United States Court of Appeals
For the First Circuit

No. 11-1674

SAMUEL BARTLEY STEELE

Plaintiff – Appellant

STEELE RECORDZ; BART STEELE PUBLISHING

Plaintiffs

v.

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

Defendants – Appellees

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

REPLY OF APPELLANT SAMUEL BARTLEY STEELE

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I. APPELLEES CONCEDE FACTS OF FRAUD ON THE COURT

Appellees' Response Brief ("Response") fails to dispute *any facts* showing Appellees' fraud on the court in *Steele* v. *TBS,* et al., No. 08-11727 (D.Mass.) ("*Steele I").* *Response* at 25-26.

Accordingly, Appellees concede those facts. *Blackwell* v. *Cole Taylor Bank*, 152 F.3d 666, 673 (7th Cir. 1998) (appellee failure to address appellant's argument not a "confession of error," however, "*silence about facts does constitute a waiver of the specific factual contentions* made by the opposing party in a brief filed earlier" (emphasis supplied), *citing Hardy* v. *City Optical Inc.*, 39 F.3d 765, 771 (7th Cir. 1994)); *Beazer East, Inc.* v *Mead Corp.,* 412 F.3d 429, 437, n.11 (3rd Cir. 2005) (appellee who fails to respond to an appellant's argument "waives, as a practical matter, anyway, any objections not obvious to the court to specific points urged by the [appellant]," *quoting Hardy,* 39 F.3d at 771); *Mironescu* v. *Costner,* 480 F.3d 664, 667, n.15 (4th Cir. 2007) (court declined to address argument not raised by appellee, noting that Fed.R.App.P. 28(b) "requires that appellees state their contentions and the reasons for them at the risk of abandonment of an argument no presented… Even appellees

waive arguments by failing to brief them") (citations and internal quotation marks omitted).

Steele has already raised Appellees' fraud and misconduct with this Court on *five* occasions, each time providing unchallenged facts, including Steele's four appeals (including Steele's Opening Brief ("Brief") here) and his Motion for Sanctions. Brief at 62, n.10, 64, n.12. Steele has also raised these facts repeatedly in other forums without challenge or dispute. *Id.*

Appellees' Response represents yet *another* missed – or ignored – opportunity to challenge the voluminous record facts of Appellees' fraud, initiated in *Steele I* and continuing even now.

II. APPELLEES CONCEDE FRAUD ON THE COURT AS A LEGAL MATTER

Appellees claim Steele offers no "record citation other than to his own arguments," and that Steele's "factual allegations fail to suggest fraud or misconduct of any kind…" Response at 25-26

First, Steele refers generally to prior briefs in each of his four appeals pending in this Court, so as to not waste pages spelling out - yet again – the numerous, established, and long-undisputed facts of Appellees' fraud on the court, *each and every*

one of which was supported by ample citation to the factual record. Brief at 62, n.10, 64, n.12.

Second, Appellees are incorrect insofar as Steele, in addition to citing to prior briefs and appendices, *does* cite to the instant record – generously so, in fact. Brief at 35-36; 57-68.

Third, Steele appeals the Rule 12(b)(6) dismissal of his Complaint, to which his Brief cites - which is part of the record - in which Steele alleges detailed facts of fraud on the court, and which the district court ostensibly *took as true,* and which therefore need no *additional citation* to the factual record. App-31-39.

Appellees' argument, instead, suggests three "reasons" why this Court should ignore their spate of fraud and misconduct. However, each proffered "reason" is grounded in Appellees' notion that Steele's fraud on the court claims are unsupported by the facts and/or do not rise to the appropriate level of required "egregiousness." Response at 25-26.

As to the facts – explained above - they don't merely *support* Steele's claims; they conclusively *prove* them. As to "egregiousness," Appellees impugn all courts in

the First Circuit by implying that Appellees' actions are somehow routine in this jurisdiction.

In sum, Appellees' inability to refute *a single fact* confirms - yet again – counsel-client fraud designed to obtain judgment in *Steele I*, which, in turn, has been exploited and, indeed, extended to subsequent proceedings.

Of immediate concern, fraud on the court has now infected *this appeal*: Appellees' Response fails not only to dispute their earlier improprieties, but introduces *new* misconduct into this appeal.

III. APPELLEES PERPETUATE THEIR FRAUD IN THIS APPEAL

Appellees' Response perpetuates nearly three years of unrelenting, undisputed, and unrectified fraud on the court by Appellees and their counsel throughout - and now co-appellees - Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates ("Skadden" or "Skadden Appellees"), initiated in Steele's original copyright infringement action, *Steele I*.

Steele set forth Appellees' fraud in meticulous detail, fully supported by citations to the factual record, in his filings with the district court below. App-103-105, 107-108, 109-114, 116-117. Those facts remain undisputed.

Appellees' Response has now revealed additional Appellee fraud during or since *Steele I*. Specifically, Appellees' Response misrepresents – and also *fabricates* - facts relating to the primary evidence at issue in *Steele I*: the Bon Jovi-baseball audiovisual from which copyright management information ("CMI") was removed ("Infringing Audiovisual") and which, because that same CMI-removal lies at the heart of this case, introduces fraud into this appeal.

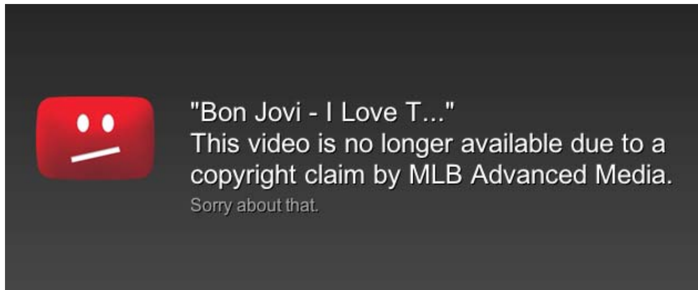
Steele has long believed – and put in writing – that more fraud arising from *Steele I* remained to be discovered. *See,* e.g., App-288-289, (Appeal No. 10-2173).

Unfortunately, Appellees' Response has, once again, confirmed Steele's belief.

a. Skadden Client MLBAM Deleted Original YouTube Copy of Infringing Audiovisual; Appellees Now Misdirect Court to YouTube Derivative Missing MLBAM Copyright Notice

The primary evidence at issue in this appeal – the audiovisual central to *Steele I* from which CMI was unlawfully removed ("Infringing Audiovisual") – was *deleted* from its original YouTube internet website ("YouTube Original") during litigation.

Specifically, the precise URL (Uniform Resource Locator), or "link" to the Infringing Audiovisual, i.e., YouTube Original, cited in the *Steele I* complaint *and defendants' motion to dismiss*, now displays the following:[1]



Nonetheless, there remains on YouTube a derivation of the YouTube Original ("YouTube Derivative"), which – for reasons unknown – was *not* deleted "due to a copyright claim by MLB Advanced Media."[2] *Appellees' Brief* at 19.

The YouTube Derivative is similar to the now-deleted YouTube Original but – as with the Altered Audiovisual Appellees filed in *Steele I* – it lacks MLBAM's copyright notice. *Id.* In concert, Appellees' Response cites the YouTube Derivative while entirely ignoring the since-deleted YouTube Original. Response at 19.

[1] http://www.youtube.com/watch?v=MIXNOGK5dg8

[2] Steele is unable to find evidence of a "copyright claim by MLB Advanced Media." The posted language may refer to an MLBAM "takedown notice" to YouTube pursuant to the DMCA, at 17 U.S.C. §512.

MLBAM's deletion of the *original* - while allowing the *derivative* to remain online - is certainly suspicious (more so during litigation), but it is perfectly consistent with the Skadden Appellees' concealment of MLBAM during *Steele I,* e.g., the Altered Audiovisual, MLBAM's willful default, and Skadden's false appearance for MLBAM. Brief at 25, 33-37, 60-62, etc.

If, as it appears, MLBAM (likely through counsel, Skadden) authorized deletion of the YouTube Original while allowing the derivative to remain, MLBAM was complicit in Appellees' spoliation of evidence. Conversely, if MLBAM has no 'connection' with the YouTube Derivative, it represents an additional *de-facto* violation – of unknown origin - of 17 U.S.C. § 1202 insofar as its CMI was removed without MLBAM's authority.

Appellees' failure to reference the YouTube Original was not an oversight: The Skadden Appellees themselves cited the URL to the original in their December 8, 2008 motion to dismiss. Appeal I App-66, ¶10, 132-133. In addition, the Skadden Appellees have represented MLBAM since *Steele I*, orchestrating their default, false appearance, and removal of their CMI from the court-filed Altered Audiovisual.

Accordingly, Appellees' bait-and-switch is textbook spoliation, if not fraud on the court. *Torres* v. *Lexington Insurance Co.*, 237 F.R.D. 533, 534 (D.Puerto Rico 2006) (plaintiff sanctioned for deleting websites contradicting her claims; "This is the type of unconscionable scheme the court seeks to deter."); *Arista Records LLC* v. *Usenet.com, Inc*., 608 F.Supp.2d 409, 433, 442-443 (S.D.N.Y. 2009) (defendants sanctioned for spoliation by failing to preserve images of their website).

i. The Steele I Complaint Cited the Original YouTube Copy

Steele I alleged copyright infringement via "temp tracking" by MLBAM's "full length" 2:38:90-sec. CMI-bearing "original MLB/TBS promo advertisement." Appeal I App-31, ¶¶15, 29; App-145, ¶27. Steele's Complaint provided the precise URL to the YouTube Original. Appeal I App-31, ¶29, Exhibit I - #5.

Steele's Complaint explained that the original "ad with its Bon Jovi soundtrack can currently be seen and heard on the internet… the [Y]ou[T]ube link to the original MLB/TBS promo advertisement [is] on the CD-R Ex. I- #5." *Id.* [3]

Steele's Complaint additionally provided instructions to find the YouTube Original by entering the terms "Bon Jovi MLB promo ad" into a Google search

[3] Exhibit I- #5 to the *Steele I* Complaint is a CD containing a text file of the URL/link to the YouTube Original.

("Google Search"). *Id*. On October 8, 2008 – the day Steele filed his Complaint – the first result of the Google Search was the YouTube Original.

Of course, a search three years later will yield different results because the Original YouTube Copy *has since been deleted*.

ii. The Skadden Appellees Also Cited the Original YouTube Copy in Their Steele I Motion to Dismiss

The Skadden Appellees – representing *Steele I* defendants - cited the YouTube Original in their December 8, 2008 Motion to Dismiss *Steele I*. Appeal I App-66, ¶10, 132-133 ("Exhibit 11 is a text file Steele named 'MLB_Bon Jovi_promo_video_link'"). Exhibit 11 to the Motion to Dismiss was the identical URL for the YouTube Original first cited in Steele's Complaint. *Id.*

Exhibit 11 was the Skadden Appellees' first and last citation to the YouTube Original, thereafter citing only to their court-filed CMI-lacking Altered Audiovisual. The Skadden Appellees, in fact, never again referenced or alluded to their client-in-default - MLBAM - until forced to respond to Steele's motion for entry of default as to MLBAM.

iii. Appellee Skadden's Client MLBAM Deleted the Original YouTube Copy During Litigation, Despite Steele's Explicit Written Notice to Steele I Defendants Five Months Before Filing Suit Warning Against Spoliation

On March 28, 2008, Appellees were put on notice of Steele's claim through a "discrepancy letter" to Appellees Bongiovi and Sambora from the American Society of Composers, Authors, and Publishers (ASCAP), from which Steele had requested assistance in pursuing his infringement claim. *Appeal I* App-145. On April 20, 2008 – still five and a half months before filing *Steele I* - Steele sent an evidentiary "preservation letter" to counsel for several prospective *Steele I* defendants, including Appellees Bongiovi and Sambora, demanding that they "preserve and protect any and all evidence that may be in any way relevant to this dispute… including electronic data." Appeal II App-666-667.

Steele requested that his "preservation letter" be forwarded to "all persons…with custodial responsibilities for any materials relevant to this dispute… failure to preserve such evidence may subject you to additional claims for spoliation of evidence." *Id.* *Arteria Property Pty Ltd.* v. *Universal Funding V.T.O., Inc.*, 2008 WL4513696 at *5 (D.N.J. 2008) (sanction of adverse inference warranted for deletion of defendants' website; websites no different than other electronic files with respect to

duty to preserve; defendants' control over website's content equals power to delete content; "no dispute" that website existed at time of filing and that defendants were required to maintain it; "*irrelevant" that third-party owned host server*).

Additionally, on September 29, 2008, Steele sent to likely defendants – TBS among them - a cease and desist letter, prior to filing his copyright infringement complaint on October 8, 2008. Appeal II App-420-421. This letter served as an additional notification and in any event unequivocally triggered Appellees' duty to preserve. *Arista Records LLC* v. *Usenet.com, Inc*., 608 F.Supp.2d 409, 431, 433 (S.D.N.Y. 2009) (cease and desist letter in copyright infringement dispute "triggers the duty to preserve evidence, even prior to the filing of litigation").

Appellees – thrice alerted to potential and actual litigation – had unambiguous notice and an unequivocal duty to *preserve* the YouTube Original, i.e., singularly relevant, probative, and – most of all – *inculpatory* evidence. Instead, Appellees took affirmative steps in the opposite direction, *removing* it from the world wide web. However, of more immediate concern to this appeal, Appellees' Brief seeks to *exploit* MLBAM's and Appellees' spoliation by misleading the Court away from the deleted original, and instead toward the materially-altered YouTube Derivative.

b. Appellees' Brief Attempts to Conceal – and *Exploit* – *Skadden Client MLBAM's Deletion of the Original YouTube Copy*

Appellees, in four labored pages, attempt - and fail - to defy a simple incontrovertible fact: MLBAM's CMI was *here*, now it's *gone*. Response at 16-20. Specifically, Appellees point to the YouTube Derivative to (1) advance their disingenuous 'one of many innocent versions' argument;[4] and (2) falsely attribute the basis of Steele's claims to the website of their own client, MLBAM, a/k/a MLB.com. *Id.*

Appellees' arguments are failed attempts to deflect attention from the *actual* source of Steele's claims, the now "AWOL" YouTube Original. Response at 16-20.

i. Appellees Attempt to Conceal MLBAM' Deletion of the Original YouTube Copy by Misdirecting the Court, Under False Pretenses, to the MLBAM-Owned Website, MLB.com

Appellees – having succeeded in their YouTube spoliation gambit in *Steele I* – seek now on appeal to both conceal *and further exploit it*. Specifically, in a relentless-as-to-be-conspicuous effort to divert attention from the unlawfully purged YouTube

[4] The Altered Audiovisual was never commercially released; rather it was litigation-driven, created and/or edited *exclusively* – and improperly – for court filings. Brief at 32.

Original, Appellees assert - from whole cloth - that Steele based his claims on "an MLB.com version" of the Infringing Audiovisual. Appellees' Brief at 17-18.

Disingenuously, Appellees assert: "a 'true and correct *copy*'…of the purported 'Infringing Audiovisual' []is located on the MLB.com website" (Response at 17 (emphasis original)); "a 'copy' of the MLB.com version used by Steele" (Id. at 18); "a 'true copy' *of the MLB.com version*" (Id. (emphasis original)); "a 'true copy' of the version used on the MLB.com website" (Id.); and, "Paragraph 27 of the Amended Complaint, referenced in the Brown Declarations… does not refer to an MLB.com version."[5] Id.

And where Appellees had built up a straw man, they were sure to knock him down: "The suggestion that the Defendants represented the Audiovisual they submitted to the Court to be a 'true copy' *of the MLB.com version* containing the MLBAM Copyright Notice is demonstrably false." Response at 18 (emphasis original).

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[5] In some circumstances, spoliation may be mitigated by a litigant's ability "to obtain comparable evidence by other reasonably available means." *U.S.* v. *Jackman*, 72 Fed.Appx. 862, 867 (3rd Cir. 2003) (unpublished) (citation omitted). Appellees make no such argument. Further, Appellees' spoliation was not 'garden variety,' but rather *compounded* by Appellees' Response in order to conceal and falsify evidence *in this Court during appellate proceedings*.

False or not, is irrelevant, as MLB.com is to the *Steele I* Complaint. Let there be absolutely no doubt: Steele's original and successive claims – and Brown's Declarations - were based explicitly and exclusively on the Infringing Audiovisual published at the YouTube Original website - *not* MLB.com.[6] Appeal I App-31, ¶29, 65, ¶2, 66, ¶10, 132-133, 145, ¶27, 174, 222, ¶2, 477, ¶10. Appellees' misleadingly vague implication notwithstanding, Steele never made such a "suggestion." Accordingly, Appellees' straw man cannot stand.

Additionally, Appellees attempt to distract from the YouTube Original using an amateurish ruse to abruptly 'change the subject' by tacking on, at the end of the paragraph, an entirely out-of-place footnote about Mr. Brown's departure from Skadden. Response at 19. This gimmick – no substitute for merit – simply draws more attention than it diverts.

Finally, Appellees' careless – or perhaps *too* careful - treatment of Attorney Brown's language used in his sworn declarations should not go unnoticed. Whereas Brown repeatedly submitted an ostensible "true *and correct* copy" of the Infringing

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[6] Appellees have steadfastly refused to provide Steele and the Courts with a true and correct copy of the Infringing Audiovisual in a physical medium, e.g., compact disc or other digital storage device.

Audiovisual (Appeal I App-65, 222, 477 (emphasis supplied))[7], by contrast Appellees' Response uses the truncated "true copy" in reference to Brown's audiovisual submissions, omitting – or rather *avoiding* – the thorny issue of being *correct*. Response at 18.

Conflictingly – and conclusively - Brown provided a link to the "full length" 2:38:90-sec. MLBAM "copy" *in the same Declaration* in which he submitted his inaccurate 2:46-sec. TBS "version" - both filed in support of the December 8, 2008 Motion to Dismiss.[8] Appeal I App-65, ¶2, 66, ¶10, 67-68, 122, 145, ¶27, 132-133; Add-15; Appeal I Reply at 11, n.6.

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[7] Brown's first submission of the Altered Audiovisual sworn to as "true and accurate,", claimed it to be a copy of the audiovisual described in Steele's Complaint, ¶15. Appeal I App-65. Steele's Complaint ¶15 alleges infringement by the "unauthorized derivative version of Bart's song…through a method called 'temp tracking.'" Appeal I App-27. At Complaint ¶29, entitled "Temp Tracking," Steele describes how, and by whom, his song was infringed through temp tracking, and cites to exhibits, a website link, and the Google Search keywords leading to the Infringing Audiovisual via Original YouTube website. Appeal I App-31.

[8] Appellees characterized the "full length" "Turner Promo" in their moving papers, to which Brown's audiovisual submission referred. Appeal I App-174, 174, n.4. Additionally, in his Declarations, Brown swore to be filing a copy of the audiovisual "alleged in paragraph 27 of the Amended Complaint," which Steele identified as the "*full length* promo." Appeal I App-145 *also* 145, ¶27, 222, ¶2, 477, ¶10 (emphasis supplied).

Finally, Appellees' grammatical use of quotation marks around "true copy" suggests attribution but provides none, and thus lends empty 'authority' to – or responsibility for – this phrase, when none is cited. Response at 18.

Appellees' purpose here in omitting the word "correct" from statements related to Brown's falsely sworn-to filings, should have been stated forthrightly; since it was not, it must be taken - at *bare minimum* – with a grain of salt.

ii. MLBAM'S Deletion of Original YouTube Copy Allowed Appellees to Falsely Represent Steele's Original Google Search as Leading to YouTube Derivative

Appellees appear to have coordinated their Response with MLBAM's deletion of the Original YouTube Copy in order exploit its deletion by misdirecting this Court to the YouTube Derivative, rather than the since-deleted Steele-cited Original YouTube Copy. Response at 19. Specifically, Appellees co-opt Steele's Google Search 'keywords' – 'Bon Jovi MLB promo ad' – then point to the results to support their argument that they did not improperly remove CMI. Response at 19.

Significantly, these keywords – first cited in the *Steele I* Complaint – *at one time* led to the Infringing Audiovisual; however, *now*, Steele's Google Search keywords lead to a *different* YouTube audiovisual, specifically the Derivative YouTube version, which

is identical to the Infringing Audiovisual except that it is about two seconds shorter.[9] Those two seconds - in the Infringing Audiovisual – are at the end, which displays the MLBAM logo and copyright notice. The Derivative YouTube version – without the final two seconds - displays the TBS logo but no MLBAM copyright notice.

Accordingly, with the Infringing Audiovisual deleted from the Original YouTube website, and the strikingly similar (though CMI-less) Derivative *now* appearing as the top result using Steele's Google Search terms, Appellees adopt Steele's language and play spoliation to their advantage:

> Steele identified the allegedly infringing video…on YouTube.com… That search leads to a version of the Audiovisual…which, like the version submitted by the Defendants, does *not* contain the MLBAM copyright notice. Response at 19 (emphasis original).

While audacious, Appellees' are correct: currently, Steele's Google Search *does not* lead to a "version" of the audiovisual with MLBAM's copyright notice - but only because *MLBAM deleted the Original YouTube Copy from the world wide we*b.

Though there remain many questions, this much is fact: using their Response Brief, Appellees and counsel (1) lured this Court away from *deleted*, *relevant* evidence,

[9] At http://www.google.com/, Google Search keywords 'Bon Jovi MLB promo ad' yields "Bon Jovi and the MLB – YouTube: 3 min - Aug 29, 2007, Uploaded by bigbling123, www.youtube.com/watch?v=hbWn204p6og."

specifically cited by both sides in *Steele I*, (2) misdirected the Court to different - *proxy* - evidence (3) which they falsely implied as Steele's by referring to his Google Search terms (4) whose duration is *shorter* than the work at issue (where the deleted website was *identical),* and (4) whose final frame *omits* CMI (where the deleted website *concludes with* CMI).

Appellees' spoliation and their Response represent a larger fraudulent design to conceal the MLBAM audiovisual at the center of this appeal, consistent with their prior concealment MLBAM itself in *Steele I* , and to point this Court to materially different – but 'similar enough' - evidence, which neither side has previously introduced or referenced, *and therefore is not part of the record*; and further misdirect the Court with a patently false assertion – in contradiction of their earlier citation in their *Steele I* motion to dismiss - attributing Steele's claims to their own client's evidence. *Reyes-Garcia* v. *Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 15-16 (1st Cir. 1996) ("Draconian consequences" appropriate for "major infractions… [and] prosecuting appeals in ways that deviate substantially from the rules.") (citation omitted).

c. Appellees' Ongoing Factual and Legal Misrepresentation of MLBAM

Despite heightened scrutiny of MLBAM-related filings – or perhaps *because* of it[10] - Appellees' Response inexplicably mischaracterizes the CMI at issue, and misidentifies MLBAM, even after Steele had put MLBAM on notice.[11] Response at 2-3.

Contrary to MLBAM's earlier disclosure to this Court[12], Appellees (identifying the CMI) define MLBAM as "Major League Baseball Advanced Media ('MLBAM')." Response at 2-3. Two pages later, Appellees' *own brief* provides direct, graphic, and conflicting evidence of Appellees' true nomenclature, i.e., MLBAM's copyright notice, identifying MLBAM as "MLB Advanced Media," *not* "Major League Baseball Advanced Media." Id. at 5.

Appellees are well-aware that "Major League Baseball Advanced Media" is, in fact, a legal non-entity, according to the Secretary of State of Delaware, MLBAM's

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[10] *See Steele* v. *Turner Broadcasting System, Inc.*, 746 F.Supp.2d 231, 236 (D.Mass 2010); MLBAM's First, Second, and Third Corporate Disclosure Statements (No. 10-2173) (1st Cir.); Appeal II Steele Opening Brief at 19-24, 53-54; Appeal II Steele Reply Brief at 18-20, 34-37.

[11] *See* Steele Letter to Sloan of March 25, 2011 at 2, attached as Exhibit A to MLBAM March 28, 2011 Third Corporate Disclosure Statement (No. 10-2173) (1st Cir.) ("MLBAM Third Disclosure").

[12] MLBAM Third Disclosure.

state of incorporation, where it is identified as "MLB Advanced Media, L.P." Appeal II App-280. Nor is there a "Major League Baseball Advanced Media" registered in New York, MLBAM's headquarters.

When MLBAM's doppelgänger first appeared *in this Court*, Steele objected directly to Skadden, prompting corrective action, specifically the Skadden Appellees' filing of MLBAM's *third* corporate disclosure statement. MLBAM's Second and Third Corporate Disclosure Statements (No. 10-2173) (1st Cir.).

Based on MLBAM's and Appellees' own definitions, therefore, Appellees' references to "MLBAM" lack legal verity insofar as they refer to a self-defined non-entity, and could be disregarded. In the context of their unending game of 'hide-and-seek,' such disregard is entirely appropriate and proportionate. *See Reyes-Garcia,* 82 F.3d at 15 ("rules are not mere annoyances, to be swatted aside like so many flies, but, rather…rules lie near the epicenter of the judicial process… patterns of repeated inattention warrant severe decrees").

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The Court may wonder, as has Steele: how did it come to this? We appear to be witnessing the natural – if tragic – evolution of unchecked power; the product of

failed deterrence. As Steele has argued, the inaction of the District Court to intervene and sanction Skadden – as punishment and prophylactic – was an invite for more misconduct, which Appellees accepted; to wit, party defaults and misidentification in *Steele III* and *IV*, and still more misconduct in this appeal.

Litigation is not a test of unchecked strength, nor a 'no holds barred' fight to the proverbial death; at least, it is not meant to be. Centuries of rule and procedure-based jurisprudence, from England's Magna Carta to our own Constitution and Bill of Rights and Federal Rules of Civil Procedure, were implemented, in large part, as a check to ensure that power does not trump fairness; that might does not equal right; to provide that disparate parties to legal disputes are nonetheless equals with respect to legal procedure.

IV. APPELLEES CONCEDE FACTS OF SPOLIATION

Appellees offer no defense against the settled law and established facts of their evidentiary spoliation. Brief at 27-30, 68-72, 77-79. Indeed, Appellees' Response does not even contain the word (spoliation). Accordingly, Appellees abandon the issue and concede the facts of spoliation. *Mironescu,* 480 F.3d at 677, n.15; *Blackwell*, 152 F.3d at 673.

The specific facts repeatedly met with 'silence' over the past two years of litigation (and included in the underlying Amended Complaint), thus conceded, include filing false evidence to conceal MLBAM; failing to correct that evidence; willfully defaulting MLBAM; filing a false appearance to conceal MLBAM's default; and, recently uncovered, MLBAM's deletion of the Infringing Audiovisual formerly posted on YouTube, which Steele precisely cited from the outset in his *Steel I* Complaint. Brief at 27-35, 77-79. Such conduct far exceeds - though perfectly satisfies - the elements of spoliation recognized by this Court. *Booker* v. *Mass. Dept. of Public Health*, 612 F.3d 34, 45-46 (1st Cir. 2010).

Appellees' silence is telling. *See SEC* v. *Tambone*, 597 F.3d 436, 450 (1st Cir. 2010) (where appellate briefs are "devoid…of any developed argumentation… silence speaks volumes"). Worse than silence, Appellees' failure to *correct the record* is conclusive as to spoliation and underscores its willfulness. Brief at 30-31. *See Anderson* v. *Cryovac, Inc.*, 862 F.2d 910, 928 (1st Cir. 1988).

Accordingly, Steele has shown that Appellees' spoliation - the CMI removal - substantially interfered with Steele's ability to fairly litigate his claim in *Steele I* and beyond, and shows Steele's injury for standing purposes. *Booker*, 612 F.3d at 45-46.

V. APPELLEES CONCEDE FACTS THAT ALTERED AUDIOVISUAL AFFECTED PROBATIVE AND SUBSTANTIAL SIMILARITY, INJURING STEELE

Appellees' spoliation altered material elements bearing on any probative and substantial similarity copyright infringement analysis in *Steele I*. Brief at 27-30, 77-79; App-24-26; 112-113. Specifically, the works' *identical length* was altered by Appellees' CMI removal, Brief at 77-79, and the Infringing Audiovisual's similar "fade" ending was altered, along with its now 'clipped' soundtrack. Brief at 77-79; App-112-113. *Coquico, Inc.* v. *Rodriguez-Miranda*, 562 F.3d 62, 69 (1st Cir. 2009) (as to length as linear dimension); *Three Boys Music* v. *Michael Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (as to fade ending).

Appellees, as with spoliation generally, are also silent as to Steele's facts and argument regarding the effect of their spoliation of the Infringing Audiovisual on probative and substantial similarity in *Steele I*. Brief at 27-30, 77-79; App-112-113; Response at 10-26. Again, where Appellees fail to address Steele's facts, they are conceded. *Mironescu*, 480 F.3d at 677, n.15; *see also Blackwell*, above, 152 F.3d at 673; *Beazer East,* 412 F.3d at 437 n. 11.

Nor did the district court address or adjudicate the effect of the Altered Audiovisual on its own analysis. Brief at 61-62, 77-79. The district the court, in fact, departed from First Circuit precedent in foregoing probative similarity analysis altogether[13], and denying Steele any and all discovery – "access and copying" – of evidence of probative similarity, despite the works were *identical* length, defendants admitted *access* to Steele's work, and failure to deny using Steele's work as an unlawful 'temp track.' *Id*.; Appeal I App-424, ¶20; App-30-31, respectively.

Steele's facts as to injury caused by CMI removal which affected – or *should have* affected - the district court's probative and substantial similarity analyses in *Steele I*, are conceded. *Mironescu*, 480 F.3d at 677, n.15; *See also U.S.* v. *Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.") (citation and internal quotation marks omitted); Brief at 61-62, 77-79.

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[13] *Yankee Candle Company, Inc.* v. *Bridgewater Candle Company, LLC*, 259 F.3d 25, 33 (1st Cit. 2001) ("This Court conducts a two-part test [i.e., probative and substantial similarity,] to determine if illicit copying has occurred.")

VI. APPELEES' REMAINING 'ARGUMENTS'

Steele responds to Appellees' "Arguments" as presented in their Response:

a. *Standing: Fraud on the Court Has "No Conceivable Bearing" on Injury(?)*

Appellees assert Steele suffered no injury from CMI removal because (1) "MLBAM's asserted *status*…had no conceivable bearing on…substantial similarity;" and (2) "there was no possibility…[the Infringing Audiovisual] could mislead anyone about MLBAM's *status*." Response at 10-12 (emphasis supplied).

At this late stage, Appellees' euphemisms are glaring. As candor is preferred, Steele shall – where Appellees failed - "call a spade a spade:"[14] MLBAM's "status" was *willful default* (concealed by false appearance by proxy, spoliated evidence, misrepresentations: in sum, fraud on the court). The injury, i.e., "conceivable bearing," arising from such brazen abuse of the judiciary has been briefed at length (and remains unchallenged). Brief at 23-35, 57-68, 71; Appeal I Steele Opening Brief at 8-19; Appeal II Steele Reply at 7-10, 16-20, 25-31.

As to "no possibility" of being 'misled,' one need look no further than page 24 of the Response for *real evidence* to the contrary: the district court, referring to

[14] *Anderson*, 862 F.2d at 927.

MLBAM's audiovisual as the "TBS Promo," apparently took Mr. Sloan's bait – i.e., "the video…we'll call the Turner promo" - hook, line, and sinker. March 31, 2009 Hearing on Motions to Dismiss. Appeal I App-377, 395; Response at 24.

Moreover, Appellees narrow reading of Steele's claims leaves the following injuries yielded to Steele *in fact*: MLBAM's *default* (Brief at 32-35, 61, 64); restricted *discovery* (*Id*. at 25-26, 60-62, 79); *spoliation* (detailed above, *Id*. at 68-72); probative-substantial similarity (above, *Id*. at 77-79); and fraud on the court (above, Id. at 57-68, 83-85). *Blackwell*, 152 F.3d at 673.

Such range and variety of facts – mutely conceded by Appellees - provides sufficient plausible injury for Steele to state a claim. *Watterson* v. *Page*, 987 F.2d 1, 3 (1st Cir. 1993) (doubt resolves in plaintiff's favor on motion to dismiss).

b. Standing: Appellees Concede No Authority Supports Their "Legal Interest" Theory

Appellees concede "there do not appear to be any cases specifically addressing the scope to bring a Section 1202 claim." Response at 14. Such admitted novelty in Steele's claim disfavors dismissal. *Branch* v. *F.D.I.C.*, 825 F.Supp. 384, 397-98 (D.Mass. 1993).

Yet despite lacking any § 1202 standing authority, Appellees float a trial balloon – already rejected elsewhere for its lack of "textual support" and its narrow reading of the DMCA - over the First Circuit, *IQ Group:*[15] "Recently, the Third Circuit rejected the *I.Q. Group* court's interpretation of Section 1202 and the term CMI… A growing number of district courts have concluded that CMI should be construed more broadly." *Brown v. Stroud*, Slip Copy, 2011 WL 2600661, at *4 (N.D.Cal. 2011), *citing Murphy* v. *Millennium Radio Group*, --- F.3d ---, 2011 WL 2315128 (3rd Cir. June 14, 2011); *see also* App-102, n.2.

Moreover, the unambiguous language of the statute gives Steele standing as "*Any* person injured by a violation of section…1202" resulting from unlawful removal of "*any* copyright management information… in connection with copies." 17 U.S.C. §§ 1202 (b), (c), 1203 (a) (emphasis supplied).

Lacking statutory *and* judicial authority, Appellees beg for a restrictive reading of § 1202, that plaintiffs "should" be required to show legal interest in CMI to pursue

[15] *IQ Group Ltd.* v. *Wiesner Publishing LLC*, 409 F.Supp.2d 587, 597 (D.N.J. 2006) (court examined the legislative history of the DMCA and "other extrinsic sources," to conclude that § 1202 "should be construed to protect copyright management performed by the technological measures of automated systems"); Response at 13.

a claim under the DMCA. Response at 15. Granting Appellees' wish would create precedent (1) contrary to plain statutory language; (2) contrary to this Court's "low bar with respect to constitutional standing under the DMCA" (*Bose BV* v. *Zavala*, 2010 WL 152072 at *2 (D.Mass. 2010), *citing CoxCom, Inc*. v. *Chaffee*, 536 F.3d 101, 110 (1st Cir. 2008)); and (3) contrary to clear policy interests behind the DMCA. *Murphy*, --- F.3d ---, 2011 WL 2315128, at *4 ("it is undisputed that the DMCA was intended to expand – in some cases [] significantly – the rights of copyright owners").

Accordingly, whereas the clear and unambiguous language of the statute grants Steele – as *any* aggrieved person – standing to bring a claim under § 1202, Appellees' "legal interest" argument with respect to standing under the DMCA should be rejected.[16]

[16] In district court – and despite notification, again in *this Court* - Appellees misrepresented § 1203 (a) as providing standing to "*a* 'person injured by a violation…," whereas the law specifies "*A*ny person…" Steele notified Appellees that their truncated transcription – replacing "any" with "a" - was material, given the *singular* nature of "a" - and the *expansive* reach of "any" - especially where Appellees sought – and seek - to deny Steele standing by *exclusion*. Response at 14; App-82, 107, n.4.

c. Here Today, Gone Tomorrow: The Undisputed Facts of CMI Removal or Alteration

Appellees' misrepresentations to this Court are addressed in Section III, above. A noxious potpourri of straw men, red herrings, and deceit, Appellees' 'argument' might as well have been labeled 'Achilles Heel,' as it serves only to underscore their desperation. Response at 16-20. Appellees cannot – despite their reckless attempts – escape the singular un-escapable fact: CMI is unquestionably *present* on the "copy" cited in the *Steele I* Complaint and Brown Declaration, yet undeniably *absent* from the purported "copy" submitted by Mr. Brown.

That CMI is now also missing from the present day results of Steele's original Google Search terms, which formerly yielded the CMI-containing Copy – solely as a result of MLBAM's deletion of the Original YouTube Copy – represents the same sort of misconduct in a different context, YouTube: CMI was there; now it's gone.

More revealing is that it was only *because Appellees attempted to exploit this fact* that Steele discovered MLBAM had deleted his originally-cited YouTube Copy.

d. Scienter

The collective acts of Appellees in concealing the default and identity of MLBAM and others – part of the jaw-dropping antics of Skadden since late 2008 –

have created a fact record which far exceeds the plausibility standard for scienter in a Section 1202 claim at the motion to dismiss stage. *Agence France Presse* v. *Morel*, 769 F.Supp.2d 295, 306 (S.D.N.Y. 2011) ("Courts must be 'lenient in allowing scienter issues… to survive motions to dismiss.'" (quotation omitted)); *BanxCorp*. v. *Costco Wholesale Corp*., 723 F.Supp.2d 596, 610 (S.D.N.Y. 2010) ("'scienter issues…are appropriate for resolution by the trier of fact' when omissions had occurred 'over a period of years'" (citation omitted)).

Where doubt resolves in Steele's favor, and where there is *no doubt*, Steele was – is – entitled to an answer to his Complaint. *Watterson* v. *Page*, 987 F.2d 1, 3 (1st Cir. 1993)

e. Claim Preclusion

Appellees defend the district court's decision, arguing that "Steele cites no legal authority" for his supposed "narrow interpretation of claim preclusion," Response at 22. According to Appellees, Steele's "narrow interpretation" is that (1) mutually exclusive facts cannot legally or logically form the same nucleus of operative facts giving rise to preclusion; and that (2) Steele cannot legally, ethically, or morally be precluded for his "failure" to uncover Appellees' crimes *during Steele I*, which were

concealed not just from Steele, but from the district court as well. The district court was unable to detect Appellees' elaborate scheme, but the *pro se* Steele "could have?" *Id*.

And what if Steele "could have," but did not? Appellees' successful implementation of their fraud excuses it? In other words, it's only a crime if you get caught?

Beyond what Steele "could have" done is the more fundamental question of whether fraud on the court should *ever* be tolerated in a civilized society; or, as Appellees imply, whether it should be *rewarded*, with preclusive effect, where it is *successfully implemented*. Again, what has this litigation come to – what deranged logic is behind seeking this Court's imprimatur for Appellees' illegal conduct (when successful)?

With respect, Appellees go too far; that they even argue the point is offensive.

Steele needs no citation because, as this Court knows, such an unprecedented – and shameless – argument has never been adjudicated (if even put forth – Appellees cite no precedent because none exists - thankfully); put another way, Steele hereby cites to *every claim preclusion case ever published*, each of which supports the basic –

implicit - principles of not just preclusion, but attorney conduct, which flatly reject Appellees' position.

f. Issue Preclusion

Appellees' issue preclusion argument fails its most basic duty, that is, to correctly identify the issue. Appellees boot-strap *copyright infringement*, 17 U.S.C. § 106, into Steele's non-copyright, *post-infringement* claim under the DMCA, i.e., 17 U.S.C. § 1202. Response at 23-24; App-8, 31-39.

In fact, the *only* issue at stake in this appeal, i.e., Appellees' unlawful removal of CMI, was discovered by Steele in April, 2010 during appellate briefing of No. 09-2571,[17] nearly six months after *Steele I* final judgment.[18]

Accordingly, as a matter of fact, chronology, and common sense, this *issue* was not – could not have been - adjudicated by the lower court *on a date preceding its discovery*. *Ashcroft* v. *Iqbal*, 556 U.S. __, 129 S.Ct. 1937, 1949 (2009) (plausibility determination requires "reviewing court to draw on its judicial experience and common sense").

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[17] Appeal I Steele Reply Brief at 8-19.

[18] *Steele* v. *Turner Broadcasting System, Inc.*, 2009 WL 3448698 (D.Mass., October 13, 2009) (court denies Steele's motion to reconsider).

All four elements of issue preclusion fail to apply, since the present issue of CMI removal was (1) unknown by Steele and the Court during the *Steele I* proceeding, therefore (2) not litigated, (3) not adjudicated, and (4) not essential to judgment on the merits. *Global NAPs, Inc.* v. *Verizon New England, Inc.*, 603 F.3d 71, 95 (1st Cir. 2010).

Appellees, fully cognizant of their position, deploy another red herring: the "predicate" copyright infringement proposition: "Steele is precluded from relitigating [copyright infringement]… Steele cannot establish…an actual 'infringement' of *his* copyright, as is required to sustain a claim under Section 1202." Response at 23 (emphasis supplied); App-89.

Once again, the law clearly states otherwise: Section 1202 has no such "require[ment]" to "establish…actual 'infringement' of [one's] copyright." *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. ---, 129 S.Ct. 1436, 1443 (2009) (statutory claim analysis must "begin, as always, with the text of the statute"); *Murphy* v. *Millennium Radio Group LLC,* -- F.3d --, 2011 WL 2315128, at *4 (3rd Cir. 2011) ("[Section 1202] simply establishes a cause of action for the removal of (among other things) the name of the author of a work when it has been 'conveyed in connection with copies'

of the work."); *Med. Broadcasting Co.* v. *Flaiz*, 2003 WL 22838094, at *3 (E.D.Pa. 2003) (unpublished) ("claims under the DMCA…are simply not copyright claims and are separate and distinct from the latter"); *I.M.S. Inquiry Management Systems, Ltd.* v. *Berkshire Information Systems, Inc.*, 307 F.Supp.2d 521, 530, n.9 (S.D.N.Y. 2004) ("[§] 1202 'occup[ies] a niche distinct from copyright infringement, albeit codified in the same title of the United States Code"), *quoting* 3 M. & D. Nimmer, *Nimmer on Copyright*, § 12A. 18[B] (2003); App-116, n.10.

Appellees' copyright infringement "predicate" argument fails, as it must; otherwise, similar to Appellees' claim preclusion argument, a violation of the law – if successful – would reward the lawbreaker: an unlawfully, but successfully concealed infringement would preclude inquiry into the unlawful concealment. Surely § 1202 was not enacted to *protect* copyright infringers, whether they successfully conceal their infringement or not.

g. "Fraud-on-the-Court"

Of note, Appellees' "Fraud-on-the-Court" section is not mentioned in their Summary of Argument (Response at 9). Nonetheless, though it offers – nor refutes – any facts, Appellees' Response *does* raise an eyebrow as to its variable usage of "fraud

on the court" (four times) and "fraud-on-the-court" (five times). Response at 25-26. A Westlaw search of First Circuit "fraud on the court" cases reveals *none* which uses Appellees' hyphen-laden construction; and the hyphenated fraud-on-the-court is further variably placed in quotation marks (four times), though never given attribution. Where such distinctions are intentional, but unclear, Appellees once again leave us in the dark.

As to its substance, the hyphenated "fraud-on-the-court" delivers that section's – and Appellees' - final sentiment and crowning falsehood: "[Steele's] 'fraud-on-the-court' allegations are unavailing and were *properly rejected* by the district court." Response at 26 (emphasis supplied). In reality, the district court *did not even mention* "fraud on the court," much less adjudicate it, let alone *reject* it. Appellees' false conclusion *necessarily* casts doubt upon its argument and its proponents.

Irrespective of Appellees' additional misrepresentations, as to all material facts actually bearing on fraud on the court: they point only to Appellees; they are overwhelming, undisputed, and *true*; they are hard won, by Steele, who has – despite Appellees' open invitation to the gutter – refused to bow.

Appellees cite to Steele's briefs because they have no facts of their own; and Steele cites to "his own arguments" for efficiency, as they are well-documented, fact-bound, and in the end, conceded. Brief at 62, n.10, 69, ns. 18, 19; Response at 25.

h. Rule 11 Sanctions

In light of the facts, issues, and principles implicated in this appeal, as briefed by Steele, there is little to add with respect to the district court's Rule 11 admonishment. If the undisputed facts are not self-evident proof of the backwardness of the district court's admonishment, there is, respectfully, nothing left to argue.

VII. CONCLUSION

WHEREFORE, Steele respectfully requests that this Honorable Court reverse the District Court's Order dismissing this case and provide the relief sought by Steele in his Opening Brief.

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CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that on September 30, 2011, I caused this Reply of Appellant Samuel Bartley Steele, filed through the ECF system, to be served electronically by the Notice of Docket Activity upon the ECF filer listed below.

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United States Court of Appeals
For the First Circuit

No. 11-1674

SAMUEL BARTLEY STEELE

Plaintiff – Appellant

STEELE RECORDZ; BART STEELE PUBLISHING

Plaintiffs

v.

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

Defendants – Appellees

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

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
FOR APPELLANT'S REPLY

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This Brief complies with the type-volume limitations of Fed.R.App.32(a)(7)(B) because this brief contains 6,841 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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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 September 30, 2011.

Dated: September 30, 2011

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