

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 DEFENDANTS’ MOTION FOR
RULE 11 SANCTIONS FOR THE FILING OF THIS LAWSUIT**

Plaintiff Samuel Bartley Steele ("Steele") opposes Defendants’ Motion for Rule 11

Sanctions for the Filing of this Lawsuit on the following grounds:

1. Defendants’ Rule 11 Motion Echoes Defendants’ Motion to Dismiss

Defendants’ Memorandum in Support of its Rule 11 Motion (“Defendants’ Rule 11 Motion”) restates the arguments made in Defendants’ Motion to Dismiss The First Amended Verified Complaint And To Recover Attorneys' Fees And Costs (“Defendants’

Motion to Dismiss”), both of which were served on November 24, 2010.¹

Defendants’ Rule 11 Motion begins and ends with recitation of, and cross-reference to, each of the four grounds argued in Defendants’ Motion to Dismiss: (1) standing, (2) failure to state a claim and/or facts sufficient to support a claim, (3) claim preclusion, and (4) issue preclusion. See Defendants’ Rule 11 Motion at 3-4, 7-9.

Plaintiff’s Opposition to Defendants’ Motion to Dismiss (“Plaintiff’s Opposition”) refutes each of Defendants’ four grounds and, to avoid repetition, Steele refers to and incorporates Plaintiff’s Opposition:

As to (1) standing, see Plaintiff’s Opposition at 3-4, 7-10.²

As to (2) failure to state a claim and/or facts sufficient to support a claim, see Plaintiff’s Opposition at 4-5, 10-14;

As to (3) claim preclusion, see Plaintiff’s Opposition at 5, 14-16;

As to (4) issue preclusion, see Plaintiff’s Opposition at 5-6, 16-17.

2. Defendants Provide no Factual or Legal Bases for Sanctions

Defendants’ Rule 11 Motion offers no facts or law showing sanctions are warranted. To be sure, Defendants Rule 11 Motion offers various theories – harassing Defendants, “trying to force a settlement of a prior lawsuit,” and “attempting to relitigate” issues decided

¹ Defendants filed only their Motion to Dismiss with the Court on that day. Pursuant to Rule 11’s “safe harbor provision,” Defendants have waited the requisite 21 days prior to filing their Rule 11 Motion with the Court.

² Docket No. 14, filed December 15, 2010.

in Steele v. TBS, et.al., 08-11727-NMG (D.Mass.) (“Steele I”) – of sanctionable conduct, but what little evidence is offered in support thereof is fully addressed in Plaintiffs’ Opposition. See Defendants Rule 11 Motion at 1.

Beyond that, Steele attempted to obtain – pursuant to Rule 11’s “safe harbor period” - clarification as to how, by filing this complaint, Steele and the undersigned violated Rule 11, in a December 14, 2010 letter requesting information from counsel for Defendants, Ben T. Clements (“Steele Letter”). See Exhibit 1. Steele requested information in a good faith effort to reasonably determine whether to withdraw this complaint. Defendants replied via e-mail six days later, stating only that they “respectfully disagree with the assertions” in Steele’s December 14, 2010 letter, Exhibit 1, and proceeded to file the Rule 11 Motion. See Exhibit 2.

Steele’s Letter did not contain merely “assertions,” however, but *very specific* requests for non-conclusory facts or evidence in support of Defendants’ claim that Steele and/or the undersigned violated Rule 11. See Exhibit 1 at 2, 6, 8, 11, 13, 14, 15, 16, 17, 18.

Steele’s Letter plainly stated that “if [Steele is] wrong, [Steele] will withdraw the complaint, mooting both [Defendants’] Motion to Dismiss and Rule 11 Motion.” See Exhibit 1 at 2.

Defendants two sentence e-mail reply received today, December 22, 2010 was non-responsive. See Exhibit 2. Defendants’ failure to provide any answers, much less refute any

of the facts in Steele's Letter is not at all surprising, given that the history of Steele's experience in this and related cases outlined in Steele's Letter is not disputed.

Given the seriousness of the questions posed in Steele's Letter, Defendants decision to proceed with their Rule 11 Motion - after tacitly conceding that it lacks any substantive basis - is, on the other hand, disturbing.

Steele should be awarded – and hereby requests - costs and attorneys' fees incurred in having to address Defendants' irresponsible motion practice.

WHEREFORE, Plaintiff Samuel Bartley Steele requests that this Honorable Court deny Defendants' Rule 11 Motion and order that Steele be awarded attorney's fees and costs incurred in connection with this motion, and any other form of relief that this Honorable Court deems just and proper.

Dated: December 22, 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
Hopedale, MA 01747
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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 22, 2010.

Dated: December 22, 2010

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

EXHIBIT 1

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VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

December 14, 2010

Ben T. Clements, Esq.
Clements & Pineault, LLP
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

EXHIBIT 2

Christopher Hunt

From: Ben Clements <bclements@clementspineault.com>
Sent: Tuesday, December 21, 2010 4:44 PM
To: Christopher Hunt
Subject: RE: STEELE II/RULE 11 MOTION

Chris,

We have received and reviewed your letter of December 14. We respectfully disagree with the assertions in your letter and will proceed with the Rule 11 motion, the basis for which is set forth in the supporting memorandum.

Regards,

Ben

Ben T. Clements
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-----Original Message-----

From: Christopher Hunt [mailto:cadhunt@earthlink.net]
Sent: Tuesday, December 14, 2010 10:08 AM
To: Ben Clements
Cc: Lila Slovak
Subject: STEELE II/RULE 11 MOTION

Ben:

Please see the attached letter. By my count, your Rule 11 Motion is ripe for filing tomorrow. I strongly suggest you carefully review the attached.

Regards,

Chris

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