recounting of events to this point is required (though you are - or should be - aware of the full story given your motions' citations to virtually every paper Steele has filed).

This much is undisputed:¹

First, in response to my client's complaint in Steele I, the target defendant - the infringer in a copyright infringement case - MLB Advanced Media, L.P. ("MLBAM") willfully defaulted and their counsel, Skadden, quietly filed an appearance on behalf of an unserved and "entirely separate"

¹ When you read this please keep in mind that your clients have never denied the underlying facts of Steele I or offered an alternate theory to Steele's. Steele I - like virtually any case - could have been resolved in simply and in short order by volunteering to show Steele exculpatory digital evidence. That is, of course, if any such evidence exists.

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(Skadden's words) entity to "defend [MLBAM's] interests" (again Skadden's words). If there is any legal basis for this willful default coupled with a false appearance - any authority or defensible reason - to show it was not unethical, illegal, and fraud on the court, I have yet to hear it - from Skadden (and they have had numerous openings) or any other source, yourself included. I am quite certain a properly served defendant is not permitted to remove itself from a lawsuit through such extra-judicial means. Please correct me if I am wrong.

Second, on the same day Skadden appeared for MLBAM's proxy, they filed a motion to dismiss that attached, as an exhibit, a purported "true and correct copy" (as sworn to by your client Scott Brown) of the infringing audiovisual. It was neither true nor correct. In fact, it was the first time that particular draft version was ever made public. There is no room for debate here: it was either a "copy" (identical) or it was a "version" (not identical), pursuant to §1202 as well as common sense and good faith.

With the copyright notice (are you really unclear as to its "conceivable bearing" on both Steele I and Steele II?) of the willfully defaulting, primary target, and infringing copyright owner missing, it was not a copy. It was a version, an intentionally misleading and false version, submitted to further "bury" MLBAM and conceal its willful default. If there is any other explanation for Skadden's submission of a version of the audiovisual lacking the "© 2007 MLBAM" notice at the end (on the same day they filed their false appearance for MLBAM's proxy), to dissuade me from what is otherwise open and obvious - that these acts constituted fraud on the court, again I have yet to hear it.²

Third, Skadden's proxy appearances for the defaulting MLBAM (and Vector Management), unsurprisingly, went unnoticed by the *pro se* Steele (and the court, for that matter) for the duration of Steele's status as a *pro se* litigant. Steele – unfortunately – trusted that Skadden could not – and

² If there is any doubt whatsoever about what Skadden purported to submit, note that they specifically cross-referenced my client's submission of the "full length promo" audiovisual (with the soundtrack replaced with his song), stating that theirs was "true and correct" thereof. My client's submission – taken from MLBAM's website – included the MLBAM copyright notice.

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would not – brazenly remove two defendants, including the owner of the infringing work, right in front of his (and the court’s) eyes.³

There are two significant factors related to Skadden’s false proxy appearances: First, Skadden’s default/substitution ploy indicates a well-planned and meticulously executed scheme, with the proxies for both MLBAM and Vector filing appearances – along with a number of other defendants – falsely claiming that they had been “misidentified,” all on the same day that Skadden filed their motion to dismiss on behalf of all defendants (except one, represented by Dwyer & Collora). The *pro se* Steele was, Skadden calculated (correctly), certain to miss the proxy appearances – Major League Baseball Properties, Inc. for MLB Advanced Media; Vector 2 LLC for Vector Management – and focus on the (seemingly) more important motion to dismiss.⁴

In addition, Skadden, having passed the point of no return - crossing legal and ethical lines with false appearances and false evidence – had to press their advantage and, most importantly, ensure my client remained *pro se*.⁵

Thereafter, and for the remainder of the district court litigation, Skadden also used the rapport – trust, actually – that your client, Christopher Clark, feigned to have built with Steele, to lie, misdirect, and flat-out abuse Steele in every conceivable way. It was not a fair fight, of course, nor was it ever meant to be. And one might claim Steele was naïve – indeed, he was, trusting Skadden at all – but the law and rules of attorney conduct do not allow exceptions for misconduct where one’s opponent exhibits naïveté.

³ Recall that MLBAM's absence was arranged before the court's limited discovery order and, under normal discovery rules would have resulted in no discovery from the primary defendant and owner of the primary infringing work.

⁴ Skadden, in fact, encouraged Steele to ignore their nominal appearances and with sadistic mockery, on the first page, first footnote of their motion to dismiss, offered: “As is noted, most of the Moving Defendants are identified incorrectly or incompletely in the Complaint. Those misidentifications are, however, not contested for purposes of this motion to dismiss.”

⁵ For the most part they succeeded, winning summary judgment against the *pro se* Steele. With their ill-gotten judgment in hand, Skadden - ever the barometer of good faith and class – celebrated by holding an office contest (online, for the world to see) for who could come up with a “love anthem” to Skadden “Bart Steele-style.” Bad taste aside, it was a premature celebration.

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I will not repeat - nor is it my burden to do so - the numerous instances of out-and-out lies flowing from Skadden to my client – and to the court – which are explained in excruciating detail in numerous court filings and letters, with which you are obviously familiar, given the citations in your Rule 11 Motion. The facts – undisputed and unchallenged – are all there, if you choose to see them, including their misstatements to an attorney who was considering taking Steele’s case, but backed out under the torrent of Skadden’s threatening and misleading statements to him.⁶ Skadden’s proxy/substitution plan was *specifically designed* to take advantage of Steele’s *pro se* status and, indeed, went further by ensuring he stayed *pro se*.

Fourth, Skadden not only denied their proxy ruse when it was brought to light, they instead, with hubris, intransigence, and Orwellian logic filed Rule 11 Motions on behalf of the willfully defaulting MLBAM and Vector (through their proxies, of course) against my client and myself for bringing their illegal acts to light. Skadden’s Rule 11 Motions were filed in bad faith and denied by the court without benefit of Steele’s opposition (the court ruled prior to the date on which Steele’s oppositions were due). As I’m sure you are aware, I went out of my way – as I am here – to inform Skadden that their Rule 11 Motions were baseless and requested any facts or law in support thereof. They were unable to provide any bases in fact or law justifying sanctions against my client or myself for bringing MLBAM and Vector back from whence they fled: Steele I.⁷

Lastly, let's not forget Skadden's "scheme" - their bizarre, ill-advised, and desperate attempt to manufacture the appearance of bad faith on the part of myself and my client. I'm sure you are aware of this incident, but if not, see Steele's September 15, 2010 Motion for Sanctions filed in the First Circuit, beginning on page 16. Their silence in response to my accurate and detailed recount of their clumsy ploy (in a letter attached to the motion) is deafening.⁸

⁶ I have personally spoken with Attorney Kevin McCullough and he confirms the facts as outlined by Steele in two affidavits.

⁷ Steele’s Motions for Default were denied, based in large part on the law of the case – that there was no “substantial similarity” – but MLBAM and Vector, caught hiding in plain sight, are now back where they belong: as defendants in Steele I (on appeal).

⁸ As in Steele I, Skadden sent their associate Christopher Clark - the junior most Skadden attorney appearing in these cases - to do the dirty work, this time to gain my trust under false pretenses. For the record, neither my client nor I harbor ill will towards Mr. Clark.

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2. Steele II: You Reap What You Sow

I assure you my client has no desire to pursue a fruitless – much less sanctionable – claim. But neither will my client be - continue to be, that is - your clients' whipping post. As it stands, your Rule 11 Motion not only fails to show any sanctionable conduct on – it reeks of bad faith itself.⁹

As an initial matter, every action of which your Rule 11 Motion complains – e.g., the filing of additional lawsuits, the filing of motions for default, appeals to, and motions in, the First Circuit, correspondence between counsel, and most significantly this case – was set in motion by your clients' misconduct during Steele I. We could go through every action taken and relate them back to one or more of Skadden's misdeeds.

For now, however, the focus is Steele II, specifically whether merely filing it constitutes sanctionable conduct under Rule 11. It need not bear repeating, but to properly put your Motion for Sanctions in perspective, remember that the underlying facts of Steele II are the same facts showing undisputed evidence of your clients' fraud on the court. As stated, this issue, among others, is now squarely before the First Circuit.

3. Rule 11 and Steele II: The Truth, The Whole Truth, And Nothing But the Truth

In an attempt to maintain civility in the face of what is truly an offensive motion, I offer the following facts and law in good faith, and respectfully request the favor of a good faith reply in order to make an informed decision as to whether to withdraw the Steele II Complaint.

⁹ Skadden's choice of you to represent them is, of course, unimpeachable. However - and I pray I am wrong - your Rule 11 Motion appears to take on not just their defense, but their tactics.

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I address the Rule 11 "issues" in roughly the order in which they are raised in your Motion.¹⁰

a. *"Standing"/Steele's Alleged Lack of Legal Interest in the MLB Audiovisual*

Your Rule 11 Motion argues Steele has no "legal interest" in the infringing audiovisual and, therefore: (1) Steele lacks "standing," (2) his claim is "utterly baseless," and (3) Rule 11 sanctions are warranted since I – Steele's counsel - "could [not] reasonably have believed that the facts of this case could sustain a claim."

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." See 17 U.S.C. §§ 1202 (b), (c), 1203 (a) (emphasis supplied).

The language of the DMCA does not support your §1202 standing theory. Rather, the plain language supports Steele's position. 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 and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."), quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).¹¹

You acknowledge that Steele's claim is unique. See Motion to Dismiss at 9. As you know, courts are generally loath to dismiss novel claims for relief. See Branch v. F.D.I.C., 825 F.Supp. 384, 397-98 (D.Mass. 1993) ("[C]ourts should generally be reluctant to grant a motion to dismiss

¹⁰In an effort to dignify our discourse, I will not repeat each of the colorful adjectives utilized in your Rule 11 Motion, of which I count at least a baker's dozen. Particularly outlandish is your remark that Steele (and I, presumably) are using the "threat of civil liability as a tool to extort settlement." Have you inquired of your clients as to the status of "settlement talks?" There is no "talking," much less "extorting." My client has made no demand or effort to initiate settlement negotiations since your client Mr. Sloan called off the First Circuit's mandatory settlement conference last year, promising any such efforts would be fruitless and that defendants would never pay any amount in settlement. We have taken him at his word.

¹¹ Case law is silent as to your theory, as you acknowledge.

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when the claim in question asserts a novel theory of recovery. Novel theories of recovery are best tested for legal sufficiency in light of actual, rather than alleged facts.”).¹²

In addition to the statute’s plain language and courts’ general preference for not disposing of novel claims at the motion to dismiss stage, all reasonable inferences further resolve in Steele’s favor. See Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993) (“In considering a motion to dismiss, a court must take the allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiffs.”).

Given the above, on what do you base your assertion that I could not “have reasonably have believed that the facts of this case could sustain a claim?” Do you claim, in good faith, that filing a lawsuit based on a novel theory – but nonetheless supported by the clear language of the statute, with no extant case law to the contrary, when the underlying conduct also constitutes fraud on the court – and simple, undisputed facts constitutes sanctionable conduct under Rule 11?

b. *Failure to State a Claim/Waiver/Timeliness*

Waiver/Timeliness:

Your Rule 11 Motion states, on page five: “sanctions are particularly appropriate here where the sole legal theory asserted in *Steele I*, an alleged violation of Section 1202 of the DMCA, is completely without merit.” I assume this is a mistake, given that Steele did not allege a §1202 violation in *Steele I*.

Your Rule 11 Motion argues on the same page that “Steele and Hunt” have raised the (falsely sworn-to as a “copy”) altered audiovisual in post-judgment motion practice (and appeals and correspondence) in *Steele I*. However, you are less than forthright in failing to reference the

¹² See also Electrical Construction & Maintenance Co. v. Maeda Pacific Corp., 764 F.2d 619, 623 (9th Cir.1985) (“The court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel... since it is important that new legal theories be explored and assayed in the light of actual facts.”); Baker v. Cuomo, 58 F.3d 814, 818-19 (2nd Cir. 1995) (“Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development”).

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correspondence specifically relating to this case, in which Skadden concedes (or at least fails to dispute) filing a “version” – not a “copy,” as sworn to – of the audiovisual in Steele I.

Indeed, Steele has repeatedly raised this issue – and will continue to do so until it is adjudicated.¹³ Which leads to your next argument, that Steele waived his rights to a §1202 claim because he did not raise it *during* Steele I.

Incredibly, you argue Steele *waived* his right to *now* seek redress for Skadden’s fraud on the court during Steele I because he failed to uncover the fraud *during its perpetration* in the Steele I litigation. Recall at the time Steele was *pro se* and subject to Skadden’s unrelenting abuse and dishonest conduct, both as to him and the court, which was orchestrated specifically to confuse and blind Steele to the illicit happenings around him. You next point out, correctly, that once Steele obtained counsel, Skadden’s conduct and false evidence were raised immediately upon their discovery. That the issue was raised post-judgment was nonetheless much sooner than Skadden’s intended time for it to be raised, which is to say never.¹⁴

During Steele I, defendants’ §1202 violation was contemporaneous with the following related events:

1. Skadden swore to filing “true and correct” copies, but in fact filed untrue and incorrect versions, of the infringing audiovisual, which lacked – among other elements –

¹³In mentioning Steele’s raising of the issue you fail to mention that the issue has yet to be adjudicated, a misleading omission leaving the reader with the impression it has been adjudicated.

¹⁴ Skadden has – each time Steele raises their fraudulent submission – defended by arguing Steele’s failure to root-out their own misconduct earlier constitutes waiver, despite that their misconduct was specifically designed to *remain hidden forever*. It is, all in all, a sickeningly bad faith argument – pointing to the target of Skadden’s fraud and misconduct’s failure to earlier uncover their misdeeds as grounds for protection from the consequences of those acts.

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Copyright Management Information (“CMI”) found in the original digital work (see Appellant’s Brief at 38-41 and Appellant’s Reply at 8-19);¹⁵

2. Two parties willfully defaulted, concealing their defaults from the court and Steele; one defaulter being the primary defendant whose CMI was removed by the false evidentiary submissions above (see Memorandum & Order of September 27, 2010 at 7, 9);
3. Skadden simultaneously filed appearances for two unserved parties with similar sounding names to those in default and claimed – falsely – that the appearing parties had been “misidentified” as the defaulting parties (see Id. at 7-9).

Waiver - legally, factually, and ethically - is a specious argument in these circumstances.

As you know, Steele recently filed, in the first Steele I Appeal (No. 09-2571), a Motion for Sanctions alleging Defendants’ and Skadden’s fraud on the court.¹⁶ The First Circuit denied the

¹⁵ See also Gregerson v. Vilana Financial, Inc., 2008 WL 451060 at *7 (D.Minn. 2008) (“The Court infers from Defendants’ failure to produce the original electronic image used in its advertisements that the original image would have demonstrated that Defendants removed or altered Plaintiff’s digitally embedded [CMI] in violation of §1202(b)(1)”; citing Goldie v. Cox, 130 F.2d 695, 719 (8th Cir. 1942) (“Where relevant evidence is within the control of a party to whose interest it would naturally be to produce it and he fails so to do, without satisfactory explanation, and produces no evidence or weaker evidence, an inference is justifiable that it would be unfavorable to him.”); see Finley v. Hartford Life and Acc. Ins. Co., 249 F.R.D. 329 (N.D.Cal. 2008) (defendants sanctioned for failure to initially disclose the full version of a surveillance video); see also Browning v. Navarro, 826 F.2d 335, 344 (5th Cir. 1987) (“once the determination is made that officers of the court have corruptly abused the judicial process, the court is not required to examine the effect that such conduct might have had on the ultimate judgment, but rather the court may rely on such conduct alone to set aside the judgment... the Supreme Court...noting that the attorneys had urged the falsified article upon the court and had prevailed, held that they ‘are in no position now to dispute its effectiveness’”); quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 247 (1944).

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motion “without prejudice to appellants raising in their pending appeals... those requests for relief over which this court has jurisdiction.” See Order of Court of November 9, 2010 (No. 09-2571) (1st Cir.) (emphasis supplied)

Steele accepted the First Circuit's invitation and, in his second appeal arising from Steele I, (No. 10-2173), fully addressed the above-referenced misconduct, a significant component of which relates to the underlying facts of Steele II, and which is now before the First Circuit.

For purposes of your Rule 11 Motion, on what do you base your argument that a §1202 claim based on acts constituting fraud on the court during litigation, but discovered after judgment, is waived and “utterly baseless?”

More to the point, what authority or grounds do you have for asserting that the filing of a §1202 claim based on defendants’ removal of CMI while litigating a copyright infringement case constitutes sanctionable conduct under Rule 11?

No “Evidentiary Support;” Multiple “Versions” of the Audiovisual

Your Rule 11 Motion argues that "Steele and Hunt" violate Rule 11 by asserting "factual allegations without 'evidentiary support' or the 'likely' prospect of such support," because Steele "acknowledges" that multiple versions of the audiovisual “exist.” This is a non-sequitur: First,

¹⁶ See, e.g., Pearson v. First NH Mortgage Corp., 200 F.3d 30, 38 (1st Cir. 1999) (“attorneys are officers of the court, [and] their conduct, if dishonest, would constitute fraud on the court”); see also George P. Reintjes Co., Inc. v. Riley Stoker Corp., 71 F.3d 44, 47 (1st Cir. 1995) (“under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry”); Tri-Cran, Inc., v. Fallon (In re Tri-Cran, Inc.), 98 B.R. 609, 616 (Bankr.D.Mass. 1989) (“Where a judgment is obtained by fraud perpetrated by an attorney acting as an officer of the court, the judgment may be attacked for fraud on the court.”) (emphasis supplied).

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Steele not only “acknowledges” that multiple versions exist, he argues it, repeatedly.¹⁷ Second, the existence of multiple published versions is neither a basis for Steele's argument nor is it germane to whether your clients violated §1202 by removing or altering CMI on the “version” filed with the court (which was falsely sworn to as copy, not a version).¹⁸ There were not multiple “versions” at issue in Steele I. Steele II indeed arises from your clients’ improper insertion of a false copy – a “version” – into Steele I. It’s a clever (but vacuous) argument – muddying the waters by showing there were other versions (and implying Steele was downplaying this fact), therefore how can Steele argue which “version” was “real” and which was “altered,” etc.

As to "Steele and Attorney Hunt" "surmis[ing] - with no support from factual allegations" that your clients' version was altered, I can't tell if this is an attempt at artful phrasing or just utter nonsense. The absence of the CMI from your clients' version is real evidence of a §1202 violation: what should have been there is not. Steele’s "factual allegations" assert exactly this in his complaint. With the facts "caught on tape" - literally - I'm not sure what else Steele was required to include in his complaint.

Your Rule 11 Motion further states "there are no material differences" between the infringing audiovisual at issue in Steele I and your clients’ false “version” thereof, and that there is "nothing conceivably misleading" about the "version" your clients filed with the court.

¹⁷ To show, for example, that your clients use of the term “Turner Promo” to describe the audiovisual was intentionally misleading, given that TBS neither owned the full-length audiovisual’s copyright (MLBAM does) nor did TBS ever air the full-length version, but only shorter “interstitials” i.e., versions. In addition, the infringing work was released on MLB.com (MLBAM) on August 27, 2007, not TBS, as stated by your clients’, which broadcast the interstitials four days later, on August 31, 2007.

¹⁸ Recalling, again, that your clients specifically referenced the MLB.com version with the MLBAM copyright notice. There is no confusion as to the audiovisual - and only audiovisual at issue here. In any event, the version your clients submitted was not a version – interstitial or otherwise – ever published before, despite their claims to the contrary; it is clearly labeled “VERSION: FINAL 2.”

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You appear to claim that the absence of CMI is not a "material difference" in a case alleging removal or alteration of CMI pursuant to §1202. Please explain this to me. I assume you are not in good faith claiming - as implied by your citation from Roger Edwards LLC v. Fiddes & Son, Ltd., 437 F.3d 140, 143-144 (1st Cir. 2006) - that the absence of the MLBAM copyright notice in defendants' Steele I filings - coincident with their other acts to conceal themselves - was a "mistake." If it were a mistake – something Skadden never argued – certainly your clients, once made aware of the error, should have corrected it, which is exactly the point Steele made in his Reply Brief in the first Steele I appeal.¹⁹

As to there being "nothing conceivably misleading" about your clients' version, I can think of at least one "thing" that is "conceivably misleading:" The absence of MLBAM's copyright notice. In a copyright lawsuit against MLBAM. Filed simultaneously with Skadden's false appearance for a proxy for MLBAM, which concealed itself by willfully defaulting.

Given the above, what about the Steele II complaint is sanctionable pursuant to Rule 11?

"Actual" Removal of CMI

Your Rule 11 Motion argues that "Steele and Hunt" should be sanctioned because they are "lacking a plausible allegation [against Defendants] of an actual removal or alteration of copyright management information." (emphasis supplied).

This defense - no "actual removal" (versus omission) of CMI from a copy - has already been rejected for good reason. Irrespective of removal being *de facto* or *de jure*, §1202 (b) looks to results, not methods. See Monotype Imaging, Inc. v. Bitstream, Inc., 2005 WL 936882 at *8 (N.D.Ill. 2005) ("The Court agrees with Plaintiffs that the plain language of the DMCA does not require that [defendant] physically remove the copyright notices from the Plaintiffs' [work]... Therefore, the mere fact that [defendant] does not 'remove' the copyright notices, but instead makes copies of the [work] without including the copyright notice, does not preclude liability under the DMCA.").

¹⁹ Whatever the cause, Skadden has yet to correct the record. However viewed, you – and Skadden – acknowledge the obvious: the version on file – including with the First Circuit where two appeals remain pending - is incorrect. Skadden has yet to correct its incorrect/false/erroneous evidentiary filing.

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Your clients filed with the court a “cop[y] of the [work] without including the copyright notice.” See Id. Moreover, as a practical matter, without any discovery on the issue, the only “evidence” as to removal or omission comes from your clients' self-serving statements. Accordingly, and particularly at the 12(b)(6) stage, asserting lack of a “plausible allegation” - which can only be read as “lack of direct evidence” of your clients loading the audiovisual file into Avid or Final Cut Pro (or the like) and pressing the delete key - is disingenuous at best.

The audiovisuals speak for themselves, any doubt resolves in favor of Steele, and, ultimately, by removal or omission, Steele clearly states a claim for §1202 CMI removal. See Id.

Once again, on what do you base your assertion of sanctionable Rule 11 conduct arising from filing Steele II when CMI is present in the original work yet absent from the copy?

No Conceivable Bearing to Copyright Infringement

Your Rule 11 Motions claims Steele’s §1202 complaint is “baseless” because the “absence of the copyright notice at the conclusion [of the Altered MLB Audiovisual], had no conceivable bearing on the issue” of copyright infringement.

Your Rule 11 Motion concludes, based on this, that “the assertion that the Defendants altered the Audiovisual and did so for the purpose of misleading the court simply makes no sense.”

You appear to argue that where (1) removal of the primary defendant’s CMI from the central infringing work at issue, (2) during the litigation of a copyright infringement lawsuit, (3) through defense counsel’s false evidentiary submission to the court; and where (4) defendant copyright owner has willfully defaulted, (5) defense counsel concealed defendant’s willful default from plaintiff and the court by falsely appearing - claiming to appear for the defendant - but actually appearing for an unserved and entirely different, with a deceptively similar name; and where (6) defense counsel litigates the case to judgment under these false pretenses on behalf of the defaulting party, the “absence of the copyright notice” from the primary infringing work whose copyright owner has willfully defaulted and been illegally substituted with a false proxy, has “no conceivable bearing” on the issue of copyright infringement?

Just for starters - one “conceivable bearing” the removal might have in a copyright infringement lawsuit is in identifying the infringing work's copyright owner. One might argue that

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Steele already knew the owner - indeed, he did, at least as a general matter, given MLBAM's self-proclaimed "stealth" business model, and he properly named and served them. MLBAM's response was to willfully default and conceal their default with a false appearance.

In addition, it is well-established that a work's "dimensions" – e.g., length as a linear dimension of music and audiovisual works – may be material elements in an infringement analysis. The audiovisual and my client's work are each 2:38:90-long to their similar fade endings (fade ending being another element subject to an infringement analysis). The audiovisual your clients' filed was 2:46-long and ends-abruptly (just before the MLBAM copyright notice normally appears).

Please explain how your clients' deletion of the copyright owner's name and logo, significant alteration to the infringing work's length, and removal of its fade-ending had "no conceivable bearing" on the issue of infringement? More specifically, how does any of the above warrant sanctions against myself and my client for filing Steele II?

c. Claim Preclusion: Steele II "Nucleus Of Operative Facts"

Your Rule 11 Motion asserts Steele II is meritless and vexatious because it "pleads the same common core of facts as were asserted in Steele I." While the two complaints contain similar factual allegations, you confuse facts with causes of action: In Steele I the facts of infringement directly supported that cause of action. In Steele II, the facts of infringement are background to the later facts of CMI removal supporting Steele's §1202 cause of action. Had Steele II omitted the facts of infringement, you no doubt would have argued "lack of sufficient facts" as a basis for dismissal.

Your assertion that Steele I and Steele II are "nearly identical" with the "only material difference" being that Steele II arises from the altered audiovisual is – as you surely know - flat wrong. Steele I was a copyright infringement claim. Steele II is a removal of CMI claim. The understated "only material difference," as you put it – the altered audiovisual – is a required element of Steele II's §1202 claim, on the one hand, but not of an infringement claim, i.e., Steele I.

Steele I was filed October 8, 2008 based on allegations of copyright infringement arising from a "nucleus of operative facts" commencing on or about October 20, 2004 with the Boston Red Sox's Jay Rourke receiving a digital copy of the Steele Song; and concluding on or about September 29, 2008 with Steele's final correspondence with defendants following over eight months of fruitless pre-suit settlement efforts. See Steele Complaint ¶¶ 1, 27.

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Steele II is based on allegations of removal of a defaulting defendant's CMI from the primary work at issue during the litigation of Steele I. The Steele II "operative facts" occurred during Steele I (and its Appeal), the "nucleus" of which commenced on December 8, 2008 with your client Scott Brown's first (of four) submission of a "version" of the infringing audiovisual lacking the original's CMI. The "operative facts" likely concluded with your clients' filings in the First Circuit Court of Appeals.²⁰

Please explain which of the "nucleus of operative facts" – or even one operative fact – from defendants' actions between December 8, 2008 and March 29, 2010 "could have" or "should have" been raised by Steele in his Complaint of October 8, 2008 or, indeed, at any time during Steele I?

Again, more pertinent to the matter at hand: how does your preclusion argument, which fails in any event, meet the burden of showing sanctionable conduct pursuant to Rule 11?

d. Issue Preclusion

Predicate Judgment

Your Rule 11 Motion seeks sanctions because Steele has no "predicate" judgment of copyright infringement on which to base his § 1202 (b) claim.

Courts uniformly hold that a finding of copyright infringement is not a predicate of a §1202 claim nor a basis for dismissal, provided there "may be a copyright claim." See Jacobsen v. Katzer, Slip Copy, 2009 WL 4823021 (N.D.Cal. 2009) ("Defendants move for summary judgment on Plaintiff's Digital Millennium Copyright Act ('DMCA') claim on the sole basis that there is no underlying copyright infringement. As the Court has determined that there may be a copyright

²⁰ "Likely" because these cases are ongoing.

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claim, Defendants' motion for summary judgment of the DMCA claim is unavailing and is, accordingly, denied.” (emphasis supplied).²¹

The reasoning behind the courts' analyses is self-evident: dismissing a claim alleging CMI in the concealment of infringement on the bases that infringement has not yet been shown would reward the concealment against which §1202 is designed to protect. Not surprisingly, your Rule 11 Motion cites no authority for your “predicate” theory.

Accordingly, on what basis do you alleged that filing Steele II violated Rule 11 in this regard?

Relitigation

Your Rule 11 Motion asserts that “Steele and Hunt” are “attempting to relitigate in this new lawsuit issues dismissed from Steele I.” This is, as you know, plainly false.

Steele II alleges claims derived – not dismissed - from Steele I.

The elements of Steele's §1202 (b) claim are 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).

Steele's three §1202 elements arose from the litigation of Steele I; they were not issues during Steele I, arising only after judgment with the discovery of your clients' false evidentiary submissions.

²¹ See also BanxCorp v. Costco Wholesale Corp., --- F.Supp.2d ----, 2010 WL 2802153 at *9 (S.D.N.Y. 2010) (“Courts have applied [the 1202] statute in a straightforward manner such that Plaintiffs here need only allege (1) the existence of CMI on the [subject work]; (2) removal and/or alteration of that information; and (3) that the removal and/or alteration was done intentionally.”); Gordon v. Nextel Communications and Mullen Advertising, Inc., 345 F.3d 922 (6th Cir. 2003) (despite finding no copyright infringement, the court nevertheless analyzed §1202 claim and dismissed on other grounds); and Monotype Imaging, Inc. v. Bitstream, Inc., 376 F.Supp.2d 877 (N.D.Ill. 2005) (no copyright infringement, §1202 claim on its own merits); Thron v. HarperCollins Publishers, Inc., 2002 WL 1733640 (S.D.N.Y. 2002) (summary judgment against §1202 claim rested on merits, not lack of underlying infringement).

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Intention is clear from the contextual elements and your clients intransigence regarding the altered audiovisual. Lack of authorization was confirmed by Skadden's failure to provide evidence of "authorized removal" in response to Steele's invitation in connection with his offer to conditionally withdraw this case. Knowing concealment is equally obvious, given the CMI's removal in the midst of litigating a copyright infringement lawsuit, in which the primary defendant and copyright owner willfully defaulted and concealed its default with a false proxy appearance.

Steele I litigated substantial similarity. Steele II will litigate CMI removal. What aspect of the latter will "relitigate" an issue adjudicated in the former? And how does this support your assertion of sanctionable conduct?

In closing, I had – and have – no desire to turn this case into (another) unnecessary battle of "bad faith" accusations and sanctions motions. My client has suffered enormously at the hands of Skadden and, through it all, has maintained his composure and his strong desire to "take the high ground" by ignoring Skadden's attacks whenever possible. Scour the record: you will not find anything remotely resembling bad faith on the part of my client or myself. The juxtaposition with Skadden's antics is high-definition black and white.

Steele's insistence on absolute honesty, good faith, and discretion – even when maligned, attacked, and abused – continues. But we are not fools. While we maintain and will hold the high ground, we reserve the right – in good faith, as always – to respond forcefully to unwarranted attacks.

Very truly yours,



Christopher A.D. Hunt