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

PETITION FOR PANEL REHEARING AND REHEARING EN BANC OF APPELLANT SAMUEL BARTLEY STEELE

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STATEMENT PURSUANT TO FED. R. APP. P. 35(b)

The Panel's February 10, 2012 Judgment ("Judgment") conflicts with Supreme Court and First Circuit holdings on the fundamental question of how to uphold the integrity of the judicial system when faced with fraud on the court. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Aoude v. Mobil Oil Corp., 892 F.2d 1115 (1st Cir. 1989).

1. The Judgment Conflicts With Supreme Court Precedent

The Judgment conflicts with the United States Supreme Court's holding that a circuit court, as a public institution charged with safeguarding the public, has "both the duty and the power" to defend the integrity of the judicial system when confronted with undisputed evidence of fraud on the court. Hazel-Atlas Glass Co. 322 U.S. at 249-250.

The Judgment's silence on the following facts of record - each undisputed, meticulously-documented, and conceded by defendants' silence, and which the district court declined to address – is in direct conflict with the Court's duty to requite "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the

good order of society," Hazel-Atlas Glass 322 U.S. at 247 (quoted in Aoude, 892 F.2d at 1119):

(1) Defendants filed fraudulent evidence, under oath, repeatedly, to wit a false version of the evidentiary centerpiece – the infringing work - of plaintiff's original copyright infringement case (Appeal No. 09-2571); the evidence was intentionally and materially altered, e.g., the primary defendant's copyright notice, name, and logo were deleted, its identical length (to plaintiff's work) was changed, synchronization offset, and protectible expression deleted; the district court relied on the altered evidence in allowing summary judgment; defendants' counsel allowed inclusion of the false evidence in the joint appendix to that appeal, No. 09-2571; duly notified, defendants have yet to explain the alterations or correct the record (defendants now term the altered evidence a "version," whereas defendants' original sworn declarations to the court stated that it was a "true and correct copy" of the infringing work);

(2) The primary defendant – the claimed copyright owner of the infringing work – willfully and surreptitiously defaulted, unbeknownst to the court or plaintiff;

(3) The primary defendant's willful default was concealed by the removal of its name, logo, and copyright notice from the false version of infringing work filed with the court as referenced above;[1]

(4) The primary defendant's willful default was further concealed by defendants' misattributing authorship of the infringing work to other defendants and by misrepresenting the legal nature and ownership of the infringing work under the copyright statute;

(5) The primary defendant's willful default was further concealed by the voluntary appearance of an unrelated, unserved, similarly-named entity, which falsely stated that *it* was the primary defendant; the appearing defendant had evaded service – forbidding the U.S. Marshall to enter its offices – the same day that the same U.S.

[1] The unauthorized removal of the primary defendant's name and copyright notice – i.e., its Copyright Management Information ("CMI") – as defined in the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §§ 1202, from the infringing work gave rise to plaintiff's cause of action in the case underlying this appeal.

Marshall successfully served the primary defendant;[2]

(6) During litigation the primary defendant deleted its infringing work from the website to which both plaintiff and defendants had, in their pleadings, cited to as the published source of the infringing work;

(7) During litigation a materially altered version of the infringing work, from which the primary defendant's name, logo, and copyright notice had been removed, was subsequently published on the same website;

(8) Defendants – in their Response Brief in this appeal – directed this Court to the above website, which now displays the altered version, to support defendants' false assertions regarding the identity, content, and origin of the primary defendant's work;

(9) The primary defendant filed contradictory corporate disclosure statements in related district court cases and their subsequent appeals (Nos. 10-2173 and 11-

[2] A second defendant also willfully defaulted in plaintiff's original copyright case, using the same modus operandi to conceal its default, i.e., having an unserved similarly named entity file an appearance falsely claiming to be the defaulting defendant. That issue is addressed in a related appeal (No. 10-2173). A third defendant similarly defaulted in a case underlying a related appeal (No. 11-1675).

1675) stating, for example, that it was at once "owned by" a corporation and that it had "no parent corporation."[3]

The above lists only a portion of defendants' acts of fraud in the three related cases and four appeals litigated over the past three-plus years in First Circuit courts, namely those acts particularly pertinent to this appeal. The record and briefs in this and Plaintiffs' three other related appeals (09-2571, 10-2173, and 11-1675) contain the entire compendium of defendants' (known) fraudulent acts.

In Hazel-Atlas Glass, the Supreme Court found it significant that the accuracy of the fraudulent documents "indisputedly show[ing] fraud on the Patent Office and Circuit Court" was never questioned by the responsible party, nor did they claim to have evidence to disprove the facts as shown by the documents. Id., at 249, n. 5.

The Judgment here, by contrast, made no mention of, much less adjudicates, defendants' unquestioned fraudulent documents and actions "indisputedly" showing

[3] Another defendant in the case underlying Appeal No. 11-1675, after getting caught willfully defaulting (see note 2, above), filed three conflicting corporate disclosure statements, as well as several fraudulent filings, while rearranging and rebranding its corporate structure, during litigation, in direct conflict with its corporate disclosure statements and without amending its disclosure statements.

defendants' years of fraud on both the district court and this Court. The Judgment's silence conflicts with the First Circuit's duty pursuant to Hazel-Atlas Glass.

Neither the district court nor this Court has adjudicated, addressed, or discussed the ascendant issue in this and plaintiff's related cases: defendants' unchallenged fraud on the court. Plaintiff respectfully requests rehearing in order for this Court's review to conform to Hazel-Atlas Glass, where the Supreme Court stated in language equally applicable here that "[e]very element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments." Id. at 245.

2. The Judgment Conflicts With First Circuit Precedent

The First Circuit followed Hazel-Atlas Glass in Aoude and expounded upon the danger posed by unmitigated and unaddressed fraud on the court to the "very fundament of the judicial system." Aoude, 892 F.2d at 1119. The First Circuit, noting Hazel-Atlas Glass's warning of fostering "impotency" in the courts, found it "surpassingly difficult to conceive of a more appropriate use of a court's inherent power than to protect the sanctity of the judicial process – to combat those who

would dare to practice unmitigated fraud upon the court itself." Aoude, 892 F.2d at 1119.

The First Circuit's decision in Aoude defined fraud on the court, set a "clear and convincing" standard for showing fraud on the court, and held that when considering the appropriate punishment for fraud on the court, a court should "balance the policy favoring adjudication on the merits with competing policies such as the need to maintain institutional integrity and the desirability of deterring future misconduct. Aoude, 892 F.2d at 1118.

While the First Circuit, unlike the Supreme Court in Hazel-Atlas Glass, did not explicitly hold that courts have "the duty" – in addition to "the power" – to respond to fraud on the court, it was not necessary: the duty is implied by Aoude's holding, its discussion of the court's perforce authority to defend itself against fraud, and Aoude's heavy citation to Hazel-Atlas Glass. More fundamentally, it could not be otherwise: A court has neither the option nor discretion to surrender itself – and the public – to "those who would dare to practice unmitigated fraud upon the court itself." Aoude, 892 F.2d at 1119 (citing Hazel-Atlas Glass, 322 U.S. at 246).

Without a self-imposed duty to act, a court could, by inaction, be complicit in its own defrauding.

Here, presented with a "compendious" district court record, in which the facts of fraud on the court "were undisputed" and based "largely on" defendants' "own admissions[,] no more was required" for the Court to act; it did not. Aoude, 892 F.2d at 1120. The Judgment forgoes plaintiff's right to just and fair proceedings and neglects the court's self-defense and, therefore, the defense of those the court is charged with safeguarding, eroding public trust in the integrity of the judicial system.

3. This Appeal Involves Questions of Exceptional Importance

The importance of the integrity of the judicial system cannot be overstated. All other questions are, *a priori*, secondary to a court's ability to effectively adjudicate those questions. The Judgment's silence as to defendants' uncontested and unmitigated fraud on the court overlooks this singularly important question, fundamental to the "preservation of the integrity of the judicial process." Hazel-Atlas Glass, 322 U.S. at 246.

The dangers of not answering this question are far from theoretical. Defendants' fraud – unaddressed by any court in the past three years – has multiplied,

as has the damage it has inflicted. Specifically, the district court's failure to address defendants' fraud when first raised – giving the appearance of a lack of "concern[] about deterrence" and its failure to "send a message, loud and clear," Aoude, 892 F.2d at 1122 – spawned defendants' additional fraud in subsequent proceedings in the district court, Massachusetts Superior Court, and this court, including in this appeal. The Judgment's endorsement-by-omission of the district court's inaction, an implicit green light for additional fraud, sends a disturbing message to would-be perpetrators: the First Circuit selectively countenances fraud on the court.

OVERLOOKED AND MISAPPREHENDED FACTS AND LAW[4]

1. Fraud on the Court

The Judgment overlooks undisputed facts supported by a voluminous record – primarily comprised of defendants' own documents and statements – showing defendants' multi-year, multi-jurisdictional, and multi-faceted scheme of false filings, misrepresentations, and concealment in this court, the district court, and the

[4] The Judgment states that this appeal arose from the district court's dismissal of plaintiff's "claims of copyright infringement." Judgment at 1. This is incorrect. Plaintiff appeals the dismissal of his action "for the removal or alteration of Copyright Management Information ("CMI") pursuant to 17 U.S.C. §1202."

Massachusetts Superior Court, which show exceptionally sophisticated fraud on the court of unprecedented magnitude.

The Judgment misapprehends the Court's duty to respond forcefully – as punishment and deterrence, but no less so to protect plaintiff's right to fair proceedings - to the three-plus years of defendants' continuous defilement of the judicial process in the First Circuit.

2. Standing

The Judgment endorses the district court's reasoning as to standing, which is illogical, contrary to basic notions of fairness, and undermines the purpose and public policy of the judicial system, conflicts with First Circuit precedent, overlooks the plain language of the DMCA, and .

The district court's outcome determinative logic precludes standing for injury sustained during litigation based solely on the outcome of the litigation. The district court determined that there was no effort to conceal infringement *during* the litigation based on its ruling at the *end* of the litigation, i.e., that there was no infringement.

The Judgment's approval of this logic sets a new and troubling precedent: only those who are unsuccessful at concealing infringement during litigation – i.e., those

who ultimately lose the infringement case - face liability under the DMCA, while those who succeed at concealing infringement (the exact wrong §1202 seeks to redress) – and defeat an infringement claim – are absolved of their concealment by virtue of having done so successfully. The Judgment sanctions a rule whereby a fraudulently obtained judgment as to infringement forbids inquiry into its illegal procurement, i.e., through concealment of the infringement in violation of §1202.

The Judgment overlooks the undisputed facts of defendants' fraud on the court – part of which was defendants' unauthorized removal of CMI in violation of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §§1202, 1203 – which, in corrupting in their entirety the proceedings in plaintiff's original copyright case (Appeal No. 09-2571) substantially interfered with plaintiff's "ability fully and fairly to prepare for, and proceed at, trial." Aguiar-Carrasquillo v. Agosto-Alicea, 445 F.3d 19, 28 (1st Cir. 2006). Defendants' fraud on the court injured plaintiff, continues to injure plaintiff, and allows for standing under the DMCA.

In any event, defendants' fraud was "knowing and deliberate" misconduct, and therefore legally *presumed* to have interfered with plaintiff's ability to fairly prepare his case. Id. Accordingly, the Panel erred insofar as plaintiff was injured –

both in fact and by legal presumption – by defendants' misconduct, including their CMI removal in violation of §1202.

The Judgment misapprehends plaintiff's burden in showing standing under the DMCA, particularly at the motion to dismiss stage. The Judgment departs from First Circuit precedent whereby, to establish DMCA – and constitutional – standing, plaintiff "need only show that they were directly affected by the conduct complained of, and therefore have a personal stake in the suit." CoxCom, Inc. v. Chaffee, 536 F.3d 101, 107 (1st Cir. 2008).[5] Plaintiff was unquestionably affected by the "conduct complained of," i.e., defendants' fraudulent scheme in his original copyright case, which included defendants' removal of CMI from the infringing work to conceal infringement during copyright litigation in direct violation of §1202, as well as to conceal the primary defendant's willful default,.

The Judgment misapprehends the DMCA's plain language providing a civil cause of action to "any person injured" by removal of "any copyright management information." 17 U.S.C. §§1202(b); 1203(a). The Judgment further overlooks

[5] As explained by the District Court, "CoxCom, Inc. v. Chaffee sets a relatively low bar with respect to constitutional standing under the DMCA." Bose BV v. Zavala, 2010 WL 152072 at *2 (D.Mass. 2010) (unpublished).

Supreme Court and First Circuit precedent that, at the pleadings stage, plaintiff's burden to demonstrate standing is less onerous than at summary judgment. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Adams v. Watson, 10 F.3d 915, 921-922 (1st Cir. 1993).

Finally, the Judgment overlooks the fact that defendants' removal of CMI from the infringing work altered elements that were part of the district court's substantial similarity analysis – which ultimately led to summary judgment - including the infringing work's otherwise *identical* length and "fade" ending, as well as cutting short the infringing work's soundtrack. Plaintiff was therefore further injured as a result of defendants' alterations insofar as his infringement case was dismissed based on the district court's substantial similarity analysis between plaintiff's work and defendants' *version* of the infringing work that defendants had illegally rendered less similar than the actual infringing work.[6]

[6] The Panel's erroneous affirmance of the district court's departure from First Circuit precedent requiring a two-part test (probative and substantial similarity) – the district court conducted only a substantial similarity analysis - is the subject of plaintiff's petition for rehearing of Appeal No. 09-2571.

4. Claim and Issue Preclusion

The Judgment misapprehends the substantive and chronological exclusivity of the facts of plaintiff's initial infringement case and his later §1202 case in affirming that the former precluded the latter. Specifically, the facts alleged in plaintiff's initial copyright infringement lawsuit (i.e., copyright infringement occurring prior to plaintiff's October 8, 2008 complaint) are mutually exclusive of those facts occurring during that lawsuit (i.e., concealment of infringement during litigation; in other words after October 8, 2008).

Facts derived prior to litigation and facts derived from litigation cannot be the same facts. The Panel overlooks the facts and misapprehends the law in affirming that facts occurring exclusively prior to October 8, 2008 preclude a claim based on facts occurring exclusively after October 8, 2008.

As to issue preclusion, the Judgment overlooks that plaintiff's §1202 action is based on facts of CMI removal, which were unknown to plaintiff and the court, never litigated or adjudicated, and not essential to the court's judgment in plaintiff's original infringement case.

CONCLUSION

For the reasons stated above, the Judgment conflicts with Supreme Court and First Circuit precedent, involves an issue of exceptional importance, and overlooks and misapprehends material facts and law. Plaintiff respectfully requests a rehearing by the Panel or a rehearing *en banc*.

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CERTIFICATE OF SERVICE

I, Christopher A.D. Hunt, hereby certify that on February 20, 2012, I caused this Petition for Panel Rehearing and Rehearing e*n banc* 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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Dated: February 20, 2012

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

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, ET AL.

Defendants - Appellees

Before

Boudin, Howard and Thompson,
Circuit Judges.

JUDGMENT

Entered: February 10, 2012

Plaintiff-Appellant Samuel Bartley Steele ("Steele") appeals from the judgment of the district court dismissing his claims of copyright infringement under Fed. R. Civ. P. 12(b)(6) and the principles of claim and issue preclusion and awarding sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

After our own careful review of the record and the briefs of the parties, we affirm the dismissal of all claims, for substantially the reasons set forth in the district court's thorough memorandum and order dated May 17, 2011. Further, we discern no error or abuse of discretion in the district court's orders concerning costs and sanctions. The judgment of the district court is affirmed in all respects.

By the Court:

/s/ Margaret Carter, Clerk

cc:

Christopher A.D. Hunt
Ben T. Clements
Liza E. Slovak