

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
SAMUEL BARTLEY STEELE,)	
)	
Plaintiff,)	
v.)	
)	Civil Action No. 10-11218 (DPW)
JOHN BONGIOVI, Individually and d/b/a Bon)	
Jovi Publishing, SCOTT D. BROWN,)	
CHRISTOPHER G. CLARK, MAJOR)	<u>ORAL ARGUMENT REQUESTED</u>
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.)	
_____)	

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

Defendants move for sanctions and an award of attorneys’ fees against Plaintiff Samuel Bartley Steele (“Steele”) and his attorney, Christopher A.D. Hunt (“Hunt”) under Rule 11 of the Federal Rules of Civil Procedure for the filing of this lawsuit. This lawsuit is completely without merit and was filed solely for improper purposes, including (i) harassing the Defendants; (ii) trying to force a settlement of a prior lawsuit, *Steele v. Turner Broadcasting System, Inc.*, No. 08-11727 (Gorton, J.), *appeals pending*, Nos. 09-2571 and 10-2173 (1st Cir.) (“*Steele I*”), which was dismissed on the merits after several rounds of dispositive motion practice; and (iii) attempting to relitigate in this new lawsuit issues resolved against Steele in *Steele I*.

In this lawsuit (*Steele II*), as in *Steele I*, Steele alleges that the defendants who are named in both suits, John Bongiovi, Richard Sambora, Major League Baseball Properties, Inc., and

Turner Broadcasting System, Inc., infringed Steele's copyright in a song written by Steele in 2004 by participating in the creation of an audiovisual, which combined portions of a song written and recorded by the band Bon Jovi with images of the band performing and images associated with Major League Baseball (the "Audiovisual"). The only material difference between the two suits is that in *Steele II*, Steele alleges that the *Steele I* defendants and their attorneys, who Steele now names as *Steele II* defendants, submitted to Judge Gorton in support of their summary judgment motion, a purportedly "altered" copy of the Audiovisual that allegedly (i) removed a copyright notice at the end of that work, and (ii) added 12 seconds of lead-in "dead air." Based on these allegations, Steele claims that the Defendants violated Section 1202 of the Copyright Act by allegedly removing copyright management information from the Audiovisual to facilitate or conceal infringement of the Steele Song.

As set forth in greater detail in the Defendants' Memorandum in Support of Motion to Dismiss and Memorandum in Support of this Motion for Rule 11 Sanctions, Steele's claim is utterly baseless and plainly subject to dismissal for several independent reasons:

First, because Steele has no legal interest in either the allegedly removed copyright notice or the Audiovisual itself, he lacks standing to assert a Section 1202 claim based on their alleged alteration.

Second, Steele fails to allege or offer any theory by which the alleged removal of a copyright notice on the Audiovisual could have had any conceivable relevance to the issue raised and resolved in *Steele I*, *i.e.*, whether the Audiovisual infringed Steele's copyright in the Steele Song, and therefore fails to sufficiently allege facilitation or concealment of copyright infringement.

Third, the Complaint is barred by claim preclusion because it arises out of the same nucleus of operative facts as the claims in *Steele I* and is based on allegations that could have been raised (and, indeed have been raised, post-judgment on multiple occasions) in *Steele I*.

Finally, the Complaint fails as a matter of law under the doctrine of issue preclusion, because it is predicated on Steele's renewed contention that the Audiovisual infringed the Steele Song – a contention that was fully litigated and resolved against Steele in a final judgment in *Steele I*.

Given the complete absence of a plausible right to relief, the clear violation of principles of claim and issue preclusion, and the vexatious, frivolous, and harassing nature of this lawsuit, Steele and his counsel should be sanctioned and ordered to pay the Defendants' attorneys' fees and costs incurred as a result of this lawsuit.

For the foregoing reasons, and the reasons set forth in the Defendants' Memorandum in Support of this Motion, the Defendants respectfully request that the Court:

1. Grant this Motion for Rule 11 Sanctions;
2. Order Steele and his counsel to pay the Defendants their attorneys' fees incurred in responding to this lawsuit and preparing this motion; and
3. Grant additional sanctions and relief as the Court deems appropriate.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(D), the Defendants request oral argument on this Motion.

Respectfully submitted,

/s/ Ben T. Clements

Ben T. Clements (BBO #555802)

Lila E. Slovak (BBO #672799)

Clements & Pineault, LLP

24 Federal Street

Boston, Massachusetts 02110

(857) 445-0133

bcllements@clementspineault.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I, Ben T. Clements, hereby certify that this document has been served by email and regular mail on counsel for plaintiff on November 24, 2010.

/s/ Ben T. Clements

Ben T. Clements

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SAMUEL BARTLEY STEELE,)

Plaintiff,)

v.)

Civil Action No. 10-11218 (DPW)

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.)

ORAL ARGUMENT REQUESTED

**DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION FOR RULE 11 SANCTIONS FOR THE FILING OF THIS LAWSUIT**

Ben T. Clements (BBO #555802)
Lila E. Slovak (BBO #672799)
Clements & Pineault, LLP
24 Federal Street, 3rd Floor
Boston, Massachusetts 02110
(857) 445-0133
bclements@clementspineault.com

Counsel for Defendants

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

 A. Steele Files *Steele I* Seeking
 \$400 Billion From More Than 20 Defendants..... 1

 B. After *Steele I* is Dismissed on the Merits, Steele Files
 Sucessive Lawsuits Seeking to Relitigate the Same Claims and Issues 2

 C. Steele and Hunt Raised the Same “Alteration” Issues in
 Vexatious Motion Practice Post-Judgment in *Steele I*..... 4

ARGUMENT: THE COURT SHOULD IMPOSE RULE 11 SANCTIONS AGAINST
PLAINTIFF STEELE AND ATTORNEY HUNT..... 5

 A. Applicable Legal Standard..... 5

 B. Steele’s and Hunt’s Conduct Warrants Sanctions and an Award of Fees 7

CONCLUSION..... 10

INTRODUCTION

This lawsuit is completely without merit and was filed solely for improper purposes, including (i) harassing the Defendants; (ii) trying to force a settlement of a prior lawsuit, *Steele v. Turner Broadcasting System, Inc.*, No. 08-11727-NMG (Gorton, J.), *appeals pending*, Nos. 09-2571 and 10-2173 (1st Cir.) (“*Steele I*”), which was dismissed on the merits after several rounds of dispositive motion practice; and (iii) attempting to relitigate in this new lawsuit issues dismissed from *Steele I*. The Defendants have moved to dismiss the action on the grounds that Steele has failed as a matter of law to assert a claim on the merits and the action is barred under principles of claim and issue preclusion. The Defendants now seek, pursuant to Rule 11 of the Federal Rules of Civil Procedure, sanctions against Plaintiff Samuel Bartley Steele (“Steele”) and his attorney, Christopher A.D. Hunt (“Hunt”), for filing this lawsuit, and an award of the Defendants’ costs including their attorneys’ fees.

BACKGROUND

A. Steele Files *Steele I* Seeking \$400 Billion From More Than 20 Defendants

On October 8, 2008, Steele commenced *Steele I*, naming more than 20 defendants and seeking \$400 billion in damages. (First Amended Verified Complaint (*Steele II* Docket No. 7) (“*Compl.*”) ¶ 134; *Steele I* Docket Nos. 1 and 41.) *Steele I* revolved around three works: (i) a song written by Steele in 2004 (the “Steele Song”); (ii) a song written and recorded by the band Bon Jovi (the “Bon Jovi Song”); and (iii) an audiovisual combining portions of the Bon Jovi Song, images of the band performing, and images associated with Major League Baseball, used to promote Major League Baseball post-season telecasts (the “Audiovisual”). Steele alleged that the latter two infringed his copyright in the Steele Song. (*Compl.* ¶ 134; *Steele I* Docket No. 1 ¶ 28; *Steele I* Docket No. 41 ¶¶ 30, 39.)

Following several rounds of dispositive motion practice and discovery on the copyright issue of substantial similarity, Judge Gorton dismissed all of Steele's claims, and on August 19, 2009, entered final judgment against him.¹ *Steele I*, 646 F. Supp. 2d at 193-94. On November 6, 2009, Steele filed a notice of appeal to the U.S. Court of Appeals for the First Circuit, and that appeal has been fully briefed.

B. After *Steele I* is Dismissed on the Merits, Steele Files Successive Lawsuits Seeking to Relitigate the Same Claims and Issues

Almost a year after *Steele I* was dismissed on the merits, Steele and Hunt filed this lawsuit ("*Steele II*"), which alleges facts nearly identical to those asserted in *Steele I*. (*See Steele II* Docket Nos. 1, 7.) The only material difference between the two lawsuits is the addition in *Steele II* of the allegation that, in connection with dispositive motion practice in *Steele I*, the defendants and their attorneys – who are now named as defendants in this case – submitted to Judge Gorton an allegedly "altered" copy of the Audiovisual that allegedly (i) removed a copyright notice at the end of that work and (ii) added 12 seconds of lead-in "dead air." (*Compare Steele I*, 646 F. Supp. 2d at 187-88 with Compl. ¶¶ 17-133.) Predicated on those alleged "alterations," Steele now purports to assert a claim against each *Steele II* Defendant under Section 1202 of the Digital Millennium Copyright Act ("DMCA"). Steele alleges that the Defendants removed the copyright notice from the Audiovisual to facilitate or conceal infringement of the Steele Song.

Steele and his attorney have also filed two additional lawsuits, *Steele v. Ricigliano*, No. 10-11458 (D. Mass. 2010) (*Steele III*) and *Steele v. Boston Red Sox Baseball Club L.P.*, No. 10-

¹ Judge Gorton's Orders in *Steele I* include an Order (i) granting in part defendants' motion to dismiss (*Steele I* Docket No. 85) (reported at 607 F. Supp. 2d 258 (D. Mass. 2009)) and (ii) granting defendants' motion for summary judgment (*Steele I* Docket No. 104) (reported at 646 F. Supp. 2d 185 (D. Mass. 2009)).

3418E (Mass. Sup. Ct. 2010) (*Steele IV*), that arise out of the same common nucleus of operative facts as *Steele I* and *Steele II*. In *Steele III*, Steele alleges, as he did in *Steele I*, that the Audiovisual was developed by reference to the Steele Song as a “temp track.” (*Steele III*, Docket No. 1 ¶ 196). All defendants in *Steele III* were either named in *Steele I* or *II*, or they are closely related to previously named defendants. In *Steele IV*, which names no new defendants, Steele asserts two claims, one for unjust enrichment and one for civil conspiracy, based on the defendants’ alleged use of the Steele Song and a marketing concept on how to use that song. (Compl. ¶¶ 183-199, *Steele IV*).

Steele’s First Amended Verified Complaint does not – and cannot – state a valid claim for relief for several independent reasons:

First, because Steele has no legal interest in either the allegedly removed copyright notice or the Audiovisual itself, he lacks standing to assert a Section 1202 claim based on their alleged alteration.

Second, Steele fails to allege (nor could he allege) any plausible facts suggesting that any Defendant altered or removed copyright management information from the Audiovisual or that they did so with reason to know that any alteration or removal would facilitate or conceal infringement. Indeed, Steele fails to allege or offer any theory by which the alleged removal of a copyright notice on the Audiovisual could have had any conceivable relevance to the issue raised and resolved in *Steele I*: whether the Audiovisual infringed Steele’s copyright in the Steele Song.

Third, the Complaint is barred by the doctrine of claim preclusion because it arises out of the same nucleus of operative facts as the claims in *Steele I* and is based on allegations that could have been raised (and, indeed have been raised, post-judgment, on numerous separate occasions) in *Steele I*.

Finally, the Complaint fails as a matter of law under the doctrine of issue preclusion. The Complaint is predicated on Steele's renewed contention that the Audiovisual infringed the Steele Song – a contention that was fully litigated and resolved against Steele in a final judgment in *Steele I*.

The relevant facts and applicable legal authorities are set forth at length in the Defendants' Memorandum in Support of Motion to Dismiss the First Amended Verified Complaint and to Recover Attorneys' Fees and Costs filed with the Court and attached hereto as Exhibit A.

C. Steele and Hunt Raised the Same "Alteration" Issues in Vexatious Motion Practice Post-Judgment in *Steele I*

Since the appearance of his counsel, Steele has raised the alleged "alteration" of the Audiovisual in *Steele I* on numerous occasions: (i) in briefs supporting a post-final judgment motion for entry of a default (*Steele I* Docket No. 119, at 7-8; *Steele I* Docket No. 124, at 6) (which motion has since been denied, *Steele I*, No. 08-11727, 2010 WL 3810850 (D. Mass. Sept. 27, 2010)); (ii) in merits briefs in the First Circuit (Brief of Appellant at 18-19, 38-41, *Steele I*, No. 09-2571 (1st Cir. Feb. 24, 2010); Reply Brief of Appellant at 8-19, 23-24, 29, *Id.* (Apr. 20, 2010)); (iii) in briefs in support of a "Motion for Sanctions" filed in the First Circuit (Appellants' Motion for Sanctions at 7-8, 12, *Id.* (Sept. 15, 2010) (denied by Order of Nov. 9, 2010); Appellants' Response to Appellees' Reply at 1, 7-8, *Id.* (Oct. 5, 2010); Appellants' Motion to Supplement Motion for Sanctions at 3-7, *Id.* (Nov. 8, 2010)); and (iv) in two post-judgment "Rule 11 letters," sent to the Defendants and later placed in the public record by Steele. (*Steele I* Docket Nos. 123-24, Exs. 7, 9.)

ARGUMENT

**THE COURT SHOULD IMPOSE RULE 11 SANCTIONS
AGAINST PLAINTIFF STEELE AND ATTORNEY HUNT**

Rule 11 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. Moreover, the alleged violation, if it had occurred, would have occurred in the course of litigating *Steele I*. At any time before the district court's determination of that lawsuit Steele could have protested the conduct to Judge Gorton. He did not, but then raised the same issue numerous times in *Steele I* post-judgment, after hiring a lawyer, both before and after filing this lawsuit.

Steele's \$3.3 million damages claim in *Steele II* is identical to his last settlement demand in *Steele I*. (See Civil Cover Sheet, Section VII (*Steele II* Docket No. 1); *Steele I* Docket No. 123, Ex. 12 at 1.) The demand evidences one of the true motivations for the filing of *Steele II*: to try to force Defendants to capitulate and accept a settlement on claims that have already been dismissed on the merits.

A. Applicable Legal Standard

Rule 11 of the Federal Rules of Civil Procedure provides in part that:

By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b)(1)-(3).

The First Circuit has recognized that Rule 11 “prohibits filings made with any improper purpose, the offering of frivolous arguments, and the assertion of factual allegations without evidentiary support or the likely prospect of such support.” *Roger Edwards, LLC v. Fiddes & Son Ltd.*, 437 F.3d 140, 142 (1st Cir. 2006) (affirming award of Rule 11 sanctions where plaintiff made “highly dubious” allegations, which even if true, would not have impacted the litigation) (internal quotation marks omitted); *see also Nyer v. Winterthur Int’l*, 290 F.3d 456, 460 (1st Cir. 2002) (“Rule 11 provides for the imposition of sanctions against an attorney who files a pleading, motion or paper that is not well grounded in fact or is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or is interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation” (internal quotation marks omitted)).

This Court has acknowledged that one of the primary purposes of Rule 11 sanctions is to “protect parties and the Court from wasteful, frivolous, and harassing lawsuits.” *Jones v. Soc. Sec. Admin.*, No. 03-12436, 2004 WL 2915290, at *3 (D. Mass. Dec. 14, 2004) (Woodlock, J.). As such, Rule 11 permits an award of sanctions that “suffices to deter repetition of the conduct,” and that may include “nonmonetary directives” as well as “an order to pay a penalty into court” or, where “warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney’s fees and other expenses directly resulting from the violation.”

Fed. R. Civ. P. 11(c)(4); *see Jones*, 2004 WL 2915290 at *3 (“The imposition of a Rule 11 sanction usually serves two main purposes: deterrence and compensation”).²

In addition to the power to impose Rule 11 sanctions, this Court has the inherent power to “manage its own proceedings and to control the conduct of litigants who appear before it through the issuance of orders or the imposition of monetary sanctions for bad-faith, vexatious, wanton, or oppressive behavior.” *Jones*, 2004 WL 2915290, at *4 (enjoining plaintiff from filing further actions without leave of Court).

B. Steele’s and Hunt’s Conduct Warrants Sanctions and an Award of Fees

Steele’s and Attorney Hunt’s continued harassing and vexatious conduct in this Court warrants Rule 11 sanctions and an award of attorneys’ fees. First, sanctions are appropriate under Rule 11 because Steele and Hunt filed *Steele II* for improper purposes, namely to harass the *Steele II* Defendants and use the threat of additional civil liability as a tool to extort a settlement for meritless claims dismissed as a matter of law in *Steele I*. *See* Fed. R. Civ. P. 11(b)(1). Indeed, the Complaint in *Steele II* pleads the same common core of facts as were asserted in *Steele I*. (*Compare Steele I*, 646 F. Supp. 2d at 187-88 with Compl. ¶¶ 17-133.)

Second, sanctions are appropriate under Rule 11 because Steele and Hunt assert frivolous claims in *Steele II*. *See* Fed. R. Civ. P. 11(b)(2). The claims in *Steele II* are barred as a matter of law by the doctrines of claim preclusion and issue preclusion. In addition, even if this case was

² *See also Reinhardt v. Gulf Ins. Co.*, 489 F.3d 405, 417 (1st Cir. 2007) (affirming district court’s imposition of Rule 11 sanctions that reprimanded plaintiff’s attorney, not for misstating facts or law, but for “unnecessarily forcing defendants to litigate [an] issue and tak[ing] up court time and consequently burden[ing] other individuals’ rights to come before [the] court in a timely manner to have their issues litigated” (internal quotation marks omitted)); *Hughes v. McMenamon*, 379 F. Supp. 2d 75, 81 (D. Mass. 2005) (warning plaintiff who filed three actions involving the same subject matter that “any future filing of abusive, frivolous or vexatious cases in this Court will result in the imposition of sanctions, including an order enjoining [plaintiff] from filing further proceedings in this Court”).

not entirely precluded by principles of preclusion, for the reasons set forth in the Defendants' Memorandum in Support of Motion to Dismiss (Exhibit A), Steele has not – and cannot – allege sufficient plausible factual allegations demonstrating a right to relief under Section 1202 of the DMCA. Given these absolute bars, no reasonable individual or attorney could believe that the *Steele II* claims could be sustained. *See Nyer*, 290 F.3d at 462 (affirming sanction award where the court found that a claim was brought despite the fact that “no attorney . . . could reasonably have believed that the facts of this case could sustain a claim”).

Third, sanctions are appropriate under Rule 11 because Steele and Hunt also have violated Rule 11 by asserting “factual allegations without ‘evidentiary support’ or the ‘likely’ prospect of such support.” *Roger Edwards, LLC*, 437 F.3d at 142; *see also* Fed. R. Civ. P. 11(b)(3). Steele repeatedly pleads and acknowledges in both *Steele I* and *Steele II* that multiple versions of the Audiovisual exist. (Compl. ¶¶ 62, 163-64; *see also* Plaintiffs' Amended Complaint And Opposition To Defendants' Motion To Dismiss at 10 (*Steele I* Docket No. 42); Opposition To Motion To Dismiss at 19 (*Steele I* Docket No. 61).) Nevertheless, Steele and Attorney Hunt surmise – with no support from factual allegations – that the version of the Audiovisual submitted to Judge Gorton in *Steele I* must have been “altered” prior to submission because it has 12 seconds of lead-in “dead time” and no copyright notice at the end.³

³ Steele's counsel has effectively acknowledged the lack of factual basis to allege that any Defendant “removed or altered” any copyright notice and he now instead asserts that the Defendants' submission of a version that differs from that submitted by Steele was somehow misleading. (Appellants' Motion to Supplement Motion for Sanctions, or Alternatively, for Judicial Notice at 6, Ex. 3 at 1-2, *Steele I*, No. 09-2571 (1st Cir. Nov. 8, 2010).) As the Defendants have demonstrated above and in their Memorandum in Support of Motion to Dismiss, there are no material differences between the two submissions and nothing conceivably misleading about the version submitted by the Defendants. In any event, lacking a plausible allegation of an actual removal or alteration of copyright management information, an essential element of a claim under Section 1202, Steele plainly had no legal basis to assert such a claim.

Simply relying on the conclusory fallacy that, because multiple versions of the Audiovisual exist, the Defendants therefore must have altered it, is not an adequate basis on which to bring a claim within the requirements of Rule 11. *See Roger Edwards*, 437 F.3d at 143-44 (affirming award of sanctions where the plaintiff had based his claim in part on the “explicit, conclusory inference” that, because an alleged mistake occurred, the defendants had acted dishonestly).

Equally baseless is the assertion by the Plaintiff and his counsel that the purported alteration was intended to facilitate or conceal infringement by misleading the court in *Steele I*. As is demonstrated in the Defendants’ Memorandum in support of their Motion to Dismiss, the presence of “dead air” at the outset of the Audiovisual, and/or the absence of the copyright notice at the conclusion, had no conceivable bearing on the issue decided by the court in *Steele I*. Thus, the assertion that the Defendants altered the Audiovisual and did so for the purpose of misleading the court simply makes no sense. Commencing this lawsuit on such baseless and speculative assertions, and forcing the unnecessary and wasteful expenditure of the Defendants and the Court’s resources is exactly the type of conduct Rule 11 was designed to deter.

Finally, Steele and his counsel have compounded the violation by proceeding to serve and proceed with this action *after* being warned by Judge Gorton against further unwarranted litigation. On September 27, 2010, more than a month prior to Steele and Attorney Hunt taking action to serve the *Steele II* complaint, Judge Gorton rejected their efforts to resurrect *Steele I* through default motions and advised that while the court would not award sanctions at that time, “Plaintiff and his counsel are . . . forewarned that any further motion practice in this regard will

be looked upon askance.” 2010 WL 3810850, at *7.⁴ The defiance of this warning by Steele and his counsel further merits sanctions and fees here.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court impose Rule 11 sanctions against Plaintiff Steele and his attorney Christopher A.D. Hunt and order them to pay the Defendants’ costs and attorneys’ fees incurred in defending this suit and preparing this Rule 11 motion.

Respectfully submitted,

/s/ Ben T. Clements

Ben T. Clements (BBO #555802)

Lila E. Slovak (BBO #672799)

Clements & Pineault, LLP

24 Federal Street, 3rd Floor

Boston, Massachusetts 02110

(857) 445-0133

bclements@clementspineault.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I, Ben T. Clements, hereby certify that this document has been served by email and regular mail on counsel for plaintiff on November 24, 2010.

/s/ Ben T. Clements

Ben T. Clements

⁴ Steele has appealed Judge Gorton’s decision to the First Circuit. *See Steele I*, No. 10-2173 (1st Cir. 2010).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

 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.)

Civil Action No. 10-11218 (DPW)

ORAL ARGUMENT REQUESTED

**DEFENDANTS' MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS THE FIRST AMENDED
VERIFIED COMPLAINT AND TO RECOVER ATTORNEYS' FEES AND COSTS**

Ben T. Clements (BBO #555802)
Lila E. Slovak (BBO #672799)
Clements & Pineault, LLP
24 Federal Street
Boston, Massachusetts 02110
(857) 445-0133
bclements@clementspineault.com

Counsel for Defendants

November 24, 2010

TABLE OF CONTENTS

INTRODUCTION 1

FACTUAL AND PROCEDURAL BACKGROUND..... 3

A. The Allegations in *Steele I*..... 3

B. *Steele I* is Dismissed on the Merits 4

C. Following the Entry of Final Judgment in *Steele I*, the Alleged Alteration of the Audiovisual Has Been Raised Numerous Times in That Case..... 5

D. The Allegations in *Steele II*..... 6

ARGUMENT 7

I. MOTION TO DISMISS LEGAL STANDARD..... 7

II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE STEELE HAS NOT ALLEGED – NOR CAN HE ALLEGE – A COGNIZABLE SECTION 1202(b) CLAIM 7

A. Steele’s Section 1202(b) Claim 7

B. Steele Does Not Have Standing to Assert a Section 1202 Claim 8

C. Steele Has Not – and Cannot – Plead the Factual Allegations Necessary to Assert a Facially Plausible Section 1202 Claim 10

1. Steele Does Not Allege Any Plausible Facts Suggesting That Copyright Management Information on the Audiovisual Was Removed or Altered 10

2. Steele Has Failed to Sufficiently Allege Intent or Reason to Know That Any Removal or Alteration Would Conceal Infringement..... 11

III. THIS LAWSUIT IS BARRED BY THE DOCTRINE OF CLAIM PRECLUSION..... 13

A. Applicable Legal Standard..... 13

B. The Claim Preclusion Standards Are Satisfied Here 13

1. The *Steele I* Court Entered Final Judgment on the Merits in Favor of Defendants..... 13

2.	The Allegations in <i>Steele I</i> and <i>Steele II</i> Arise Out of a Common Nucleus of Operative Facts	14
3.	The Parties in <i>Steele I</i> and <i>Steele II</i> Are Identical or Closely Related.....	15
IV.	THE LAWSUIT IS BARRED BY THE DOCTRINE OF ISSUE PRECLUSION	15
V.	THE COURT SHOULD AWARD THE DEFENDANTS THEIR ATTORNEYS' FEES AND COSTS INCURRED IN RESPONDING TO THIS LAWSUIT	17
	CONCLUSION.....	20

INTRODUCTION

On October 8, 2008, plaintiff Samuel Bartley Steele and two of his unincorporated businesses commenced a lawsuit in this Court, *Steele v. Turner Broadcasting System, Inc.*, No. 08-11727 (Gorton, J.), *appeals pending*, Nos. 09-2571 and 10-2173 (1st Cir.) (“*Steele I*”), naming more than 20 defendants (the “*Steele I* Defendants”) and seeking \$400 billion in damages. That lawsuit involved three works: (i) a song written by Steele in 2004 (the “Steele Song”); (ii) a song written and recorded by the band Bon Jovi (the “Bon Jovi Song”); and (iii) an audiovisual combining portions of the Bon Jovi song, images of the band performing, and images associated with Major League Baseball, used to promote Major League Baseball post-season telecasts (the “Audiovisual”). Steele alleged that the latter two infringed his copyright in the Steele Song.

Following several rounds of dispositive motion practice and discovery on the copyright issue of substantial similarity, Judge Gorton dismissed all of Steele’s claims, and on August 19, 2009, entered final judgment against him. On November 6, 2009, Steele filed a notice of appeal to the United States Court of Appeals for the First Circuit, and that appeal has been fully briefed.

On July 20, 2010 Steele filed this second lawsuit (“*Steele II*”), in which he alleges facts nearly identical to those asserted in *Steele I*. The only material difference between the two lawsuits is the addition in *Steele II* of the allegation that, in connection with dispositive motion practice in *Steele I*, the defendants and their attorneys – who are now named as defendants in this case – submitted to Judge Gorton an allegedly “altered” copy of the Audiovisual that allegedly (i) removed a copyright notice at the end of that work and (ii) added 12 seconds of lead-in “dead air.” Predicated on those alleged “alterations,” Steele now purports to assert a claim against each *Steele II* Defendant under Section 1202 of the Digital Millennium Copyright Act (“DMCA”).

Steele alleges that the Defendants removed the copyright notice from the Audiovisual to facilitate or conceal infringement of the Steele Song.

Steele's Complaint fails to state a claim and should be dismissed for several independent reasons:

First, because Steele has no legal interest in either the allegedly removed copyright notice or the Audiovisual itself, he lacks standing to assert a Section 1202 claim based on their alleged alteration.

Second, Steele fails to allege (nor could he allege) any plausible facts suggesting that any Defendant altered or removed copyright management information from the Audiovisual or that they did so with reason to know that any alteration or removal would facilitate or conceal infringement. Indeed, Steele fails to allege or offer any theory by which the alleged removal of a copyright notice on the Audiovisual could have had any conceivable relevance to the issue raised and resolved in *Steele I*: whether the Audiovisual infringed Steele's copyright in the Steele Song.

Third, the Complaint is barred by the doctrine of claim preclusion because it arises out of the same nucleus of operative facts as the claims in *Steele I* and is based on allegations that could have been raised (and, indeed have been raised, post-judgment, on numerous separate occasions) in *Steele I*.

Finally, the Complaint fails as a matter of law under the doctrine of issue preclusion. The Complaint is predicated on Steele's renewed contention that the Audiovisual infringed the Steele Song – a contention that was fully litigated and resolved against Steele in a final judgment in *Steele I*.

In light of this complete absence of a plausible right to relief, the clear violation of principles of claim and issue preclusion, and the vexatious, frivolous, and harassing nature of this

lawsuit, Steele should be ordered to pay the Defendants' attorneys' fees and costs incurred as a result of this lawsuit. *See* 17 U.S.C. §§ 505, 1203; 28 U.S.C. § 1927.

FACTUAL AND PROCEDURAL BACKGROUND¹

A. The Allegations in *Steele I*

In *Steele I*, Steele sought \$400 billion in damages from more than 20 defendants, including all of the non-attorney Defendants named in this lawsuit. (First Amended Verified Complaint (*Steele II* Docket No. 7) ("Compl.") ¶ 134; *Steele I* Docket Nos. 1 and 41.)² *Steele I* centered around the allegation that the Bon Jovi Song and the Audiovisual infringed the copyright in the Steele Song. (*Steele I*, 607 F. Supp 2d at 261; Compl. ¶ 148.) Steele also asserted claims pursuant to the Lanham Act and the Massachusetts Consumer Protection Act. *Steele I*, 607 F. Supp. 2d at 261.

In support of his initial allegations in *Steele I*, Steele submitted as an exhibit to his complaint a version of the Audiovisual in which Steele had replaced the Bon Jovi Song audio with the Steele Song audio (the "Steele Audiovisual Exhibit"). (*Steele I* Docket No. 1, Ex. I.) The Steele Audiovisual Exhibit did not have the lead-in "dead air" at the start of the Audiovisual, and at the end of the Steele Audiovisual Exhibit, the following image is displayed:

¹ The Defendants have assumed the facts alleged in the First Amended Verified Complaint to be true only for purposes of this motion.

² In resolving this motion to dismiss, the Court may take judicial notice of court filings in *Steele I*. *Am. Glue & Resin, Inc. v. Air Prods. & Chems. Inc.*, 835 F. Supp. 36, 40 (D. Mass. 1993) (recognizing that it is "undoubtedly true" that the court may take judicial notice of court records in related proceedings on a Rule 12(b)(6) motion to dismiss); *see Airframe Sys., Inc. v. Raytheon Co.*, 601 F.3d 9, 11-12 (1st Cir. 2010) (acknowledging that "[o]ther undisputed documents about the [plaintiff's first copyright lawsuit] were . . . properly before the district court"). These filings include Judge Gorton's orders (i) granting in part defendants' motion to dismiss (*Steele I* Docket No. 85) (reported at 607 F. Supp. 2d 258 (D. Mass. 2009)), and (ii) granting defendants' motion for summary judgment (*Steele I* Docket No. 104) (reported at 646 F. Supp. 2d 185 (D. Mass. 2009)).



(the “Copyright Screen”). (*Id.*) Thus, Steele knew before he filed his complaint in *Steele I* that there was a version of the Audiovisual that included the Copyright Screen, and did not have any lead-in “dead air.”

B. *Steele I* is Dismissed on the Merits

On December 8, 2008, the *Steele I* Defendants moved to dismiss the complaint. (*Steele I* Docket Nos. 17, 24, 29, 33.) In support, the *Steele I* Defendants filed the version of the Audiovisual that Steele now alleges was “altered.”³ (*Steele I* Docket No. 19, Ex. 1.) In response to the *Steele I* Defendants’ motions to dismiss, Steele filed an amended complaint. (*Steele I* Docket No. 41.) The *Steele I* Defendants then moved to dismiss that new pleading (*Steele I* Docket Nos. 48, 52, 58, 64, 71), and in support resubmitted a copy of the allegedly “altered” Audiovisual. (*Steele I* Docket No. 50, Ex. 1.)

On April 3, 2009, Judge Gorton granted in part the motions to dismiss, dismissing as a matter of law Steele’s Lanham Act and Massachusetts Consumer Protection Act claims. *Steele I*,

³ The Court may consider both the Steele Audiovisual Exhibit and the alleged “altered” Audiovisual in resolving Defendants’ motion to dismiss even though Steele did not submit them with his complaint in this case. *See Feldman v. Twentieth Century Fox Film Corp.*, No. 09-10714, 2010 WL 2787698, at *4 (D. Mass. July 13, 2010) (granting motion to dismiss copyright case and recognizing that a court may consider the parties’ works referred to in the complaint without converting the motion into one for summary judgment); *see also Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (court may consider materials “central to the plaintiffs’ claim” or “sufficiently referred to in the complaint” on a motion to dismiss). Moreover, each of these audiovisuals was publicly filed in *Steele I* and are therefore properly before this Court on that basis as well. *See* footnote 2, above.

607 F. Supp. 2d at 262. The court denied the motions to dismiss Steele’s copyright infringement claim, explaining that it wanted to afford Steele an opportunity to conduct discovery and submit expert analyses on the issue of substantial similarity. *Id.* at 264-65. The court scheduled a two-month period for that discovery, to be followed by summary judgment briefing. *Id.* at 265.

After the discovery period concluded, the *Steele I* Defendants filed a motion for summary judgment on the copyright infringement claim, supported again by the alleged “altered” Audiovisual (thus submitting it to the court for the third time). (See Compl. ¶¶ 158-59; *Steele I* Docket No. 94, Ex. 6.) On August 19, 2009, Judge Gorton granted the motion for summary judgment, holding that, as a matter of law, the Steele Song on the one hand, and the Bon Jovi Song and the Audiovisual on the other, were not substantially similar. *Steele I*, 646 F. Supp. 2d at 193-94. Both the Steele Audiovisual Exhibit and the alleged “altered” Audiovisual were at the center of the copyright/substantial similarity issues Judge Gorton adjudicated. *Id.* Nonetheless, at no point before the entry of final judgment in *Steele I* did Steele protest the content of the Audiovisual submitted by the *Steele I* Defendants.

On November 6, 2009, Steele, now represented by counsel, filed a notice of appeal to the First Circuit. (*Steele I* Docket No. 112.)

C. Following the Entry of Final Judgment in *Steele I*, the Alleged Alteration of the Audiovisual Has Been Raised Numerous Times in That Case

Since the appearance of his counsel, Steele has raised the alleged “alteration” of the Audiovisual in *Steele I* on numerous occasions: (i) in briefs supporting a post-final judgment motion for entry of a default (*Steele I* Docket No. 119, at 7-8; *Steele I* Docket No. 124, at 6) (which motion has since been denied, *Steele I*, No. 08-11727, 2010 WL 3810850 (D. Mass. Sept. 27, 2010)); (ii) in merits briefs in the First Circuit (Brief of Appellant at 18-19, 38-41, *Steele I*, No. 09-2571 (1st Cir. Feb. 24, 2010); Reply Brief of Appellant at 8-19, 23-24, 29, *Id.* (Apr. 20,

2010)); (iii) in briefs in support of a “Motion for Sanctions” filed in the First Circuit (Appellants’ Motion for Sanctions at 7-8, 12, *Id.* (Sept. 15, 2010) (denied by Order of Nov. 9, 2010); Appellants’ Response to Appellees’ Reply at 1, 7-8, *Id.* (Oct. 5, 2010); Appellants’ Motion to Supplement Motion for Sanctions at 3-7, *Id.* (Nov. 8, 2010)); and (iv) in two post-judgment “Rule 11 letters,” sent to the Defendants and later placed in the public record by Steele. (*Steele I* Docket Nos. 123-24, Exs. 7, 9.)

D. The Allegations in *Steele II*

On July 20, 2010, three plaintiffs filed the Verified Complaint And Jury Demand in this case seeking \$3.3 million from 10 defendants. (*Steele II* Docket No. 1.) On August 11, 2010, after this Court’s August 1, 2010 Order denying Bart Steele Publishing and Steele Recordz’s motion for leave to proceed *in forma pauperis*, Steele filed a First Amended Verified Complaint that removed those two parties as plaintiffs. (*Steele II* Docket No. 7.)

In the First Amended Verified Complaint, Steele re-pleads the facts asserted in *Steele I*, with the addition of allegations that in connection with dispositive motion practice in *Steele I*, certain of the defendants and their attorneys submitted to Judge Gorton an allegedly “altered” version of the Audiovisual that omitted the Copyright Screen and added 12 seconds of lead-in “dead air.” (Compl. ¶¶ 149, 150.) Steele alleges that those purported alterations were made “for the purpose of filing false evidence – the Altered Audiovisual – with this Court and the First Circuit Court of Appeals in the ongoing *Steele I*.” (*Id.* ¶ 157; *see also id.* ¶ 162.) Steele contends that these alleged alterations were made without the authorization of “Major League Baseball Advanced Media, L.P.,” the entity Steele asserts owns the copyright in the Audiovisual. (*Id.* ¶¶ 78, 171.) Thus, Steele’s Section 1202 claims are predicated upon the alleged alteration of

a work in which Steele has no legal interest. (*See id.* ¶¶ 180, 189, 198, 207, 216, 226, 236, 246, 256, 266.)

ARGUMENT

I. MOTION TO DISMISS LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, a complaint must allege “a plausible entitlement to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Although the court must take the allegations in a complaint as true and make all reasonable inferences in favor of the plaintiff, there is no duty for “courts to conjure up unpleaded facts that might turn a frivolous claim . . . into a substantial one.” *Id.* at 562 (internal quotation marks omitted). Rather, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE STEELE HAS NOT ALLEGED – NOR CAN HE ALLEGE – A COGNIZABLE SECTION 1202(b) CLAIM

A. Steele’s Section 1202(b) Claim

Steele claims that by allegedly deleting the MLBAM copyright notice from the Audiovisual, the Defendants altered or removed copyright management information in order to facilitate or conceal the alleged infringement of Steele’s copyright in the Steele Song, in violation of 17 U.S.C. § 1202(b)(1). (*See Compl.* ¶¶ 149, 162, 175, 180, 189, 198, 207, 216, 226, 236, 246, 256, 266.)

Section 1202(b)(1) provides, in relevant part:

(b) Removal or alteration of copyright management information. – No person shall, without the authority of the copyright owner or the law –

(1) intentionally remove or alter any copyright management information,

....

knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

17 U.S.C. § 1202(b).

B. Steele Does Not Have Standing to Assert a Section 1202 Claim

Section 1202 prohibits the alteration or removal of copyright management information only where the alteration or removal is intended to, or carried out with reason to know that the alteration or removal “will induce, enable, facilitate, or conceal an infringement.” 17 U.S.C. § 1202(b). Thus, the statute is intended to protect the interests of persons who rely on copyright management information to help prevent infringement of their copyrighted material. As one court has explained:

Congress intended the DMCA to modernize copyright protection as a response to the development of new technologies which both enabled new forms of copyright protection as well as new forms of copyright infringement. . . . Through scientific advances, we now have technological measures that can control access and reproduction of works, and thereby manage the rights of copyright owners and users. *Section 1202 operates to protect copyright by protecting a key component of some of these technological measures.*

IQ Group, Ltd. v. Wiesner Pub., LLC, 409 F. Supp. 2d 587, 597 (D.N.J. 2006) (emphasis added).

Steele’s claim is not predicated on the alteration of copyright management information on his copyrighted work or copyright management information that was in any way designed to protect any rights in his copyrighted work. Rather, his claim is based upon the alleged alteration of *another person’s* copyright management information that was intended to protect copyright

interests in *another person's* work – the Audiovisual. The Defendants are unaware of any decision in which a court has permitted a plaintiff to assert a Section 1202 claim predicated upon the alteration or modification of *another person's* copyright management information, in which the plaintiff had no legal interest, and Steele should not be permitted to do so here.

Although there do not appear to be any cases specifically addressing the scope of standing to bring a Section 1202 claim, decisions discussing standing to bring claims for circumventing copyright protection systems in violation of Section 1201 support the conclusion that Steele lacks standing to assert a Section 1202 claim here. Claims under both Section 1201 and 1202 are governed by Section 1203, which allows a “person injured by a violation of section 1201 or 1202” to bring a civil action for damages and other relief. 17 U.S.C. § 1203(a). Courts interpreting Section 1203 as it applies to Section 1201 claims have generally required a plaintiff to allege and establish that it had a legal interest in the copyright protection system or in the copyrighted material protected by that system. *See, e.g., Echostar Satellite, L.L.C. v. Viewtech, Inc.*, 543 F. Supp. 2d 1201, 1205-06 (S.D. Cal. 2008) (plaintiff had standing under Section 1203 because it had legal “authority to control the measures protecting the [copyrighted] programming”); *Comcast of Illinois X, LLC v. Hightech Electronics, Inc.*, No. 03-C-3231, 2004 WL 1718522 at *6 (N.D. Ill. 2004) (plaintiff had standing under Section 1203 where it “controlled access” to the copyrighted material protected by the copyright protection system).

Just as the courts interpreting the standing requirement to assert Section 1201 claims have required plaintiffs to establish a legal interest in the circumvented copyright protection system or the material it was intended to protect, a plaintiff seeking to assert a Section 1202 claim should be required to establish a legal interest in the allegedly altered or removed copyright management information or the copyrighted material to which it applies. Because Steele has not

and cannot allege any such interest in either the MLBAM copyright notice or in the Audiovisual to which it was affixed, his Complaint should be dismissed for lack of standing.

C. Steele Has Not – and Cannot – Plead the Factual Allegations Necessary to Assert a Facially Plausible Section 1202 Claim

The Complaint also fails as a matter of law to allege sufficient facts to establish either of the following essential elements of a Section 1202 claim: (1) that any of the Defendants “remove[d] or alter[ed] any copyright management information”; or (2) that any of the Defendants removed or altered copyright management information with “reasonable grounds to know” that it would “induce, enable, facilitate, or conceal an infringement.” 17 U.S.C. § 1202(b).

1. Steele Does Not Allege Any Plausible Facts Suggesting That Copyright Management Information on the Audiovisual Was Removed or Altered

While the Complaint contains conclusory allegations that the Defendants removed or altered copyright management information (Comp. ¶¶ 149), it lacks any specific factual allegations to support this conclusion. Indeed, the *only* factual support offered by Steele for this allegation is that the allegedly “altered” Audiovisual differs from the version relied on and submitted by Steele. *See* Comp. ¶¶ 163-64. But Steele’s own allegations demonstrate that the existence of two different versions cannot justify an inference that anyone – let alone the Defendants – removed or altered copyright information in the Audiovisual. To the contrary, Steele’s allegations make clear that there are multiple different versions of the Audiovisual:

- Steele alleges that there are at least two different versions of the Audiovisual (a “FINAL 1” and a “FINAL 2” version), one of which he does not have in his possession. (Compl. ¶¶ 163-64.)
- Steele alleges that the Audiovisual was “later edited to create ‘localized’ versions that were played in various ballparks in different cities, among other places.” (*Id.* ¶ 62.)

- In *Steele I*, Steele represented that “various different promo versions . . . were all released.” (Plaintiffs’ Amended Complaint And Opposition To Motion To Dismiss at 10 (*Steele I* Docket No. 42.))

In another prior court filing in *Steele I*, Steele represented that “[t]here are several versions of MLB ads, of varying lengths.” (Opposition To Motion To Dismiss at 19 (*Steele I* Docket No. 61.))

Thus, the fact that the Audiovisual submitted by the Defendants differs (in immaterial ways) from the version submitted by Steele provides no plausible basis to conclude that it was “altered,” by the Defendants or, indeed, that it was altered by anyone. This failure to plead specific facts – instead of bare conclusions – is a sufficient basis upon which to dismiss Steele’s Complaint as a matter of law. *See, e.g., Iqbal*, 129 S. Ct. at 1950.

2. Steele Has Failed to Sufficiently Allege Intent or Reason to Know That Any Removal or Alteration Would Conceal Infringement

Steele has also failed to plead any non-conclusory factual allegations “plausibl[y]” (*Twombly*, 550 U.S. at 559) suggesting that the alleged removal or altering of copyright management information was with intent to or with reason to know that it would “induce, enable, facilitate, or conceal an infringement of any right under this title.” *See* 17 U.S.C. § 1202(b).

Steele attempts to satisfy this element with the conclusory allegation that the Defendants altered the Audiovisual “for the purpose of filing false evidence – the Altered Audiovisual – with [the district court] and the First Circuit Court of Appeals in the ongoing *Steele I*” litigation, and “thereby facilitating and concealing copyright infringement.” (Compl. ¶¶ 157, 162.) More specifically, Steele claims that the alleged addition of 12 seconds of “dead air” at the beginning of the Audiovisual was intended to mislead the court by rendering the “altered” Audiovisual longer than the Steele Song, “*despite* the deletion of the MLBAM copyright notice from the end.” (Compl. ¶ 151) (emphasis added). For several reasons, these assertions are insufficient as

a matter of law to allege removal or alteration of copyright information to conceal or facilitate the alleged infringement of the Steele Song.

First, Judge Gorton's analysis properly focused on whether there was "substantial similarity" between the content of the Audiovisual and the content of the Steele Song. *Steele I*, 646 F. Supp. 2d at 190-92. The presence of "dead air" at the beginning of the Audiovisual and the absence of the MLBAM copyright notice at the end were thus immaterial to the issue before the court and could not plausibly have been intended or expected to mislead the court.

Second, even accepting, *arguendo*, that the alleged addition of 12 seconds of "dead air" at the beginning of the Audiovisual could have misled the court by rendering the Audiovisual longer than the Steele Song, Steele's claim would still fail as a matter of law because the addition of "dead air" does not constitute the removal or alteration of "copyright management information" within the meaning of 17 U.S.C. § 1202.⁴

⁴ See 17 U.S.C. § 1202(c), which defines "copyright management information" to include:

- (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
- (2) The name of, and other identifying information about, the author of a work.
- (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.
- (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.
- (5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.
- (6) Terms and conditions for use of the work.
- (7) Identifying numbers or symbols referring to such information or links to such information.
- (8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.

In short, Steele has not alleged and cannot allege any facts to show that the alleged removal of copyright management information could have been intended to mislead the court or could have otherwise concealed or facilitated the alleged infringement of Steele's copyright.

III. THIS LAWSUIT IS BARRED BY THE DOCTRINE OF CLAIM PRECLUSION

A. Applicable Legal Standard

Claim preclusion prevents parties from “relitigating claims that could have been made in an earlier suit, not just claims that were actually made.” *Airframe Sys., Inc. v. Raytheon Co.*, 601 F.3d 9, 14 (1st Cir. 2010). The First Circuit has recognized that “[t]he doctrine of claim preclusion serves at least two important interests: protecting litigants against gamesmanship and the added litigation costs of claim-splitting, and preventing scarce judicial resources from being squandered in unnecessary litigation.” *Id.* Claim preclusion applies if the following three factors are satisfied: “(1) the earlier suit resulted in a final judgment on the merits, (2) the causes of action asserted in the earlier and later suits are sufficiently identical or related, and (3) the parties in the two suits are sufficiently identical or closely related.” *Id.*; *see also id.* at 12-19 (affirming dismissal on claim preclusion grounds of second copyright infringement action arising out of “common nucleus of operative facts” as first copyright infringement action).

B. The Claim Preclusion Standards Are Satisfied Here

1. The Steele I Court Entered Final Judgment on the Merits in Favor of Defendants

The *Steele I* court dismissed Steele's claims as a matter of law and, 11 months prior to the filing of this new lawsuit, entered final judgment in favor of all defendants on the merits. (*Steele I* Docket No. 105.) That Steele has appealed the final judgment in *Steele I* does not bar the application of the doctrine. *See Amcast Indus. Corp. v. Detrex Corp.*, 45 F.3d 155, 160 (7th Cir. 1995) (“final judgment by a district court has preclusive effect even though the judgment is

pending on appeal”); *see also In re Belmont Realty Corp.*, 11 F.3d 1092, 1095-96, 1099 (1st Cir. 1993) (finding claim preclusion notwithstanding pending appeal from final judgment); *Hughes v. McMnamon*, 379 F. Supp. 2d 75, 77-79 (D. Mass. 2005) (same). Thus, the first claim preclusion factor is satisfied.

2. The Allegations in *Steele I* and *Steele II* Arise Out of a Common Nucleus of Operative Facts

The second factor “does not turn on the labels the plaintiff attaches to its various claims, but rather boils down to whether the causes of action arise out of a common nucleus of operative facts.” *Airframe*, 601 F.3d at 15 (internal quotation marks omitted); *see also Hughes*, 379 F. Supp. 2d at 79, 81. The Complaint in *Steele II* pleads the same common core of facts as were asserted in *Steele I*. (*Compare Steele I*, 646 F. Supp. 2d at 187-88 with Compl. ¶¶ 17-133.) Indeed, the only substantive difference between the operative facts is the addition in *Steele II* of the allegation that, in connection with dispositive motion practice in *Steele I*, the *Steele II* Defendants submitted to Judge Gorton a copy of the Audiovisual that had allegedly been altered. (Compl. ¶¶ 180, 189, 198, 207, 216, 226, 236, 246, 256, 266.)

Steele could have raised this alleged wrongful conduct in his first lawsuit, and, indeed, post-judgment, now represented by counsel, he has done exactly that on numerous occasions. In addition, as noted, the court in *Steele I* had before it a version of the Audiovisual submitted by *Steele* which contained the copyright notice, and the Court “carefully . . . viewed both the original TBS Promo [*i.e.*, the Audiovisual] and the version provided by the plaintiff in which the audio had been replaced with the *Steele* Song.” 646 F.Supp. 2d at 190.

In a strikingly similar situation in *Hughes v. McMnamon*, 379 F. Supp. 2d 75 (D. Mass. 2005) where the plaintiff brought a successive action based on alleged wrongdoing in prior litigation by the defendants, their attorneys, and the assigned Magistrate Judge, the court

dismissed the plaintiff's third lawsuit on claim preclusion grounds. 379 F. Supp. 2d at 81. The court reasoned that because the claims of alleged misconduct "were or could have been raised in the First and Second Cases," they met "the cause-of-action identity requirement" and were barred by claim preclusion. *Id.* at 79.

3. The Parties in *Steele I* and *Steele II* Are Identical or Closely Related

All of the *Steele II* Defendants either are named as defendants in *Steele I* or represent the defendants in *Steele I*.⁵ As the court held in *Hughes*, where "an attorney is sued for actions taken on behalf of a client, there is a sufficient relationship between the attorney and the client such that non-mutual claim preclusion applies." 379 F. Supp. 2d at 79; *see also Airframe*, 601 F.3d at 17 ("We, along with other circuits, have long held that claim preclusion applies if the new defendant is closely related to a defendant from the original action – who was not named in the previous law suit, not merely when the two defendants are in privity") (internal quotation marks omitted). Accordingly, the third and final claim preclusion factor is satisfied, and the Complaint should be dismissed on that basis.

IV. THE LAWSUIT IS BARRED BY THE DOCTRINE OF ISSUE PRECLUSION

The doctrine of issue preclusion prevents a party from relitigating issues already decided against it in a prior proceeding. Here, Section 1202(b) requires that there be "an infringement of any right under this title." However, in *Steele I* Judge Gorton has already held that there is no infringement and *Steele* is precluded from relitigating that issue.

⁵ John Bongiovi, MLB Properties, Richard Sambora, and TBS are among the *Steele I* Defendants. (*Steele I* Docket No. 1.) Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates ("Skadden") and five of its attorneys, Scott D. Brown, Christopher G. Clark, Matthew J. Matule, Kenneth A. Plevan, and Clifford M. Sloan, represented and continue to represent the *Steele I* Defendants.

Issue preclusion applies where the following four elements are satisfied: “(1) both proceedings involved the same issue of law or fact, (2) the parties actually litigated that issue, (3) the prior court decided that issue in a final judgment, and (4) resolution of that issue was essential to judgment on the merits.” *Global NAPs, Inc. v. Verizon New England, Inc.*, 603 F.3d 71, 95 (1st Cir. 2010). All four elements are satisfied here.

First, *Steele I* and *Steele II* involve numerous similar issues of law and fact, including the essential issue raised by each lawsuit: whether the Audiovisual infringed Steele’s copyright in the Steele Song. In *Steele I*, Steele’s copyright infringement claim was predicated in part on his allegation that the Audiovisual infringed Steele’s copyright in the Steele Song. (Comp. ¶ 148 (“The MLB Audiovisual was directly at issue as the infringing work in Steele I”); see *Steele I* Docket No. 41, ¶¶ 30, 39; *Steele I*, 646 F. Supp. 2d at 188). Likewise, in *Steele II*, Steele’s claim that the Defendants altered or removed copyright management information to conceal or facilitate copyright infringement is predicated on his claim that the Audiovisual infringed his copyright in the Steele Song. (Comp. ¶ 158); see also 17 U.S.C. § 1202(b) (removal or alteration of copyright management information violates statute only if done intentionally with knowledge or “reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.”)

Second, the parties actually litigated the issue of whether the Audiovisual infringed Steele’s copyright in connection with the *Steele I* defendants’ motion for summary judgment, which raised precisely that issue. See *Steele I*, 646 F. Supp. 2d at 190 (“The defendants assert that Steele’s copyright infringement claim fails as a matter of law because there is no substantial similarity between his song and the alleged infringing works.”)

Third, Judge Gorton resolved that issue against Steele in a final judgment granting the motion for summary judgment. (*Steele I* Docket No. 105.) As is the case with claim preclusion, the final judgment is preclusive on issues actually litigated and decided, notwithstanding the pendency of Steele’s appeal. *In re Kane*, 254 F.3d 325, 328 (1st Cir. 2001) (issue preclusion generally applies “even where the first, or issue preclusive, judgment is still on appeal when the second action occurs”).

Finally, resolution of that issue was the basis for Judge Gorton’s summary judgment ruling and was therefore essential to the judgment on the merits. *See Steele I*, 646 F. Supp. 2d at 193-94 (“In sum, because no reasonable juror applying the correct standards could find that the original elements of the Steele Song are substantially similar to the Bon Jovi Song or the TBS Promo, summary judgment will enter in favor of the defendants.”) Accordingly, because Steele is precluded as a matter of law from relitigating whether the Audiovisual infringed his copyright in the Steele Song and because his current Complaint is premised on his assertion that the Audiovisual did in fact infringe his copyright (*see, e.g.*, Comp. ¶¶ 134-174), the Complaint fails as a matter of law and should be dismissed.

V. THE COURT SHOULD AWARD THE DEFENDANTS THEIR ATTORNEYS’ FEES AND COSTS INCURRED IN RESPONDING TO THIS LAWSUIT

The Copyright Act authorizes the Court to award in its discretion a “recovery of full costs” and “a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. § 505; *see id.* §1203(b)(5). The Supreme Court has identified several factors that a court may consider in awarding attorneys’ fees and costs: “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (internal quotation marks omitted). The Court has

further explained that fees and costs should be awarded to prevailing defendants on an “evenhanded” basis with plaintiffs, and that “defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Id.* at 521, 527. Thus, courts have readily awarded attorneys’ fees and costs to defendants who prevail on a motion to dismiss a copyright claim. *See, e.g., Matthews v. Freedman*, 157 F.3d 25, 29 (1st Cir. 1998); *Scott v. Meyer*, No. 09-6076, 2010 WL 2569286, at *5 (C.D. Cal. June 21, 2010); *Dahn World Co., Ltd. v. Chung*, No. 06-2170, 2009 WL 277603, at *1, 4 (D. Md. Feb. 5, 2009).

As demonstrated above, Steele’s current lawsuit is utterly meritless. Given the absence of basic factual allegations demonstrating a plausible Section 1202 violation or even standing to assert a claim under Section 1203, as well as the clear precedent barring the Complaint under the doctrines of claim and issue preclusion, Steele’s Complaint is objectively unreasonable. It is apparent, moreover, that Steele’s motivation in bringing this lawsuit is to try to circumvent the dismissal of his claims on the merits in *Steele I*, particularly given that the allegations in *Steele II* reiterate dozens of allegations mimicking the facts asserted in *Steele I*.

Steele and his attorney have also filed two additional lawsuits, *Steele v. Ricigliano*, No. 10-11458 (D. Mass. 2010) (*Steele III*) and *Steele v. Boston Red Sox Baseball Club L.P.*, No. 10-3418E (Mass. Sup. Ct. 2010) (*Steele IV*), that arise out of the same common nucleus of operative facts as *Steele I* and *Steele II*. In *Steele III* Steele alleges, as he did in *Steele I*, that the Audiovisual was developed by reference to the Steele Song as a “temp track.” (*Steele III*, Docket No. 1 ¶ 196). All defendants in *Steele III* were either named in *Steele I* or *II*, or they are closely related to previously named defendants. In *Steele IV*, which names no new defendants, Steele asserts two claims, one for unjust enrichment and one for civil conspiracy, based on the

defendants' alleged use of the Steele Song and a marketing concept on how to use that song. (Compl. ¶¶ 183-199, *Steele IV*).

Under these circumstances, the Court should order Steele and his counsel to pay the Defendants their costs and reasonable attorneys' fees under both the Copyright Act and the vexations litigation statute, 28 U.S.C. § 1927 (authorizing fees against counsel who "multiplies the proceedings in any case unreasonably and vexatiously"). *See, e.g., N.W. Bypass Group. v. U.S. Army Corps of Engineers*, 569 F.3d 4, 6 (1st Cir. 2009) (affirming award of fees under § 1927 where plaintiff's allegations were "ill-founded, plainly groundless, frivolous, far-fetched and lacked a valid premise"). An award of fees against Steele and his counsel is particularly appropriate given their decision to serve and proceed with this action *after* Judge Gorton's recent decision denying in *Steele I* post-judgment motions for default and advising that while the court would not award sanctions at that time, "Plaintiff and his counsel are . . . forewarned that any further motion practice in this regard will be looked upon askance." *Steele I*, 2010 WL 3810850, at *7.⁶

⁶ Steele has appealed Judge Gorton's decision to the First Circuit. *See Steele I*, No. 10-2173 (1st Cir. 2010).

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court dismiss the Complaint and order Steele and his counsel to pay the Defendants attorneys' fees and costs incurred in responding to this lawsuit.

Dated: November 24, 2010

Respectfully submitted,

/s/ Ben T. Clements

Ben T. Clements (BBO #555802)

Lila E. Slovak (BBO #672799)

Clements & Pineault, LLP

24 Federal Street

Boston, Massachusetts 02110

(857) 445-0133

bclements@clementspineault.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I, Ben T. Clements, 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 November 24, 2010.

/s/ Ben T. Clements

Ben T. Clements