

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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SAMUEL BARTLEY STEELE,	:	
	:	
Plaintiff,	:	Civil Action
v.	:	No. 10-11458-NMG
	:	
ANTHONY RICIGLIANO, et al.,	:	<b>LEAVE TO FILE</b>
	:	<b>GRANTED ON</b>
Defendants.	:	<b>JANUARY 26, 2011</b>
	:	
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**REPLY MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS AND FOR OTHER RELIEF**

Nothing that Steele has set forth in his Opposition (*Steele III* Docket No. 16) undercuts the arguments in the Moving Defendants' opening brief demonstrating that the Court should (i) dismiss this lawsuit ("*Steele III*") as to all defendants, (ii) impose sanctions on Steele and his attorney, and (iii) issue an injunction precluding further harassing filings.<sup>1</sup>

**ARGUMENT**

**A. Claim Preclusion Bars *Steele III***

In his Opposition, Steele has completely misconstrued the doctrine of claim preclusion. As Steele himself acknowledges, the First Circuit has expressly held that the doctrine "bars relitigation of claims that were or *could have been made* in an earlier lawsuit." (Opp. at 7, emphasis added, citing *Airframe Sys., Inc. v. Raytheon Co.*, 601 F.3d 9, 15 (1st Cir. 2010).) The First Circuit has made it clear that the doctrine of claim preclusion bars not only identical claims, but also applies to any claims arising out of a common nucleus of operative facts that should

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<sup>1</sup> The Moving Defendants acknowledge that insofar as it pertains to Steele's proceeding *in forma pauperis*, their motion is now moot in light of this Court's Memorandum And Order entered September 14, 2010. (*Steele III* Docket No. 13.)

have, or could have, been brought in the earlier lawsuit. *Airframe*, 601 F.3d at 16.<sup>2</sup> Accordingly, Steele's argument that he is free to proceed with his new theory because it is not exactly the same as the one raised in *Steele I* fails because the two theories are inextricably intertwined and arise out of the same nucleus of operative facts.

In *Steele I*, Steele challenged two works, the Bon Jovi Song and the TBS Promo, as infringing Steele's copyright in his 2004 homage to the Red Sox (the "Steele Song"). *See Steele I*, 646 F. Supp. 2d 185, 188 (D. Mass. 2009) (Gorton, J.). Prior to this Court's dismissal of *Steele I*, plaintiffs never raised as a basis for liability the alleged pre-production digital copying of the Steele Song as part of the creative process leading to the challenged works. Steele did, however, raise "temp tracking" in *Steele I*, *see, e.g.*, 646 F. Supp. 2d at 188, as an argument supporting his position that the TBS Promo and the Bon Jovi Song had been derived from the Steele Song.<sup>3</sup> In Steele's new allegation, which does assert pre-production digital copying as an independent basis for alleged copyright infringement liability, the challenged conduct is also alleged to have been part of "temp tracking." (*Steele III* Complaint, ¶¶ 100-16.) Thus, the *Steele III* allegations arise out of the same *Steele I* nucleus of operative facts.

In his Opposition, Steele argues that his new allegation is "*not* related in time or space," to the facts and circumstances in *Steele I*. (Opp. at 8.) "Space" is meaningless. As to "time," it is absurd to argue that pre-production steps in the creative process are unrelated to the final product simply because pre-production activities of necessity come first.

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<sup>2</sup> Steele's silence tacitly concedes that the *Steele III* defendants are the same or closely related to the *Steele I* defendants, the third prong of claim preclusion. *Airframe*, 601 F.3d at 14.

<sup>3</sup> Steele also argued in *Steele I* that defendants alleged use of his song violated his "sync rights." *E.g.*, Plaintiff's Opposition to Defendants' Motion for Summary Judgment, at 11 (Docket No. 101.) In granting summary judgment for defendants, the Court in *Steele I* directly addressed Steele's "sync rights" argument. *See* 646 F. Supp. 2d at 193.

**B. Steele's Reliance On His 2009 Sound Recording Copyright Is Misplaced**

Steele also tries to avoid claim preclusion by citing his sound recording copyright, issued in 2009, and arguing that he could not have relied in *Steele I* on a copyright he did not yet have. (Opp. at 10.) The Moving Defendants recognize that, as Steele contends (Opp. at 11), sound recordings are works of authorship that can be registered independently from the underlying musical composition. Here, however, there is no change in the claim preclusion analysis, because Steele is the owner of both.

In *Steele I*, plaintiffs there were free to (but did not) allege that the claimed pre-production digital copying of the Steele Song was a basis for copyright liability, because if any such conduct had taken place, it would have infringed Steele's copyright on his musical composition, *i.e.*, the copyright on which the *Steele I* copyright claim was based. *See* 646 F. Supp. 2d at 188. A sound recording copyright in *Steele I* would only have given plaintiffs there an alternate legal theory for challenging the same underlying conduct. *See Airframe*, 601 F.3d at 15 (the "inquiry does not turn on the labels the plaintiff attaches to its various claims . . .").

**C. Judicial Estoppel Is Inapplicable Because No Defendants Have Changed Their Position On Any Factual Issue**

It is difficult to understand Steele's judicial estoppel argument (*e.g.* Opp. at 2-6), in large part because Steele cannot identify a material fact issue on which any defendant allegedly changed its position.

In *Steele I*, the defendants' argument focused on the dispositive issue -- substantial similarity -- which resolved the copyright infringement issue without the need to dispute allegations of access and copying. *See* 646 F. Supp. at 188, 194. Where an accused infringer seeks judgment as a matter of law in its favor because there is no substantial similarity, this approach is standard practice. *See Johnson v. Gordon*, 409 F.3d 12, 17-18 (1st Cir. 2005)

(recognizing that "it is important to note that copying does not invariably constitute copyright infringement"). No defendant has changed its position on those issues.

Steele is really arguing that, by not challenging access and copying, defendants in *Steele I* in effect duped this Court into not addressing a claim of copyright liability based on alleged pre-production digital copying of the Steele Song. (*See Opp.* at 3.) In fact, however, this Court was not misled -- it did not address that issue because no such claim had been asserted, although it could have been.<sup>4</sup> In any event, if this Court in *Steele I* had made an error (it did not), the place to raise it was in *Steele I*, to this Court or to the First Circuit<sup>5</sup> -- nothing justified filing a separate lawsuit.

**D. This Court Should Grant The Requested Injunction**

The need for the requested injunction to prevent further harassing legal tactics is best illustrated by the efforts by Steele and his lawyer Christopher A.D. Hunt to demonize Anthony Rigicliano, defendants' expert in *Steele I* and now a defendant in *Steele III*. Mr. Rigicliano, a well-respected musicologist, was, of course, thoroughly "trashed" by plaintiffs in their unsuccessful effort to stave off summary judgment in *Steele I* (*see* Steele's Opposition To Defendants' Motion For Summary Judgment (*Steele I* Docket No. 101) at 3, 11, 14, 18), but now he is named as a defendant and accused of being at the core of a purported widespread conspiracy to copy the works of unknown artists. (*Steele III* Compl., ¶¶ 193-94.)

In response to those accusations, which are clearly "scandalous" within the meaning of that term as used in Rule 12(f) of the Federal Rules of Civil Procedure, Mr. Rigicliano has

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<sup>4</sup> Since pre-production digital copying was not cited in *Steele I* as a basis for copyright liability, this Court properly limited discovery to the issue of substantial similarity. *Steele I*, 607 F. Supp. 2d 258, 261, 265 (D. Mass. 2009) (J. Gorton).

<sup>5</sup> Indeed, Steele has squarely raised the digital copying issue in his Reply Brief in the First Circuit. (*See* Appellants' Reply Brief, dated April 20, 2010, at 22, 25.)

submitted a sworn statement categorically denying both the allegations against him and their factual predicates. (*See* Declaration of A. Ricigliano (Docket No. 9).) Yet the Opposition nowhere even addresses Mr. Ricigliano's adamant denials, much less tries to justify or provide a good faith basis for the allegations against him.<sup>6</sup>

**E. Sanctions Are Justified Here**

As the Moving Defendants have previously explained, it is readily apparent what has happened here. Steele, by his own account, filed a *pro se* lawsuit after futile efforts to retain a lawyer, and, indeed, this Court specifically urged Steele to hire one. (*Steele I*, March 31, 2009 Hearing Transcript, at 5-6 (*Steele I* Docket No. 86).) Thereafter, Steele had a full and fair hearing on the issues he had raised in his Complaint and Amended Complaint, advocating his position with lengthy submissions, including a report by a musicologist and statements from numerous alleged experts and lay observers. *See, e.g., Steele I*, 646 F. Supp. 2d at 190-92.

Only after his case was dismissed by this Court did Steele hire a lawyer. That lawyer has decided that he will not let the prior legal proceedings and rulings deter him from prosecuting (or re-prosecuting) on behalf of Steele whatever claims he and Steele choose to assert, as if they are free to “hit the restart button” and litigate on a “clean slate.” Not only is that approach misguided, it is also undeniably sanctionable conduct.

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<sup>6</sup> Many other of the *Steele III* allegations are equally not credible on their face, such as the allegation that pre-production digital copies of the Steele Song were made by each of 27 defendants, including many executive-level individuals whose only “connection” to the TBS Promo or the Bon Jovi Song is an association with the Red Sox. (*See, e.g., Steele III* Compl., ¶¶ 184-86.)

**CONCLUSION**

The Court should dismiss this lawsuit (*Steele III*) as to all defendants herein, and award the Moving Defendants their full defense costs, including attorneys' fees. Alternatively, the Court should stay this lawsuit, and enjoin Steele and Hunt from filing any new lawsuits or motions related to the Steele Song without first obtaining leave of Court to do so.

Dated: January 27, 2011  
Boston, Massachusetts

Respectfully submitted,

/s/ Matthew J. Matule

Matthew J. Matule (BBO #632075)  
Christopher G. Clark (BBO #663455)  
SKADDEN, ARPS, SLATE,  
MEAGHER & FLOM LLP  
One Beacon Street  
Boston, Massachusetts 02108  
(617) 573-4800  
mmatule@skadden.com  
cclark@skadden.com

**CERTIFICATE OF SERVICE**

I, Christopher G. Clark, 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 January 27, 2011.

Dated: January 27, 2011     /s/ Christopher G. Clark  
Christopher G. Clark

Kenneth A. Plevan (*admitted pro hac vice*)  
SKADDEN, ARPS, SLATE,  
MEAGHER & FLOM LLP  
Four Times Square  
New York, New York 10036  
(212) 735-3000  
kplevan@skadden.com

Counsel for Defendants  
Turner Broadcasting System, Inc. and  
Boston Red Sox Baseball Club Limited Partnership