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Death of Copyright, the Sequel

By Steven Lowe and Daniel Lifschitz

It is no secret that the United States is in the middle of a scripted entertainment renaissance.¹ With high-speed Internet access becoming increasingly ubiquitous across the nation, there has been an explosion of online services such as Hulu, Netflix, and iTunes helping media companies to spread their works farther and wider than ever before. This spike in demand for well-written content, however, also has exacerbated a problem that has existed within the entertainment industry

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for decades: the subversive dilution of intellectual property protections for source material authors. In his dissent to the Ninth Circuit's 1993 decision in *White v. Samsung Electronics America*, now-Chief Justice Alex Kozinski famously remarked that, "for better or worse, we are the Court of Appeals for the Hollywood Circuit."² This oft-quoted observation neatly encapsulates the problem that author-plaintiffs face in litigating against studios for the misappropriation of their creative works; the law simply has become too friendly to Hollywood interests, often at the expense of doctrinal clarity and equitable balance.

One need not look far to find examples of how daunting such plaintiff-side litigation has become. In 2005, Matthew and Aaron Benay sued multiple defendants for unlawfully using their screenplay as the basis for a major motion picture (*The Last Samurai*), alleging infringement of copyright and breach of an implied-in-fact contract.³ This coupling of claims has become a common one in the Ninth Circuit, in no small part because the copyright claims are almost never successful; a nearly unbroken 20-year string of failed copyright lawsuits against film and television studios in the Second and Ninth Circuits stands as a harsh testament to that fact.⁴ This historical trend, which



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currently shows no signs of changing course, leads inexorably to the conclusion that for such plaintiffs' purposes, copyright protection is virtually nonexistent as a practical matter.

In 2010, the Ninth Circuit reaffirmed the above conclusion in *Benay*, holding that, "Stripped of [their] unprotected elements, [plaintiff's screenplay and defendant's film] are not sufficiently similar to satisfy the extrinsic test" of copyright infringement.⁵ Although the works shared a near-identical (and quite unusual) premise with numerous other uncanny commonalities,⁶ the court held the similarities too generic to be protected by copyright.⁷ The saving grace for the Benays was that the Ninth Circuit allowed their breach of implied-in-fact contract claim to proceed to trial, noting that "the analysis of similarity under an implied-in-fact contract claim is different from the analysis of a copyright claim;"⁸ more specifically, "because the claim is based in contract, unauthorized use [could] be shown by substantially similar elements that are *not* protected under copyright law."⁹

The Benays' victory proved short-lived, however. First, defendant Warner Brothers was dismissed from the lawsuit on what was effectively a technicality;¹⁰ then, after a seven-day trial in April of 2012, a jury in California's Central District returned a unanimous verdict for the remaining defendants, finding that the Benays' work *had never been submitted in the first place*, thereby rendering the issue of similarity between the works moot.¹¹ This finding, it should be noted, contravened the Ninth Circuit's own prior recitations of fact¹² and was made despite the presence of numerous similarities that were highly probative of actual copying (such as identical titles and common historical inaccuracies, the latter of which was not mentioned in the Ninth Circuit's opinion¹³).

Given this series of baffling events, litigators must ask themselves a difficult question: Are there *any* legal doctrines that still give plaintiffs a realistic chance at protecting their work against unscrupulous copying within the entertainment industry?

The Continuing Decline of Copyright Claims in the Ninth Circuit

While Hollywood has been hard at work in recent years championing stronger laws to battle the *consumptive* infringement of copyrighted works,¹⁴ it also has had a remarkable track record in *weakening* the provisions of copyright law that protect against *creative* infringement. In over 50 such copyright infringement cases against studios and networks decided by courts in the Second and Ninth Circuits between 1990 and 2010, every final decision handed down was in favor of the defendants.¹⁵

This observation, striking to many, has a deceptively straightforward explanation:

The case law governing these actions simply has become so amorphous that for almost every principle of law favorable to creators, the courts have endorsed and applied an opposite principle. As a result, the determination of each case now rests almost entirely in the unfettered discretion of trial judges, who have consistently dismissed plaintiffs' claims. Unless the current trend changes, longstanding principles once favorable to creators may be eclipsed by an evolving body of law so unfavorable to them that the studios and networks are essentially immunized from liability except in cases of identical copying and conceded access to the plaintiff's work.¹⁶

Despite pleas for the courts to consider what their shifting doctrines were doing to the inherent balance of copyright law,¹⁷ subsequent decisions between author-plaintiffs and studio-defendants have continued to follow the judicial trend of filtering out all "individually unprotected elements" of a plaintiff's work before conducting any extrinsic analysis of substantial similarity,¹⁸ essentially ignoring the long-standing "selection and arrangement" test of copyright in the process.¹⁹ In short, where it once was hoped the courts would heed calls for balance by trying to exhume the body of creative copyright protection, they appear to be placing flowers on its grave instead.

A typical example of this is 2011's *Wild v. NBC Universal*, which concerned a graphic novelist suing the network and production house that produced the television show *Heroes* for copyright infringement.²⁰ The plaintiff claimed that elements of his three-part *Carnival of Souls* comic book series were used to create a carnival-based storyline in the show's fourth season.²¹ To analyze the plaintiff's claim under the extrinsic test for copyright infringement, the district court used a smattering of Ninth Circuit precedent,²² and within this authority laid a simple explanation for why the plaintiff never stood a chance, regardless of his claim's merits (or lack thereof):

[The court] must take care to inquire only whether the protectable elements, standing alone, are substantially similar. . . . In so doing, [the court] filter[s] out and disregard[s] the non-protectable elements in making [the] substantial similarity determination.²³

This is the standard that smothered most plaintiffs' claims before they can even take their first breath, as courts are able to isolate individual similarities brought

to their attention, quickly classify them as unprotected elements (such as individual character archetypes, plot points, and themes), and remove them from analytical consideration.²⁴ At the end of the process, the plaintiff is left with nothing, and the claim is subsequently dismissed.²⁵ This defense strategy, time and again, simply works like a charm.

The “protectable elements, standing alone” standard comes from a 1995 Second Circuit decision²⁶ and was adopted by the Ninth Circuit in the *Cavalier v. Random House*²⁷ decision in 2002, under the claim that it comported with prior Ninth Circuit jurisprudence.²⁸ *Cavalier* has been cited regularly since for the propositions that courts should not only look at “protectable elements, standing alone” in assessing substantial similarity, but also “filter out and disregard the non-protectable elements.”²⁹ The problem is that the *Cavalier* court plucked that second part out of thin air; it is not in the Second Circuit standard,³⁰ and goes beyond prior Ninth Circuit case law.³¹

Cavalier claimed to find support in the 1994 decision in *Apple Computer v. Microsoft Corp.*, in which the Ninth Circuit held that, when conducting an extrinsic analysis, “unprotectable ideas [in a work] must be separated from potentially protectable expression” through analytic dissection in order to determine on what a finding of infringement may be based.³² Indeed, the Ninth Circuit in *Apple* treated the word “filter” as synonymous with “identify,” indicating that to filter unprotected elements does not mean to then ignore them entirely.³³ *Cavalier* took this holding a step further, however, by construing *Apple* to mean that “a court must filter out **and disregard** the non-protectable elements in making its substantial similarity determination.”³⁴ This command seemed to contravene the Ninth Circuit’s holding in 1990’s *Shaw v. Lindheim* that a common “pattern [that] is sufficiently concrete ... warrant[s] a finding of substantial similarity,” even where no individual element within that pattern is “remarkably unusual in and of itself.”³⁵ After all, how can a court protect a “pattern” of unprotected elements within a work if it is forced to first filter out **and disregard** all the unprotected elements?

Cavalier attempted to support its interpretation of *Apple* with two pre-1991 cases (one of them being *Shaw*) stating that infringement must be based on the copying of protectable elements in a work.³⁶ Once more, it seemed to miss the fact that a protectable element could be composed of individually non-protected elements, and that *disregarding* those unprotected elements (rather than simply cognitively separating them from inherently protected elements) before looking for substantial similarity is to potentially disregard a *protected* element as well. This point had been made not just by the Ninth Circuit in *Shaw*, but by the Supreme Court of the United States

in 1991’s *Feist Publications, Inc. v. Rural Telephone Service Co.*, which affirmed that “choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.”³⁷ It is important to note that the *Feist* decision post-dates *Cavalier*’s citations to the contrary.

Feist’s holding—that a creative selection and arrangement of otherwise unprotected material can be eligible for copyright protection—clearly vindicated *Shaw* and flies in the face of *Cavalier*’s interpretation of *Apple*. The only way *Cavalier* could stand was if it did not apply to cases in which a protected selection and arrangement of otherwise unprotected elements was asserted. Indeed, in 2003 the Ninth Circuit seemed to take that position in *Metcalf v. Bochco*, affirming the *Feist*-like notion that “[t]he particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element.”³⁸ The court further noted that “[neither *Apple* nor *Cavalier*] hold otherwise.”³⁹ *Metcalf*’s solution was to distinguish *Cavalier* as having dealt only with *random* similarities scattered throughout works, rather than concrete patterns.⁴⁰ Because the *Cavalier* plaintiff “apparently did not make an argument based on the overall selection and sequencing of these similarities,” the Ninth Circuit found that it was not applicable to a claim where that contention *was* made.⁴¹

The Ninth Circuit’s distinction was an attractive one; it would preclude *Cavalier*’s interpretation of *Apple* from applying when a *Metcalf*-style selection and arrangement was alleged to be protectable, thereby comports with what *Shaw* advocated and *Feist* mandated. Yet shortly thereafter, the Ninth Circuit twice distinguished *Metcalf* as only applicable when there has been an admission of access by the defendant⁴² (as there was in *Shaw*⁴³). This appears to have effectively created a **condition precedent** (admitted access) to use of the selection and arrangement test where none ever has been found to be required. Without access, *Metcalf* does not apply; without *Metcalf*, the court treats similarity between unprotected elements of a work as “random,” and *Cavalier* applies; if *Cavalier* applies, those unprotected elements are disregarded before an extrinsic analysis; and if unprotected elements are disregarded before an extrinsic analysis, there is effectively nothing left.

Clearly, a quiet dismantling of copyright’s balance has taken place. The Supreme Court laid out a straightforward rule in *Feist*, which the Ninth Circuit seemed to follow both before (*Shaw*) and afterward (*Apple*, *Metcalf*) with no mention at any time of any condition precedent to protecting patterns of individually unprotected elements. Yet over the last decade, the Ninth Circuit

Copyright

unceremoniously has ignored and constricted that test to a level that almost no plaintiff can possibly overcome. This preoccupation with admitted access seems specifically designed to frustrate creators in Hollywood, who will almost never have knowledge of the inner machinations of the studios with whom they must deal to have their work produced. Even *Nimmer on Copyright*, the leading treatise in the field, recognizes this: “Just as it is virtually impossible to offer direct proof of copying, so it is often impossible for a plaintiff to offer direct evidence that defendant (or the person who composed defendant’s work) actually viewed or had knowledge of plaintiff’s work. Such viewing will ordinarily have occurred, if at all, in a private office or home outside of the presence of any witnesses available to the plaintiff.”⁴⁴ Absent a confessional communiqué or surveillance tape of a studio hire pouring over the plaintiff’s work, there always will be some measure of speculation or inference required to show “actual copying”—even the claim in *Feist* heavily relied on probative similarities.⁴⁵ Yet now plaintiffs seemingly are barred from properly demonstrating substantial similarity unless they can directly prove access first.

Indeed, comparing Ninth Circuit precedent appears to demonstrate that often, the only difference between a winning and losing claim can be an access admission, as shown in Exhibit 1. These similarities, which certainly appear to give rise to “concrete patterns” by stacking specific similarities on top of general similarities to create copyrightable totalities, are sourced directly from the published opinions of the Ninth Circuit; it is difficult to believe that any slight variations between them are the difference between potential infringement and no potential infringement. Yet in *Metcalfe*, the court found a material issue of fact on substantial similarity and reversed the grant of summary judgment to the studio-defendant,⁴⁶ while in *Funky Films*, the court took up the role of fact-finder and distinguished the similarities on its own accord to reach a verdict in favor of the studio-defendant.⁴⁷ The court in *Funky Films* does not explain what compelled it to differ in its analysis, only that its comparison “reveals greater, more significant differences and few real similarities at the levels of plot, characters, themes, mood, pace, dialogue, or sequence.”⁴⁸ This harkens back to the

Exhibit 1—Comparison of Claim’s Success Based on Whether Access Is Admitted

Metcalfe v. Bochco 294 F.3d 1069, 1073-74 (9th Cir. 2002) (Access admitted by defendant)	Funky Films, Inc. v. Time Warner 462 F.3d 1072, 1077-80 (9th Cir. 2006) (Access <i>not</i> admitted by defendant)
<ul style="list-style-type: none"> Concerns an overburdened county hospital in inner-city Los Angeles with mostly black staff. 	<ul style="list-style-type: none"> Concerns a small funeral home and the lives of the family members who operate it after the sudden death of the father who had for decades run the business.
<ul style="list-style-type: none"> Deals with issues of poverty, race relations and urban blight. 	<ul style="list-style-type: none"> Deals with themes of death, relationships, and sex.
<ul style="list-style-type: none"> Main characters are young, good-looking, muscular black surgeons. 	<ul style="list-style-type: none"> Main characters are brothers who inherit equal shares of the business
<ul style="list-style-type: none"> Both surgeons grew up in the same neighborhood where the hospital is located. 	<ul style="list-style-type: none"> Both older brothers live in a distant city, working outside the funeral industry.
<ul style="list-style-type: none"> Both surgeons wrestle to decide between private practice or working in the inner city. 	<ul style="list-style-type: none"> Both older brothers wrestle to decide whether to sell off the family business or save it from dilapidation.
<ul style="list-style-type: none"> In both works, the hospital’s bid for reaccreditation is vehemently opposed by a Hispanic politician. 	<ul style="list-style-type: none"> In both works, the brothers are approached by a rival funeral home hoping to buy their business for cheap.
<ul style="list-style-type: none"> Both surgeons are romantically involved with young professional women when they arrive at the hospital, but develop strong attractions to once-married and childless hospital administrators in their thirties. The attractions flourish and culminate in a kiss, but are strained when the administrator observes a display of physical intimacy between the surgeon and his original love interest. 	<ul style="list-style-type: none"> Both businesses are shown to be financially fragile at the beginning of their stories, in debt and operating out of substandard facilities with obsolete equipment and a hearse that stalls. In the process of reviving the business, the other brother creatively uses the parlor to stage musical entertainment, while the younger brother changes his church affiliation to increase the client base of the business.

new unprecedented doctrine of “substantial dissimilarity” promulgated by the Ninth Circuit in 2006, which has its own set of doctrinal problems.⁴⁹

Given the above, it is unsurprising that author-plaintiffs are increasingly relying not on copyright claims to protect the works they submit to studios, but on contract claims; after all, if access is now all but required to survive a motion for summary judgment on both copyright *and* contract claims, a plaintiff might as well opt for the one that requires a lesser degree of similarity between the works in question. Yet, even these claims are now rife with pitfalls for the unsuspecting plaintiff.

The Increasing Dependence on Contract Claims

In the United States, the protection of artistic works from unauthorized third-party use is overwhelmingly governed by the 1976 Copyright Act (the ‘76 Act), which covers all “original works of authorship fixed in any tangible medium of expression.”⁵⁰ Prior to passage of the ‘76 Act, artistic works also were protectable through numerous state law claims, such as common law copyright, misappropriation, plagiarism, and unfair competition.⁵¹ The utility of these claims lay in the fact that copyright protection is limited to *expressions* of ideas,⁵² while the ideas themselves are deemed to be “as free as the air.”⁵³ State claims, however, were able to account for instances when taking and using a plaintiff’s intellectual endeavors, although within the allowances of copyright, was nonetheless deemed inequitable.⁵⁴

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Problematically for plaintiffs, however, the ‘76 Act effectively wiped most of these alternate claims off the map through implementation of 17 U.S.C. § 301, which provides that “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright ... are governed exclusively by [federal copyright law]. Therefore, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”⁵⁵ As defendants have learned to finesse the contours of copyright law, they have also aggressively sought to preclude any ancillary state law claims, ensuring where successful (such as in the Second Circuit⁵⁶) that plaintiffs’ arsenals against them are extremely limited.

In the Ninth Circuit, however, one strain of state law protection lives on despite the preemptive power of § 301—namely, contract claims.⁵⁷ This is because copyright, at its core, is a property-based interest; an author who possesses a valid copyright has the ability to exclude the rest of the world from using his or her copyrighted work in unapproved ways, much as a landowner can exclude trespassers. Similarly, § 301 only precludes state law claims based on proprietary notions (such as conversion) that essentially replicate the rights provided by the ‘76 Act.⁵⁸ Because contract claims derive their power through the voluntary assent of parties to be bound, their scope is not necessarily limited to any uniform set of rights and remedies (such as those granted by the ‘76 Act). This allows them to avoid federal preemption so long as they “protect rights that are qualitatively different from the rights protected by copyright.”⁵⁹ Most often, this is accomplished by alleging an “extra element” that exceeds the bounds of what can typically be accomplished by copyright (thus changing the nature of the claim), such as impliedly conditioning the use of the work not on mere permission (which is inherent to copyright), but on compensation (which is not provided for in the ‘76 Act).⁶⁰

The genesis of this claim formula (payment as an “extra element”) lies in the now-classic 1956 California case of *Desny v. Wilder*, in which the plaintiff-author had called a famous director’s office and orally pitched his concept for a film to the director’s secretary, conditioning its use upon payment.⁶¹ Because the secretary had accepted the conditions of the pitch, her apparent authority was enough to bind the director,⁶² and the contractual nature of the claim was able to protect the ideas of the pitch where copyright could not.⁶³ The Ninth Circuit’s 2004 ruling in *Grosso v. Miramax* upheld *Desny* in the face of potential § 301 preemption,⁶⁴ and its 2011 *en banc* ruling in *Montz v. Pilgrim Films & Television Inc.*⁶⁵ even expanded the *Desny* formula to include not just contracts for remuneration, but partnerships to develop submitted materials.

Based on this historical trend of staving off federal preemption, one might think that the Ninth Circuit was looking out for author-plaintiffs in the face of studio leverage. In reality, however, the implied-in-fact contract has been largely reduced to a paper tiger, with enough disqualifying features nibbling at its edges to make successful assertion of the doctrine a Herculean task at best. In this way, the Ninth Circuit has done to idea theft what it also has done to copyright—kept the plaintiff-friendly theories on the books while still providing defendants all the tools they need to short-circuit them, regardless of the merits of a plaintiff’s claim.

Copyright

A prime example of the foregoing can be seen in the 2007 case of *Hollywood Screentest of America v. NBC Universal, Inc.*,⁶⁶ where the plaintiff submitted the idea for a reality television show to NBC. Not only did the plaintiff have lengthy and extensive communications with a high-ranking executive at NBC, he even managed to procure a confidentiality agreement from the network.⁶⁷ After a year of discussions, NBC passed on the project, but soon thereafter produced a substantially similar project that prompted the lawsuit.⁶⁸ In its motion for summary judgment, NBC submitted declarations claiming that the substantially similar project had been brought to it, fully developed, by an independent producer with no knowledge of the plaintiff's work after the plaintiff submitted his ideas;⁶⁹ of course, the plaintiff was unable to submit *direct evidence* his idea was used by the second producer,⁷⁰ and the court found the declarations to constitute independent creation as a matter of law.⁷¹

An author who possesses a valid copyright has the ability to exclude the rest of the world from using his or her copyrighted work in unapproved ways, much as a landowner can exclude trespassers.

The ability for a defendant to acquire summary judgment based on self-serving declarations unless a plaintiff can demonstrate direct evidence of use has many troubling implications. In practice, it is difficult to fathom when a defendant will *not* be able to claim such independent creation, either by pointing to prior works containing similar ideas (a relatively simple task given that "there is nothing new under the sun"⁷²) or by having third parties willing to attest to such creation (whether real or fabricated). With the burden then shifted, a plaintiff will have to produce a smoking gun piece of evidence that demonstrates the defendant's statements to be false; a gun he is unlikely to find if the defendant has maintained clean internal communications. So long as the defendant sticks to his story that he, the party bound by the implied contract, did not actually contribute to his new production partner's work (which just happened to yield the same ideas the defendant was not to use), the contract has no practical effect.

It must be noted that, prior to *Hollywood Screentest*, the courts did not make it so simple for defendants to utilize the virtually bulletproof shield of independent creation; for example, in *Donahue v. United Artists Corp.*,⁷³ it was held that the evidence for independent creation had to

be "clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved" to be accepted as a matter of law.⁷⁴ Yet the court in *Hollywood Screentest* cites to the same case law as *Donahue* for the proposition that direct evidence of independent creation, *by itself*, meets this standard.⁷⁵ Nowhere does it mention the "clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved" requirement formerly attached to the standard, which grants future courts the opportunity to easily dismantle the requirement altogether if they choose to selectively cite to *Hollywood Screentest* (much as was done to the selection and arrangement test of copyright by selectively citing to *Cavalier*⁷⁶). Once again, plaintiffs are faced with the prospect of virtual impotence against studio-defendants, who may now be able to subvert the few remaining doctrines helpful to plaintiffs through mere self-serving denials.

Conclusion

Since the "death of copyright" was first highlighted in 2010,⁷⁷ it was hoped that the judiciary might take notice of the inherent inequities pointed out and seek to restore balance to the laws of copyright (and related protections). As this article has demonstrated, that has not occurred. Because authors lack the organization and resources of the major studios and networks, it is unclear how great an impact they can have on further doctrinal evolution. For now, authors can only reiterate their prior pleas to the Ninth Circuit: This current path taken by the judiciary is decidedly *not* the sort of balance that copyright (and idea protection) require. The point of protecting intellectual property, as enunciated by the Constitution, is to "promote the Progress of Science and useful Arts."⁷⁸ While the courts may believe that sheltering studios from suit helps prevent the stifling of their artistic expression, stripping authors of virtually any hope of prevailing on infringement claims is just as chilling to the arts as making it too easy to assert those claims. As with most legal fields, intellectual property requires balance in order to function properly. Litigating for plaintiffs in this area of the law has never been a walk in the park, but it absolutely should not be a death-march.

Notes

1. See e.g., Mark Colvin, "'Mad Men' Creator on American TV's Renaissance," *ABC News* (Nov. 17, 2009), <http://www.abc.net.au/pm/content/2009/s2745489.htm>; Nick Leshi, "The Scripted Television Renaissance," *Salon* (Apr. 7, 2010), http://open.salon.com/blog/kikstad/2010/04/07/the_scripted_television_renaissance.
2. *White v. Samsung Electronics Am., Inc.*, 989 F.2d 1512, 1521 (Ninth Cir. 2003).

3. Benay v. Warner Bros. Entm't, Inc., 607 F.3d 620, 622 (Ninth Cir. 2010).
4. Steven Lowe, "Death of Copyright," *Los Angeles Lawyer*, Nov. 2010, at 32; reprinted in *Computer and Internet Lawyer*, Mar. 2011, at 1.
5. *Benay*, 607 F.3d at 622.
6. *Id.* at 625 ("The Benays point to a number of similarities between the Screenplay and the Film. Both have identical titles; both share the historically unfounded premise of an American war veteran going to Japan to help the Imperial Army by training it in the methods of modern Western warfare for its fight against a samurai uprising; both have protagonists who are authors of non-fiction studies on war and who have flashbacks to battles in America; both include meetings with the Emperor and numerous battle scenes; both are reverential toward Japanese culture; and both feature the leader of the samurai rebellion as an important foil to the protagonist. Finally, in both works the American protagonist is spiritually transformed by his experience in Japan.")
7. *Id.* ("The most important similarities involve unprotectable elements. They are shared historical facts, familiar stock scenes, and characteristics that flow naturally from the works' shared basic plot premise. Stripped of these unprotected elements, the works are not sufficiently similar to satisfy the extrinsic test.")
8. *Id.* at 632.
9. *Id.* at 631 (emphasis added).
10. Civil Minutes, *Benay v. Warner Bros.*, CV 05-8508 at 7-10 (C.D. Cal. Feb. 14, 2012) (wherein the judge refused to allow the Benay brothers to pursue two theories establishing privity of contract with Warner Bros. due to their factual bases not being asserted in prior filings with the court).
11. Matthew Belloni, "Producers Zwick, Herskovitz Win 'Last Samurai' Trial Over Allegedly Stolen Script," *The Hollywood Reporter* (Apr. 6, 2012), www.hollywoodreporter.com/thr-esq/last-samurai-zwick-herskovitz-win-lawsuit-309268.
12. *Benay*, 607 F.3d at 623 ("The Benays' agent, David Phillips, 'pitched' the Screenplay to the president of production at Bedford Falls, Richard Solomon, on the telephone sometime between May 9, 2000, and May 12, 2000. Phillips provided a copy of the Screenplay to Solomon on May 16, 2000.")
13. See Brief of Appellants, *Benay v. Warner Bros.*, 2009 WL 2444597 at *11 (C.A.9) ("Both [works] contain the same historical error: that cannons would have been new to the Imperial Army when in fact cannons date back to the fourteenth century ... Both have the protagonist sailing from America and describe the ship's entry into Tokyo Bay with written (4ER:00608) and visual (DVD) shots of Mt. Fuji, which in fact cannot be seen from Tokyo Bay, another duplicated inaccuracy.")
14. See, e.g., the No Electronic Theft (NET) Act of 1997, the Pro-IP Act of 2008, the Combating Online Infringement and Counterfeits (COICA) Act of 2010, and the PROTECT IP/ Stop Online Piracy Acts of 2011.
15. Lowe, *supra* n.4 at 34-35 (listing 48 such cases); see also Novak v. Warner Bros Pictures, LLC, 387 Fed.Appx. 747 (9th Cir. 2010) (*We Are Marshall*); Clements v. Screen Gems, Inc., 2010 U.S. Dist. LEXIS 132186 (C.D. Cal. 2010) (*Stomp the Yard*); Buggs v. Dreamworks, Inc., 2010 U.S. Dist. LEXIS 141515 (C.D. Cal. 2010) (*Flushed Away*).
16. Lowe, *supra* n.4 at 32.
17. *Id.*
18. See Muller v. Twentieth Century Fox Film Corp., 2011 U.S. Dist. LEXIS 34288 (S.D.N.Y. 2011) (*Alien vs. Predator*); Goldberg v. Cameron, 2011 U.S. Dist. LEXIS 36840 (N.D. Cal. 2011) (*Terminator* franchise); Wild v. NBC Universal, Inc., 788 F.Supp.2d 1083 (C.D. Cal. 2011) (*Heroes*); Alexander v. Murdoch, 10 CIV.5613 PAC JCF, 2011 WL 2802899 (S.D.N.Y. 2011) report and recommendation adopted, 10 CIV.5613 PAC JCF, 2011 WL 2802923 (S.D.N.Y. 2011) (*Modern Family*).
19. See Universal Pictures Co., Inc. v. Harold Lloyd Corp., 162 F.2d 354, 360 (9th Cir. 1947); Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109 (9th Cir. 1970); United States v. Hamilton, 583 F.2d 448, 451 (9th Cir. 1978); Shaw v. Lindheim, 919 F.2d 1353, 1363 (9th Cir. 1990); Feist Publications Inc v. Rural Tel. Serv. Co., 499 U.S. 340, 348-351 (US Sup 1991); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000); Metcalf v. Bochco, 294 F.3d 1069, 1071, 1074 (9th Cir. 2002); Satava v. Lowry, 323 F.3d 805, 811 (Ninth Cir. 2003); Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004) (all cases in which versions of the selection and arrangement test were utilized).
20. *Wild*, 788 F.Supp.2d at 1089.
21. *Id.*
22. *Id.* at 1098-1099 (citing to Cavalier v. Random House, Inc., 297 F.3d 815 (9th Cir. Cal. 2002); *Metcalf*, 294 F.3d 1069; and Funky Films, Inc. v. Time Warner Entm't. Co., L.P., 462 F.3d 1072 (9th Cir.2006)).
23. *Id.*
24. See, e.g., *Wild* at 1099 ("Here the application of the extrinsic test and the principles articulated in controlling case law demonstrate that the only similarities between the two works involve abstract ideas or 'stock' themes and characters that are not protected by copyright").
25. *Id.* ("Based on the foregoing, the Court concludes that, even if those who wrote the Season Four episodes of *Heroes* had access to *Carnival of Souls*, and even if they read the work and drew inspiration from it, the two works are not substantially similar within the meaning of Ninth Circuit copyright jurisprudence. Plaintiff's copyright infringement claim therefore fails the extrinsic test and is DISMISSED *without leave to amend*.")
26. *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995).
27. *Cavalier*, 297 F.3d at 822 (9th Cir. Cal. 2002) (quoting Williams v. Crichton, 84 F.3d 581, 588 (2d Cir. 1996), which itself was quoting *Knitwaves*).
28. *Id.* ("A court 'must take care to inquire only whether "the protectible elements, standing alone, are substantially similar."')

- Williams v. Crichton, 84 F.3d 581, 588 (2d Cir. 1996) (emphasis in original) (citation omitted); *accord* Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1442-43 (9th Cir. 1994).”).
29. See, e.g. Hoch v. MasterCard Int’l Inc., 284 F. Supp. 2d 1217, 1222 (D. Minn. 2003); Mulcahy v. Cheetah Learning LLC, 386 F.3d 849, 855 (8th Cir. 2004); *Funky Films*, 462 F.3d at 1077; Olson v. Tenney, 466 F. Supp. 2d 1230, 1236 (D. Or. 2006); Bach v. Forever Living Products U.S., Inc., 473 F. Supp. 2d 1127, 1134 (W.D. Wash. 2007); Phillips v. Beck, CIV 06-00628SOM/KSC, 2007 WL 2972605 (D. Haw. Oct. 9, 2007); Zella v. E.W. Scripps Co., 529 F. Supp. 2d 1124, 1133 (C.D. Cal. 2007); Sun Media Sys., Inc. v. KDSM, LLC, 564 F. Supp. 2d 946, 979 (S.D. Iowa 2008); Sun Media Sys., Inc. v. KDSM, LLC, 576 F. Supp. 2d 1018, 1022 (S.D. Iowa 2008); Carmichael Lodge No. 2103 v. Leonard, CIV S-07-2665 LKK/GG, 2009 WL 2985476 (E.D. Cal. Sept. 16, 2009); McIntosh v. N. California Universal Enterprises Co., 670 F. Supp. 2d 1069, 1088 (E.D. Cal. 2009); Doody v. Penguin Group (USA) Inc., 673 F. Supp. 2d 1144, 1155 (D. Haw. 2009) (*citing to Funky Films*); Clements v. Screen Gems, Inc., CV10-220-R JEMX, 2010 WL 5174376 at 3 (C.D. Cal. 2010); Buggs v. Dreamworks, 2010 WL 5790251 at 4 (C.D. Cal. Dec. 28, 2010); Friedman v. Guetta, CV 10-00014 DDP JCX, 2011 WL 3510890 at 4 (C.D. Cal. 2011); Universal Dyeing & Printing, Inc. v. U.S. Textile Printing, Inc., CV 09-09132 DDP VBKX, 2011 WL 4084557 at 3 (C.D. Cal. Sept. 13, 2011) reconsideration denied, CV 09-09132 DDP VBKX, 2011 WL 5865567 (C.D. Cal. Nov. 21, 2011); Coble v. Renfro, C11-0498 RSM, 2012 WL 503860 at 3 (W.D. Wash. Feb. 15, 2012).
 30. See *Williams*, 84 F.3d at 588.
 31. See, *infra* n.32.
 32. Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1443 (9th Cir. 1994).
 33. *Id.* at 1446 (“[T]he party claiming infringement may place ‘no reliance upon any similarity in expression resulting from’ unprotectable elements ... This does not mean ... that infringement cannot be based on original selection and arrangement of unprotected elements. However, *the unprotectable elements have to be identified, or filtered*, before the works can be considered as a whole.”) (emphasis added).
 34. *Cavalier*, 297 F.3d at 822-823.
 35. *Shaw*, 919 F.2d at 1363.
 36. *Cavalier*, 297 F.3d at 822-823 (*citing Shaw*, 919 F.2d at 1361 and Berkic v. Crichton, 761 F.2d 1289, 1293-1294 (9th Cir.1985)).
 37. *Feist*, 499 U.S. at 348 (“[C]hoices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws”).
 38. *Metcalfe*, 294 F.3d at 1074 (It should be noted that the court does not actually cite to *Feist* for its proposition, but rather to *Shaw v. Lindheim*, which predates *Feist*).
 39. *Id.*
 40. *Id.* at 1074-1075.
 41. *Id.*
 42. Rice v. Fox Broadcasting Co., 330 F.3d 1170, 1179 (9th Cir. 2003) (“[O]ur decision in *Metcalfe* was based on a form of inverse ratio rule analysis: the plaintiff’s case was “strengthened considerably by [defendants’] concession of access to their works”); *Funky Films*, 462 F.3d at 1081, fn 4 (declining to apply *Metcalfe* because “this is not a circumstance in which the defendant has conceded access to the purportedly copied material”).
 43. *Shaw*, 919 F.2d at 1362 (“[D]efendants’ admission that they had access to Shaw’s script is a factor to be considered in favor of [the plaintiff]”).
 44. 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.02[A].
 45. *Feist*, 499 U.S. at 344 (“1,309 of the 46,878 listings in [the defendant’s] 1983 directory were identical to listings in [the plaintiff’s] 1982-1983 white pages ... Four of these were fictitious listings that [the defendant] had inserted into its directory to detect copying.”).
 46. *Metcalfe*, 294 F.3d at 1073-1074.
 47. *Funky Films*, 462 F.3d at 1077-1081.
 48. *Id.* at 1078.
 49. Lowe, *supra* n.4 at 35-36 (“The [*Funky Films*] court stated that a ‘reading of the two works reveal[ed] greater, more significant differences’ than similarities. In essence, the court constructed a brand new test of ‘substantial dissimilarity’ in the context of copyright infringement, one that completely contravenes the well-established principle that dissimilarity is irrelevant as long as the plaintiff makes a showing of the defendant work’s similarity to a substantial element of the plaintiff’s work.”).
 50. 17 U.S.C. § 102.
 51. Nimmer on Copyright § 19D.02.
 52. 17 U.S.C. § 102(b).
 53. *Desny v. Wilder*, 46 Cal. 2d 715, 731 (1956).
 54. *Id.* at 734 (“The law, however, is dedicated to the proposition that for every wrong there is a remedy (Civ. Code, § 3523) and for the sake of protecting one party it must not close the forum to the other. It will hear both and seek to judge the cause by standards fair to both. To that end the law of implied contracts assumes particular importance in literary idea and property controversies.”).
 55. 17 U.S.C. § 301.
 56. See, e.g., *Smith v. New Line Cinema*, No. 03 Civ. 5274(DC), 2004 WL 2049232, at *5 (S.D.N.Y. 2004); *Panizza v. Mattel, Inc.*, No. 02 Civ. 7722, 2003 WL 22251317, at *2 (S.D.N.Y. 2003) (holding that implied state law contract claim based on producer of television show’s failure to compensate plaintiff for creative ideas was preempted by Copyright Act).
 57. See *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (9th Cir. 2004) (“[Plaintiff’s] claim for breach of an implied-in-fact contract is not preempted by the Copyright Act, because it alleges an extra element that transforms the action from one arising under the ambit of the federal statute to one sounding in contract.”).

58. 4 Nimmer on Copyright § 19D.02[B].
59. *Grosso*, 383 F.3d at 968.
60. *Id.*
61. *Desny*, 46 Cal. 2d at 726-727.
62. *Id.* at 745-746.
63. *Id.* at 744 (“It is not essential to recovery that plaintiff’s story or synopsis possess the elements of copyright protectibility if the fact of consensual contract be found.”).
64. *Grosso*, 383 F.3d at 968.
65. *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 977 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 550, 181 L. Ed. 2d 410 (U.S. 2011).
66. *Hollywood Screentest of Am., Inc. v. NBC Universal, Inc.*, 151 Cal. App. 4th 631, 633-635 (2007).
67. *Id.*
68. *Id.* at 636.
69. *Id.* at 636-638.
70. *Id.* at 638.
71. *Id.* at 649.
72. *Weitzenkorn v. Lesser*, 231 P.2d 889, 893 (Cal. Ct. App. 1951) *vacated*, 40 Cal. 2d 778, 256 P.2d 947 (1953).
73. *Donahue v. United Artists Corp.*, 2 Cal. App. 3d 794 (Ct. App. 1969).
74. *See id.*, 2 Cal. App. 3d at 805, 83 Cal. Rptr. 131 (Ct. App. 1969) (describing a scenario in which “the judgment notwithstanding the verdict was reversed, the court holding that defendant’s evidence that it did not use plaintiffs’ idea was not of the character found in *Teich v. General Mills, Inc.*, 170 Cal.App.2d 791 [339 P.2d 627] (relied on by defendant), *i.e.*, so ‘clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved.’)
75. *Hollywood Screentest*, 151 Cal. App. 4th at 646 (*citing to Teich*).
76. *See, supra* section entitled “The Continuing Decline of Copyright Claims in the Ninth Circuit”.
77. *Lowe, supra* n.4.
78. Const., Art. 1, § 8.

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