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# Journal of Intellectual Property Law

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Volume 10  
Issue 2 *Symposium: Articles in Honor of  
Professor L. Ray Patterson*

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Article 10

March 2003

## When California Dreamin' Becomes a Hollywood Nightmare; Copyright Infringement and the Motion Picture Screenplay: Toward an Improved Framework

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### Recommended Citation

Nick Gladden, *When California Dreamin' Becomes a Hollywood Nightmare; Copyright Infringement and the Motion Picture Screenplay: Toward an Improved Framework*, 10 J. INTELL. PROP. L. 359 (2003).  
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## **WHEN CALIFORNIA DREAMIN' BECOMES A HOLLYWOOD NIGHTMARE; COPYRIGHT INFRINGEMENT AND THE MOTION PICTURE SCREENPLAY: TOWARD AN IMPROVED FRAMEWORK**

### **I. INTRODUCTION**

Movie mogul Samuel Goldwyn once famously referred to screenwriters as "schmucks with Underwoods."<sup>1</sup> Underpaid and under appreciated, the screenwriter traditionally occupied the lowest rung on Hollywood's ladder. Today, the tables have turned dramatically. In 1993, "Lethal Weapon" scribe Shane Black received four million dollars for his screenplay "The Long Kiss Goodnight."<sup>2</sup> This ushered in a virtual Gilded Age for Hollywood screenwriters. Million dollar script sales have become as routine as Robert Downey Jr.'s latest trip to rehab. With more fame, wealth, and creative input than ever before, screenwriters are finally getting the respect that they deserve. As movies become exponentially more expensive to make, studios realize the screenplay is a blueprint for a multi-million dollar investment.

With the lure of instant fame and riches, the aspiring screenwriter is just as likely to be found in Poughkeepsie as he is a Hollywood back lot. It should not be surprising then that a cottage industry of how-to-sell-a-screenplay books, conferences, and web-sites has sprung up in recent years.<sup>3</sup> For those who live outside of Hollywood, the Internet in particular is viewed as an important tool to level the playing field for new writers in search of success.<sup>4</sup> As Hollywood is flooded with more and more scripts, one unifying principle seems to unite all aspiring screenwriters: an overwhelming fear of getting ripped off.

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<sup>1</sup> WHY WE WRITE: PERSONAL STATEMENTS AND PHOTOGRAPHIC PORTRAITS OF 25 TOP SCREENWRITERS 13 (Lorian Elbert ed., 1999).

<sup>2</sup> THOM TAYLOR, THE BIG DEAL 7 (1999).

<sup>3</sup> See Kyle Creason, *Hollywood Alchemy*, at <http://www.scriptnotes.com/Interview2.htm> (last visited Apr. 7, 2003).

<sup>4</sup> CHRISTOPHER WEHNER, SCREENWRITING ON THE INTERNET 1 (2001).

While a large number of Hollywood movies get sued every year for copyright infringement, the overwhelming percentage of these suits fail. Most often, writers are just unwilling to admit that two people can come up with the same idea. One Midwestern judge is said to have found, "as a matter of triable fact, that there are only twenty-nine basic plot ideas in the world."<sup>5</sup> Generally speaking, it is much cheaper for a studio to buy a script than to steal one.<sup>6</sup> That being said, infringement does occur. New writers in particular are vulnerable to infringement because they have to be less discriminating about to whom they send their scripts.<sup>7</sup> Even though a writer may justifiably believe that his script has been stolen, proving that in a court of law can be a difficult challenge.

For a screenwriter to prove copyright infringement, he must show copyright ownership, the defendant's access to his work, and substantial similarity.<sup>8</sup> Copyright ownership is a "statutory formality easily satisfied prior to the institution of litigation."<sup>9</sup> Generally, access is shown if the defendant had a reasonable opportunity to view the plaintiff's work.<sup>10</sup> However, courts often take an unrealistically stringent view as to what constitutes reasonableness. The ease with which scripts can be disseminated over the Internet is likely to complicate this problem even more. Substantial similarity is the meat and potatoes of any copyright litigation. Unfortunately, the substantial similarity standard for motion picture screenplays has been somewhat underdeveloped. While courts have defined a number of concrete elements to compare,<sup>11</sup> little effort has been made to analyze how courts should go about applying those elements. The view being that decisions of substantial similarity "must inevitably be made ad hoc."<sup>12</sup> While

<sup>5</sup> See RON SUPPA, *THE BUSINESS OF SCREENWRITING* 66 (1999).

<sup>6</sup> See Melody Jackson, *Jingling All the Way to the Bank, A Real-Life Screenwriter's \$19,000,000 Story*, CREATIVE SCREENWRITING, March/April 2002, at 12 (discussing a recent judgment of nineteen million dollars entered on behalf of Brian Webster, a Michigan high school teacher, against 20th Century Fox). A jury found Webster's screenplay "Could This Be Christmas" had been infringed upon by the Arnold Schwarzenegger flop "Jingle All the Way." The judgment was equal to about one-third of what it cost to produce the film. *Id.*

<sup>7</sup> See David Walter, *Promote and Protect: How to Safeguard Your Creative Work From Theft*, at <http://www.entertainmentcareers.net/qa/write/protection.asp> (last visited Apr. 7, 2003).

<sup>8</sup> See *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1044 n.2, 29 U.S.P.Q.2d (BNA) 1877 (9th Cir. 1994).

<sup>9</sup> Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 277 (1993).

<sup>10</sup> See *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172, 196 U.S.P.Q. (BNA) 97 (9th Cir. 1977).

<sup>11</sup> See *Kouf*, 16 F.3d at 1045 (defining the elements as plot, themes, dialogue, mood, setting, pace, characters, and sequence of events).

<sup>12</sup> *Shaw v. Lindheim*, 919 F.2d 1353, 1356, 15 U.S.P.Q.2d (BNA) 1516 (9th Cir. 1990).

it is certainly true that each case shall rest on its own merits, clear patterns have emerged within the major elements as to what constitutes substantial similarity.

This Note will provide a comprehensive examination of copyright infringement in the area of motion picture screenplays. It will look at the history of protection for motion picture screenplays, examine the varying standards for access and argue for a lessening of the standard, and analyze the major elements of a screenplay used to determine substantial similarity, including character, plot, mood, and theme. Finally, this Note will suggest an improved framework for each element and hopefully will bring more structure to screenplay litigation.

## II. BACKGROUND

Article I, Section 8 of the Constitution grants Congress the power to enact copyright legislation in order to promote and protect the writings of authors.<sup>13</sup> Without such protection, authors would be denied the fruits of their labor and have little incentive to create. A motion picture screenplay is a "writing" within the meaning of the Copyright Clause, although it does have a unique facet to it.<sup>14</sup> In the seminal case of *Baker v. Selden*,<sup>15</sup> the Supreme Court interpreted the Copyright Clause to mean that only expression of ideas and not the ideas themselves could be copyrighted.<sup>16</sup> *Baker* involved a book which explained a method of accounting and included blank forms to illustrate that method.<sup>17</sup> The original author sued the defendant when he published a book that included forms to be used with the plaintiff's system.<sup>18</sup> In a landmark decision, the Supreme Court held that if a copyrighted work describes a system or process, copyright does not stop others from making whatever printed works are needed to use that system.<sup>19</sup> This gave rise to the so-called idea/expression dichotomy which was later codified in the Copyright Act of 1976.<sup>20</sup> It can hardly be disputed that

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<sup>13</sup> "The Congress shall have power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

<sup>14</sup> Unlike a novel, a motion picture is a highly collaborative process. This has led some scholars to believe that a screenplay is better considered a "joint work" as defined by the 1976 Copyright Act. Coauthors to the joint work might include the director, producer, and performers. See F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225, 287-88 (2001).

<sup>15</sup> 101 U.S. 99 (1879).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 100.

<sup>18</sup> *Id.*

<sup>19</sup> WILLIAM S. STRONG, *THE COPYRIGHT BOOK* 15 (4th ed. 1993).

<sup>20</sup> "In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such

denying monopoly rights in ideas is critical to creating competition in the marketplace and encouraging others to create new works. Unfortunately, the line between idea and expression is not always a clear one. One of the first major cases to shed light on that subject was *Nichols v. Universal Pictures Corporation*.<sup>21</sup> Writing for the Second Circuit, Judge Hand articulated the famous “abstractions” test for determining when the line has been crossed between idea and expression. Judge Hand said:

Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.<sup>22</sup>

In *Nichols*, the plaintiff had written a play entitled “Abie’s Irish Rose” about a taboo romance between a Jewish boy and a Catholic girl.<sup>23</sup> Knowing that their deeply religious fathers strongly disapprove of interfaith dating, the couple conceal the truth by duping the Irish father into believing the boy is Catholic and the Jewish father into believing the girl is Jewish.<sup>24</sup> The ruse is eventually discovered, and the fathers disown their children.<sup>25</sup> When the couple later gives birth to twins, the families reconcile.<sup>26</sup> The defendant produced a film called “The Cohens and the Kellys.”<sup>27</sup> The kids of an Irish and Jewish family living next door to each other fall in love and secretly get married.<sup>28</sup> While initially disapproving of the union, the feuding fathers of the couple eventually discover they are related when they jointly inherit a fortune from a distant relative.<sup>29</sup> Comparing the two works, Judge Hand found that “[a] comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*” and

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work.” 17 U.S.C. § 102(b) (2000).

<sup>21</sup> 45 F.2d 119 (2d Cir. 1930).

<sup>22</sup> *Id.* at 121.

<sup>23</sup> *Id.* at 120.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120 (2d Cir. 1930).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 121.

"[t]hough the plaintiff discovered the vein, she could not keep it to herself."<sup>30</sup> Hand determined that any similarities between the works were too abstract to deserve protection.

*Nichols* is important because it represented the federal courts' first acknowledgment of the idea/expression dichotomy in copyright infringement suits.<sup>31</sup> In *Nichols*, the court also rejected the testimony of a plaintiff's expert who prepared an elaborate analysis of each character's emotional arc.<sup>32</sup> Instead, Hand enunciated an "ordinary observer" test whereby a fact finder would "stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal."<sup>33</sup>

The Second Circuit refined Hand's abstractions test in *Arnstein v. Porter*. Arnstein alleged that the defendant, musician Cole Porter, had infringed upon songs written by Arnstein.<sup>34</sup> The court created a two-prong test to show infringement. First, the court examined access and similarity to determine if copying had occurred. An inference of copying could be created if the defendant had access to the plaintiff's work and the works were similar.<sup>35</sup> Expert testimony and analysis would be allowed to help the trier of fact determine copying.<sup>36</sup> Even if copying is established, that is not adequate enough to show infringement. The copying must go so far as to constitute "improper appropriation."<sup>37</sup> The second prong of the *Arnstein* test then turns on whether the ordinary layperson would find illicit copying.<sup>38</sup> This is shown if the defendant "took from [the] plaintiff's works so much of what is pleasing to the [eyes and] ears of lay [persons], who comprise the audience for whom such popular [works are] composed, that defendant wrongfully appropriated something which belongs to the plaintiff."<sup>39</sup> This second prong was largely a reiteration of the ordinary observer test set forth in *Nichols*.

By distinguishing copying from illicit copying/improper appropriation, the Second Circuit created a standard whereby a defendant may have copied from the plaintiff's text, even to a degree where the works are substantially similar, but the material taken may be ineligible for copyright protection.<sup>40</sup> If the material taken

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<sup>30</sup> *Id.* at 122.

<sup>31</sup> Jones, *supra* note 9, at 284.

<sup>32</sup> *Nichols*, 45 F.2d at 123.

<sup>33</sup> *Id.*

<sup>34</sup> *Arnstein v. Porter*, 154 F.2d 464, 469, 68 U.S.P.Q. (BNA) 288, 291 (2d Cir. 1946).

<sup>35</sup> *Id.* at 468.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* "Improper appropriation" would later be recast as the phrase "substantial similarity."

<sup>38</sup> *Id.*

<sup>39</sup> *Arnstein*, 154 F.2d at 473.

<sup>40</sup> See Douglas Y'Barbo, *The Origin of the Contemporary Standard for Copyright Infringement*, 6 J.

is an unprotectable idea or element, the degree of similarity is irrelevant. By adopting a bifurcated approach that required both copying and improper appropriation, the court implicitly reiterated the idea/expression dichotomy and set the stage for the Ninth Circuit's influential decision in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corporation*.<sup>41</sup>

The *Krofft* decision is important for a number of reasons. First, the 9th Circuit includes California, where the majority of screenplay infringement suits are filed. Second, it was the *Krofft* decision that first fully "synthesized the elements of a copyright action and fully articulated the distinctions between similarity in idea and expression."<sup>42</sup> Third, other jurisdictions have used *Krofft* as a starting point in developing their own standards for substantial similarity.

Sid and Marty Krofft were the creators of "H.R. Pufnstuf," a hit children's show about a young boy who lived in a fantasyland inhabited by colorful costumed characters, moving trees, and talking books.<sup>43</sup> The success of the show led to a wide variety of H.R. Pufnstuf products and endorsements.<sup>44</sup>

In early 1970, a McDonald's advertising firm approached the Kroffts about teaming up for an ad campaign that would feature the H.R. Pufnstuf characters.<sup>45</sup> When negotiations broke down, McDonald's went ahead with their "McDonaldland" project, using characters very similar to those in H.R. Pufnstuf.<sup>46</sup> McDonald's hired former Krofft employees to design and construct the costumes, and employed the same voice expert who supplied all the voices for the Pufnstuf characters.<sup>47</sup> Before the McDonaldland ads, plaintiffs had licensed the use of H.R. Pufnstuf characters to manufacturers of toys, games, lunch boxes, cereals, and even the Ice Capades.<sup>48</sup> After the McDonaldland campaign, which also included the distribution of toys and games, the plaintiff's efforts to enter

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INTELL. PROP. L. 285, 304-05 (1999).

<sup>41</sup> *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 196 U.S.P.Q.2d (BNA) 97 (9th Cir. 1977).

<sup>42</sup> DOROTHY J. HOWELL, *INTELLECTUAL PROPERTIES AND THE PROTECTION OF FICTIONAL CHARACTERS* 30 (1990).

<sup>43</sup> *Krofft*, 562 F.2d at 1161. The Kroffts were also the team behind "The Banana Splits."

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* Those characters included luminaries like Mayor McCheese, Grimace, and Hamburglar.

<sup>47</sup> *Id.*

<sup>48</sup> *Krofft*, 562 F.2d at 1161-62.

into new licensing agreements or extend existing ones proved unsuccessful.<sup>49</sup> The Kroffts eventually brought suit against McDonald's for copyright infringement.

In deciding the case, the Ninth Circuit explicitly stated what the *Arnstein* court had alluded to by requiring that both substantial similarity in ideas and expression be shown. The first prong of the test is an extrinsic test because it objectively considers similarity of ideas.<sup>50</sup> It depends not upon the trier of fact, "but on specific criteria which can be listed and analyzed."<sup>51</sup> Because it is an extrinsic test, expert testimony and analysis are appropriate.<sup>52</sup> If the first step is satisfied, the plaintiff must still show substantial similarity of the expression of the idea. This step involves an intrinsic test whereby an ordinary, reasonable observer subjectively compares the two works to determine if they are substantially similar.<sup>53</sup> In *Krofft*, McDonald's argued that the court should only apply an extrinsic test, pointing to specific differences in its characters and settings that evidenced a lack of substantial similarity.<sup>54</sup> For example, while Mayor McCheese wore a typical diplomat's sash, Pufnstuf sported a cummerbund from which hangs a medal inscribed "mayor."<sup>55</sup> If only an extrinsic test were employed, McDonald's laundry list of minute dissimilarities might have gotten them off the hook. However, the court wisely understood that such an analytic analysis does not occur in a vacuum. The characters cannot be removed from the setting and context in which they operate. As Judge Hand stated, copyright "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."<sup>56</sup> The correct intrinsic approach, showing McDonaldland's impact on the minds and imaginations of kids, revealed that the defendants had captured the total concept and feel of H.R. Pufnstuf.<sup>57</sup>

Starting in the early 1980s, a line of cases tried to define an "idea" for the purpose of employing the *Krofft* test.<sup>58</sup> In the literary setting, courts "defined [an] idea as 'plot, themes, dialogue, mood, setting, pace, characters, and sequence' [of

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<sup>49</sup> *Id.* at 1162. The H.R. Pufnstuf characters were actually booted from the Ice Capades in favor of the McDonaldland characters. At trial, the evidence showed that certain persons with whom the plaintiffs dealt for licensing mistakenly believed that the H.R. Pufnstuf characters were being licensed to McDonald's for the McDonaldland campaign. Consequently, these potential licensees did not pursue licensing agreements for the characters themselves. *Id.* at n.3.

<sup>50</sup> *Id.* at 1164.

<sup>51</sup> *Id.* (listing those elements as "the type of artwork involved, the materials used, the subject matter, and the setting for the subject").

<sup>52</sup> *Id.*

<sup>53</sup> *Krofft*, 562 F.2d at 1164.

<sup>54</sup> *Id.* at 1166.

<sup>55</sup> *Id.*

<sup>56</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120 (2d Cir. 1930).

<sup>57</sup> See HOWELL, *supra* note 42, at 31.

<sup>58</sup> *Jones*, *supra* note 9, at 292.

events].”<sup>59</sup> Since it grew to include almost every element that may be considered concrete in a literary work, “the extrinsic test as applied to books, scripts, plays, and motion pictures can no longer be seen as a test for mere similarity of ideas.”<sup>60</sup> By including all objective manifestations of creativity, the two-prong *Krofft* test is now more aptly described as “objective and subjective analyses of *expression*, having strayed from *Krofft*’s division between expression and ideas.”<sup>61</sup> The intrinsic test remains unchanged. It is still based upon the trier of fact’s subjective determination of whether the total concept and feel of the two works are substantially similar.

The idea/expression dichotomy is responsible for a majority of the confusion in screenplay litigation. Most writers do not understand that much of a screenplay is likely comprised of unprotectable elements. *Krofft* provides a general framework to sort out the protectable from the unprotectable. While courts have rightly refused to draw bright lines as to what constitutes screenplay substantial similarity, clear trends have emerged, particularly within the elements of character, plot, mood, and theme. Of course, before the court can even get to substantial similarity, the plaintiff must clear the access hurdle. While not as sexy and important as its substantial similarity counterpart, it remains a significant impediment in screenplay infringement suits.

### III. ACCESS

Direct evidence of copying is rarely available.<sup>62</sup> Most people are smart enough not to admit to copying or let someone else observe them doing it. Consequently, the access element is usually shown through circumstantial evidence. Access will be proved “if the plaintiff’s copyrighted work was available to the public or if it was specifically available to the defendant.”<sup>63</sup>

Common sense tells us that you cannot copy something unless you are acquainted with it. Generally, courts require a reasonable possibility, not a mere possibility, that the infringer saw the plaintiff’s work.<sup>64</sup> Since the average script being peddled around town is not available to the general public (via bookstore, library, etc.), a plaintiff must show a chain or link of events by which the defendant could have viewed it.<sup>65</sup> Cases where the plaintiff has directly given the

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<sup>59</sup> *Id.* at 293.

<sup>60</sup> *Shaw v. Lindheim*, 919 F.2d 1353, 1357 (9th Cir. 1990).

<sup>61</sup> *Id.*

<sup>62</sup> See generally MARGRETH BARRETT, *INTELLECTUAL PROPERTY—PATENTS, TRADEMARKS, & COPYRIGHTS* 212 (3d ed. 2000).

<sup>63</sup> *Id.*

<sup>64</sup> See *Towler v. Sayles*, 76 F.3d 579, 582, 37 U.S.P.Q.2d (BNA) 1785 (4th Cir. 1996).

<sup>65</sup> See *Cox v. Abrams*, 1997 U.S. Dist. LEXIS 6687, \*9 (S.D.N.Y. 1997).

script to an infringer are not the most common scenario. More likely is the situation where an author sends a script to a third party, who then passes it along to the defendant. Where the intermediary has a close relationship with the alleged infringer, courts often infer a reasonable possibility of access.<sup>66</sup> Unfortunately, many courts set an unrealistically high bar as to what constitutes a "close relationship." In *Towler v. Sayles*, Virginia Towler submitted a copy of her screenplay "Crossed Wires" to SCS Films, a successor company to Cinecom, which had previously released two of writer/director John Sayles' films.<sup>67</sup> Towler spoke with a representative of the company, who Towler said agreed to forward a copy of the script to Sayles.<sup>68</sup> Crediting Towler's testimony that SCS said it would forward the script to Sayles, the court still found no evidence of access.<sup>69</sup> Sayles, not surprisingly, denied receiving the script and the court found "no evidence upon which a jury could base an inference that Sayles was not truthful."<sup>70</sup> Cinecom, SCS's predecessor, was a small, independent film company that produced two of Sayles' critically acclaimed films. Clearly Sayles had a good working relationship with Cinecom or he would not have released a second film with them.

Moreover, Cinecom and SCS shared the same chairman, were located in the same office, and employed most of the same employees.<sup>71</sup> Furthermore, Sayles' own business attorney was a former Cinecom employee.<sup>72</sup> Despite those ties, the court held that the dealings between SCS and Sayles "must involve some overlap in subject matter to permit an inference of access."<sup>73</sup> Presumably there was insufficient overlap because SCS had no interest in developing "Crossed Wires" itself or was not working with Sayles on any projects at that time. The court's rationale seems to confuse a reasonable chance to view the work with an actual chance to do so. It seems reasonable that either Strain or someone whom Sayles had dealt with at Cinecom would have forwarded the script to him, given his past relationship with the company, Towler's specific request to do so, and her credited testimony that Strain agreed to pass the script along. At the very least,

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<sup>66</sup> See *Towler*, 76 F.3d at 583 (giving examples of court cited close relationships include working in the same department with the infringer or someone who regularly contributes creative ideas to him).

<sup>67</sup> *Id.* at 582.

<sup>68</sup> The SCS representative, Tracy Strain, did not recall the conversation asking her to forward the script to Sayles. However, no one disputes that SCS did actually receive a copy of "Crossed Wires" from Towler. *Id.*

<sup>69</sup> *Id.* at 583.

<sup>70</sup> *Towler*, 76 F.3d at 583.

<sup>71</sup> *Id.* at 582.

<sup>72</sup> *Id.* at 583.

<sup>73</sup> *Id.* (quoting *Meta-Film Associates, Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1358, 222 U.S.P.Q. (BNA) 211 (C.D. Cal. 1984)).

the reasonableness of access question was one for a jury to decide and should not have been decided as a matter of law.

Ironically, another badly decided access case is an Eleventh Circuit decision also involving Sayles. In *Herzog v. Castle Rock Entertainment*, a Miami high school teacher accused Sayles of infringing upon her script "Concealed" with his Oscar nominated screenplay "Lonestar."<sup>74</sup> As part of her master's thesis in film studies at the University of Miami, Herzog had to write a feature length screenplay.<sup>75</sup> She gave a copy of her script to William Cosford, the esteemed film critic for the "Miami Herald," and asked him to serve on her thesis committee.<sup>76</sup> While declining to serve because of time constraints, Cosford kept the copy of "Concealed."<sup>77</sup> It was Herzog's belief that Cosford gave "Concealed" to Sayles when he attended the Miami Film Festival in 1993.<sup>78</sup> Sayles had attended the Miami Film festival the previous two years and dined with Cosford on both occasions.<sup>79</sup> There was even evidence to suggest that Sayles stayed at Cosford's house during the 1992 festival.<sup>80</sup> While no one specifically remembered Cosford and Sayles interacting during the 1993 Miami Film Festival,<sup>81</sup> it is reasonable to believe they did. The two enjoyed a social relationship and spent time together at the previous two festivals. Even assuming they did interact in 1993, the court did not view their relationship as the kind where Cosford would have given a script to Sayles. The court remarked that Cosford "was a respected film critic, not a conduit for the film industry."<sup>82</sup> The court's statement actually disproves its point. As a film critic, Cosford was not someone who would produce or finance a film. He did not interact with studio heads or agents. The only thing he really could do with the script to help further Herzog's dream was to pass it along to someone in the film industry. Having received the script soon before the 1993 Miami Film Festival, it was reasonable for that person to have been Sayles. Sayles was a savvy film veteran. He might have been interested in purchasing the script to either rewrite it or direct it. Even if he was not interested in the screenplay for himself, Sayles could have easily passed it along to his agent or someone else in the business who might want to buy it from Herzog.

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<sup>74</sup> *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1244 (11th Cir. 1999).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1245. Cosford died in 1994 and therefore could not be deposed for the subsequent lawsuit.

<sup>79</sup> *Herzog*, 193 F.3d at 1253.

<sup>80</sup> *Id.* at 1252.

<sup>81</sup> *Id.* at 1249-50.

<sup>82</sup> *Id.* at 1251.

The *Towler* and *Herzog* cases are indicative of how far some courts have strayed from the real issue at stake: whether the defendant *copied* the plaintiff's work. While it would be unfair to dismiss access as a mere technicality, it should not be employed as a brutish bouncer preventing entrance into the more substantive club of substantial similarity. Most courts are quick to state that "no amount . . . of access will suffice to show copying if there are no similarities."<sup>83</sup> Furthermore, a majority of circuits dispense with the access requirement altogether if the two works are so strikingly similar as to preclude independent creation.<sup>84</sup> Consequently, if the absence or presence of access is not determinative to courts in these kinds of lawsuits, access should hardly be considered a critical bar to victory.<sup>85</sup>

The access problem will likely be further complicated by the ever increasing role of the Internet in screenwriting. In 2000, Matt Damon and Ben Affleck produced the online screenplay contest Project Greenlight. Over ten-thousand screenwriters submitted scripts online with the winner receiving one million dollars from Miramax Films to make their movie.<sup>86</sup> There are numerous other web-sites where scripts are posted and available for the general public to read and review. Furthermore, many producers and agents let aspiring screenwriters e-mail them directly a copy of their screenplay.

Presently, most courts accept a theory of access based upon the plaintiff's work being widely available to the public.<sup>87</sup> Since the work is widely disseminated, there is a much greater likelihood that the defendant was actually exposed to it or had a reasonable opportunity to be so exposed.<sup>88</sup> This theory of access has generally been inapplicable in the screenplay context because unproduced screenplays are not widely available to the public like a novel or television show are. However, this is no longer the case. Once a script enters cyber-space, the screenwriter loses all control over his work. With the click of a mouse, a script can be sent to a worldwide audience numbering in the millions. Scripts posted and passed around on the Internet are just as accessible as the more common cases of wide dissemination, including a song played on the radio or a novel sold in bookstores. Adopting a theory of wide dissemination based on Internet access will not give plaintiffs a free ride. They will still have the burden of showing that their work was widely disseminated, a claim which can be refuted by evidence

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<sup>83</sup> *Shaw v. Lindheim*, 919 F.2d 1353, 1357 (9th Cir. 1990).

<sup>84</sup> *See Herzog*, 193 F.3d at 1248.

<sup>85</sup> *See Karen Bevill, Copyright Infringement and Access: Has the Access Requirement Lost its Probative Value?*, 52 RUTGERS L. REV. 311, 325 (1999).

<sup>86</sup> *Contest Overview*, at <http://www.projectgreenlight.liveplanet.com/contests/pgl2/overview.jsp> (last visited Oct. 7, 2002).

<sup>87</sup> *See BARRETT, supra* note 62, at 212.

<sup>88</sup> *See Bevill, supra* note 85, at 326.

showing that the site was not widely known or used. At the end of the day, courts cannot remain complacent in the face of changing technology and changing times. A more encompassing standard of access will let courts get back to their real business: comparing the concrete, expressive elements of a screenplay in a search for substantial similarity.

#### IV. CHARACTER

Substantial similarity in characters can be analyzed in one of two ways. First, a plaintiff might seek copyright protection for the character apart from the specific plot in which they appear.<sup>89</sup> This is usually reserved for strong brand names like the Lone Ranger or Bugs Bunny. According to Judge Learned Hand, a character had to be sufficiently developed to be protected independently of a story's overall plot.<sup>90</sup> The Ninth Circuit took things a step further in a case involving hard-boiled author Dashiell Hammett. Hammett sold the rights to the "Maltese Falcon" to Warner Brothers, but continued to write stories using the Sam Spade character.<sup>91</sup> Warner Brothers sued, claiming infringement.<sup>92</sup> Although finding that Hammett had contractually maintained his rights to use Sam Spade, the court went on to state that characters were uncopyrightable unless a character itself is the story.<sup>93</sup> This is a very exacting standard, as the vast majority of characters are mere vessels to move a plot along. It should be noted, however, that courts have found literary infringement through character comparisons, thus suggesting that characters are protected by copyright.<sup>94</sup>

With regards to film and television scripts, a second type of character analysis is normally used. In these cases, plaintiffs are not claiming independent copyright protection for a character, but use character as one element of comparison to show theft of an overall work. Once again, this analysis turns on the idea/expression dichotomy. General concepts and ideas associated with a character are uncopyrightable, but the specific expression of those ideas is copyrightable.<sup>95</sup>

For instance, in *Zambito v. Paramount Pictures Corporation*, the plaintiff claimed that "Raiders of the Lost Ark" was ripped off from his archaeologist/treasure

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<sup>89</sup> See ROBERT E. LEE, A COPYRIGHT GUIDE FOR AUTHORS 134 (1995).

<sup>90</sup> See *id.*

<sup>91</sup> STRONG, *supra* note 19, at 23.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 24.

<sup>95</sup> *Id.* at 135.

hunter script "Black Rainbow."<sup>96</sup> In comparing the plaintiff's protagonist, Zeke Bannaro, to Indiana Jones, the court stated that:

Zeke is basically a serious, self-interested, individual who betrays both the museum for which he works and his illegitimate 'backer,' strikes out on his own, and [kills] his adversaries in cold-blood. Indy, on the other hand, is a larger-than-life adventurer who, in matinee-idol fashion, remains loyal to truth, justice and the American way.<sup>97</sup>

Besides, the fact that the two were male archaeologists searching for treasure, they had nothing in common.

Likewise, in *Olson v. National Broadcasting Company, Inc.*, the court found no substantial similarity among the characters in the Stephen J. Cannell<sup>98</sup> created series the "A-Team" and the plaintiff's treatment for an action television show entitled "Cargo."<sup>99</sup> While both shows were centered around Vietnam veterans engaged in comedic action-adventures, the court quickly dismissed any similarity in overall plot, dialogue, or setting.<sup>100</sup> Similarities in mood and pace were found to be common to the genre of an action-adventure television series.<sup>101</sup> The plaintiff's most viable argument involved substantial similarity in character.<sup>102</sup> Olson had not even written an actual script. He wrote a brief summary of his concept, which included only a three to four line description of each character and his wish list of the actor to play that character.<sup>103</sup> While the court allowed for the finding of some loose correspondence among the characters, it held that because the "Cargo" characters were so thinly drawn and because the "A-Team" characters differed in significant ways, substantial similarity was not present.<sup>104</sup> The court stated that "[t]he less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."<sup>105</sup> Looking back on the suit, Cannell holds no animus toward Olson.

<sup>96</sup> *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1108, 227 U.S.P.Q. (BNA) 649 (E.D.N.Y. 1985).

<sup>97</sup> *Id.* at 1111.

<sup>98</sup> Cannell is the creative force behind such hits as "The Rockford Files," "The A-Team," "Hunter," and the "Commish."

<sup>99</sup> *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1447-48, 8 U.S.P.Q.2d (BNA) 1231 (9th Cir. 1988).

<sup>100</sup> *Id.* at 1450.

<sup>101</sup> *Id.* at 1451.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1449 (describing one of the characters simply as a "militaristic, extremist, schizoid Southerner").

<sup>104</sup> *Olson*, 855 F.2d at 1453.

<sup>105</sup> *Id.* at 1452.

"I think Ernest really thought I or NBC had stolen from him. He was not a guy in the business and didn't understand how closely ideas just come together naturally. At the end of the day, the only thing the two shows shared was some sort of quasi-military theme."<sup>106</sup> Cannell added that "I think it's absolutely criminal to steal someone else's ideas. Plus, I come up with a zillion of them, so I don't need to."<sup>107</sup>

On the other hand, in *Shaw v. Lindheim*, the Ninth Circuit found substantial similarity between characters in a case involving writer/producer Lou Shaw.<sup>108</sup> Shaw wrote an unproduced pilot script that the court found had been infringed by the defendant's television show, "The Equalizer."<sup>109</sup> The court described the lead characters in both works as someone who works outside of the law enforcement system, is well educated, wealthy, has expensive tastes, and whose main mission is to equalize the odds for his underdog clients.<sup>110</sup> The court went on to state that the most striking similarity between the characters is their "self-assuredness, and unshakable faith in the satisfactory outcome of any difficult situation."<sup>111</sup> While recognizing that some of these traits were generic to a number of literary characters, the court stated that "[a]lthough James Bond may have the Equalizers' demeanor and the Ghostbusters may have their penchant for unpopular assignments, the totality of similarities between the two characters goes beyond the necessities of the 'Equalizer' theme and belies any claim of literary accident."<sup>112</sup> *Shaw* shows that even if a character is composed of mainly stock or generic elements, a sufficient number or the right combination of those elements can lead to a finding of infringement.

While there is no specific test on how to compare two characters, one very practical way to do so is by examining character background, personal attributes, and motivation.<sup>113</sup> Courts are quick to loathe plaintiffs who try to prove infringement through laundry lists of similarities, especially where the lists "emphasize random similarities scattered throughout the works."<sup>114</sup> These lists are considered inherently subjective and unreliable.<sup>115</sup> However, when courts analyze and compare characters, they can very easily fall into this same trap. Often, courts seem drawn to focus on personal attributes because these

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<sup>106</sup> Telephone Interview with Stephen J. Cannell, Writer/Producer (Sept. 20, 2002).

<sup>107</sup> *Id.*

<sup>108</sup> His best known credits include "Columbo," "Six Million Dollar Man," and "Barnaby Jones."

<sup>109</sup> *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990).

<sup>110</sup> *Id.* at 1357-58.

<sup>111</sup> *Id.* at 1358.

<sup>112</sup> *Id.* at 1363.

<sup>113</sup> *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1258 (11th Cir. 1999).

<sup>114</sup> *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1450 (9th Cir. 1988).

<sup>115</sup> *Id.*

characteristics are more flashy and jump off the page. While personal attributes are critical, they are not the end all. Background and motivation are also important because they tell a court where a character has been and where he is trying to go. A well-rounded analysis considers all three elements. For example, in *Herzog v. Castle Rock Entertainment*, the court was called upon to compare two lead characters, both small town cops on the U.S./Mexican border.<sup>116</sup> First, the court examined the background of the two characters. Marty, the plaintiff's character, was a big city cop who returned to her hometown after she cost the life of a child kidnap victim.<sup>117</sup>

In contrast, Sam, the defendant's character, is the elected sheriff of Rio County and son of the former sheriff, a local legend.<sup>118</sup> The personal attributes of the two differ as well. Marty's primary personal attribute is the self-doubt caused by the accident at her previous job.<sup>119</sup> On the other hand, Sam's major personal attribute is his resentment of living in his father's shadow.<sup>120</sup> Finally, the major motivations are different. In both screenplays, Marty and Sam are investigating murders. Marty's motivation is to exorcize the demons of her last job and prove she can still be an effective police officer.<sup>121</sup> Sam, investigating a forty year old murder in which his father may be implicated, is motivated to learn the truth about his father.<sup>122</sup>

By focusing on the "big three" of character background, personal attributes, and motivation, courts can both cut to the heart of character similarity and provide an organized way to approach its analysis. Moreover, cases like *Zambito*, *Olson*, and *Shaw* are illustrative of where the line between idea and expression lies when examining those three elements.

## V. PLOT

Plot is defined as the plan of events in a screenplay.<sup>123</sup> It is the arrangement of ideas and that arrangement of ideas amounts to expression.<sup>124</sup> Like all the other concrete elements of a screenplay, proving substantial similarity in plot hinges upon the idea/expression dichotomy. Plot, more than any other element of a screenplay, triggers most copyright infringement suits. A plaintiff sees a

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<sup>116</sup> *Herzog*, 193 F.3d at 1258.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Herzog*, 193 F.3d at 1258.

<sup>122</sup> *Id.*

<sup>123</sup> WEBSTER'S DICTIONARY 772 (Encyclopedic ed. 1989).

<sup>124</sup> See STRONG, *supra* note 19, at 22.

movie with an overall idea similar to his script, and immediately believes he has been wronged. Consequently, it falls to the courts to draw that line between unprotectable generality in plot and concrete expression.

In *Berkic v. Crichton*, the court compared the plaintiff's script "Reincarnation" to the defendant's movie "Coma."<sup>125</sup> First, the court looked at the most general level of plot similarity: both scripts concerned the basic and unprotectable idea of criminal organizations that murder healthy young people, remove their organs, and sell them to rich old people in need of transplants.<sup>126</sup> Second, the court moved to the next level of specificity: both works took their story from the adventures of a young professional who courageously investigates and exposes the criminal activity.<sup>127</sup> Once again, this was considered a "vague, abstracted idea of a general plot."<sup>128</sup> At the third level of specificity, the court found no substantial similarity. The plaintiff's doctor is a dupe of the criminal conspiracy for most of the movie, whereas the defendant's doctor starts investigating early on when her best friend falls victim to the organization during a routine surgical procedure.<sup>129</sup> Moreover, there was a major romantic relationship in the plaintiff's script and not one in the defendant's.<sup>130</sup> The court seemingly employed an abstractions test to find the level where it felt expression parted from idea.<sup>131</sup>

Additionally, case law shows that courts will find a lack of substantial plot similarity based in part on omission. When a novelist sued the producers of the Eddie Murphy film "Coming to America" for infringement, the plaintiff argued the court should disregard the second major plot in her novel that was absent in the film.<sup>132</sup> The plaintiff maintained the second plot was irrelevant because Paramount Pictures had only appropriated the romantic plot of her novel.<sup>133</sup> In rejecting this approach, the court stated that "the existence of the second plot is relevant because it greatly influences the mood of the book."<sup>134</sup> Likewise, carefully developed subplots that appear in the defendant's work but not in the plaintiff's, can weigh heavily against a finding of substantial similarity.<sup>135</sup>

<sup>125</sup> *Berkic v. Crichton*, 761 F.2d 1289, 226 U.S.P.Q. (BNA) 787 (9th Cir. 1985).

<sup>126</sup> *Id.* at 1293.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Berkic*, 761 F.2d at 1293.

<sup>131</sup> See also *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1259 (showing by defendant that a plot about a murder investigation which reveals the corrupt past of a small town is also familiar to the works of Faulkner and the movie "Chinatown").

<sup>132</sup> *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 461, 30 U.S.P.Q.2d (BNA) 1762 (11th Cir. 1994).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See *Herzog*, 193 F.3d at 1259-60.

On the other hand, the court in *Shaw* did find substantial similarity in plot. First, the plot of the pilot episodes of both Shaw's script and the actual show concerned a criminal organization that blackmails a candidate for public office.<sup>136</sup> In and of itself, this is an unprotectable idea much like the organ harvesting scheme in *Berkie*. Second, in both *Equalizer* scripts the organizations attempt to kill a person who has discovered their operation.<sup>137</sup> That person then turns to the *Equalizer* for help.<sup>138</sup> Once again, this is too general of an idea, comparable to the young doctors investigating the criminal conspiracy in *Berkie*. However, at the third level of examination, the court found a wide variety of similarities, including the *Equalizer*'s initial meeting with the client being interrupted by a shoot-out with henchmen, the *Equalizer* appearing uninvited at a party dressed in a tuxedo, the *Equalizer*'s confrontation with the candidate/blackmail victim after a campaign speech, the thwarting of the criminal conspiracy and the *Equalizer*'s subsequent rush to save a female client, and the candidate/blackmail victim's withdrawal from the political race.<sup>139</sup> The court freely admits that while none of these plot elements may be remarkably distinct in and of themselves, the plots share a common sequence or rhythm.<sup>140</sup> Defining a plot as a sequence of events through which an author expresses his idea, the court found a pattern that was concrete enough to make a finding of substantial similarity.<sup>141</sup> *Shaw* is important for the proposition that even scenes that are not unique or well-defined can be substantially similar if they unfold in a similar way or pattern within the two scripts. But, that pattern must be sufficiently concrete to avoid the doctrine of scenes *a faire*.

The doctrine of scenes *a faire* is one of the biggest impediments a plaintiff faces when trying to show substantial similarity in plot. Scenes *a faire* are those stock elements and sequences that naturally flow from a common plot or genre.<sup>142</sup> Any similarities are inherent in the situation and therefore are unprotectable.<sup>143</sup> The classic example given is the lack of protection in police fiction for "drunks, prostitutes, vermin and derelict cars" and "foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop."<sup>144</sup> The doctrine

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<sup>136</sup> *Shaw*, 919 F.2d at 1362-63.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Shaw*, 919 F.2d at 1363.

<sup>142</sup> *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994).

<sup>143</sup> HOWELL, *supra* note 42, at 38.

<sup>144</sup> *Beal*, 20 F.3d at 459. See *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 817, 7 U.S.P.Q.2d (BNA) 1659 (S.D. Fla. 1988) (holding that "such similarities as using a sand dollar as currency, foods made of seaweed, seahorses for transportation and plates made of oyster or mother of pearl are not

is predicated on a belief that “when the common idea is treated, no matter how differently, common elements must emerge in the two works.”<sup>145</sup> Ultimately, courts struggle to balance the need between protecting original expression and recognizing that sometimes similarity in expression necessarily results “from the fact that the common idea is only capable of expression in a more or less stereotyped form.”<sup>146</sup>

First, a court is going to look at a script’s central premise or idea. Since ideas are not copyrightable, neither are the elements that naturally flow from them. In *Weygand v. CBS, Inc.*, the court was called upon to evaluate two scripts which both concerned African-American farmers who take in a white child in a white community during the Depression.<sup>147</sup> The court found that given the shared general plot of a black farmer taking in a white child, it was not surprising that both works had scenes showing individuals making racist comments to the boy, the boy struggling with racism, denying the relationship, and later accepting it, the boy assisting the farmer in the field, the farmer promising the farm to the boy after the farmer is gone, and the farmer near death, with the boy’s reaction.<sup>148</sup> Furthermore, because both works take place in a rural area during the Depression, the court did not find it unusual that the sheriff would play a central role in both scripts.<sup>149</sup> All of these scenes and plot devices naturally flowed from the general and unprotectable idea of a black farmer taking in a white child during the Depression. Similarly, in *Arden v. Columbia Pictures Industries, Inc.*, the court found that any similarities were scenes *a faire* and therefore not deserving of copyright protection.<sup>150</sup> Both the plaintiff’s novel and the defendant’s film “Groundhog Day” deal with a man trapped in a repeating day.<sup>151</sup> Specifically, the court cited scenes of the respective protagonists waking up each day at the exact same time to the sound of an alarm clock, the protagonists both seeking medical/psychiatric help, and the use of knowledge gained in previous repetitions of the day to their advantage, as necessary aspects of the situation of a man trapped in a repeating day.<sup>152</sup>

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protected similarities of expression, but are more accurately characterizations that flow naturally from the common theme of an underwater civilization”).

<sup>145</sup> HOWELL, *supra* note 42, at 38.

<sup>146</sup> *Id.* at 39.

<sup>147</sup> *Weygand v. CBS, Inc.*, 1997 U.S. Dist. LEXIS 10613, at \*28, 43 U.S.P.Q.2d (BNA) 1120 (C.D. Cal. 1997).

<sup>148</sup> *Id.* at \*20.

<sup>149</sup> *Id.*

<sup>150</sup> *Arden v. Columbia Pictures Indus.*, 908 F. Supp. 1248, 1260, 38 U.S.P.Q.2d (BNA) 1104 (S.D.N.Y. 1995).

<sup>151</sup> *Id.* at 1249.

<sup>152</sup> *Id.* at 1262.

A plaintiff seeking to prove substantial similarity in plot has a number of potential landmines in his path. Many plaintiffs can show similarity in the same broad idea, and even similarity at the next level of abstraction, the same generalized manner in which that idea unfolds (i.e., a young doctor investigating the organ harvesting scheme in *Berke*). The third level of abstraction is usually where the rubber meets the road. Often, a defendant's work is more complex than the plaintiff's, containing a second or third major plot or subplot that the plaintiff's screenplay lacks. On the other hand, courts are also quick to cite a plaintiff's script that is more developed or complex than the defendant's as evidence of no substantial similarity. If a plaintiff's overdeveloped or underdeveloped script will be a loser, finding the three little bears "just right" formula appears to be a very difficult task (backed up by the fact that the vast number of these kinds of suits are losers). Moreover, even if a plaintiff can show a common idea and substantial similarity in how a plot unfolds, a court may find that most of the scenes are scenes *a faire* that naturally flow from an unprotectable idea. Furthermore, differences in the traits and personalities of the major characters operating in a substantially similar plot may be enough for the infringer to escape liability. More likely than not, a plaintiff will step on one of these landmines and find himself broken and bloodied on the battlefield of substantial similarity.

## VI. MOOD

The mood of a screenplay is a combination of the tone and feel of the work. It is certainly influenced by plot and theme, but stands separately as its own concrete element of expression. Just because mood is not as substantive as character or plot does not mean that a court should pay it short shrift. In fact, when a jury is employing the *Krofft* extrinsic test, mood should play an important role in determining if the defendant's work appropriated the same "total concept and feel" of the plaintiff's script. For instance, in *Zambito v. Paramount Pictures Corporation*, the court compared the mood of the plaintiff's screenplay "Black Rainbow" to the Lawrence Kasdan penned "Raiders of the Lost Ark."<sup>153</sup> The court described "Black Rainbow" as a "somber, vulgar script replete with overt sexual scenes, cocaine smuggling and cold-blooded killing" whereas "Raiders" was a "tongue-in-cheek, action-packed, Jack Armstrong, all-American adventure story."<sup>154</sup> Likewise, in *Herzog v. Castle Rock Entertainment*, the court found no

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<sup>153</sup> *Zambito*, 613 F. Supp. at 1108.

<sup>154</sup> *Id.* at 1111. See also *Overman v. Universal City Studios, Inc.*, 605 F. Supp. 350, 353 (C.D. Cal. 1984) (describing defendant's script as light-hearted and sentimental while plaintiff's was earthy and sometimes violent); *Arden v. Columbia Pictures Indus., Inc.*, 908 F. Supp. 1248, 1260 (S.D.N.Y. 1995) (characterizing plaintiff's script as dark and introspective whereas defendant's work was a

substantial similarity in mood.<sup>155</sup> Both scripts involved small town police officers investigating a murder.<sup>156</sup> The court characterized the plaintiff's script as a straight up action-adventure/thriller with a serious mood.<sup>157</sup> This is due largely to the fact that the protagonist's life is in danger from the very beginning of the film.<sup>158</sup> On the other hand, the court found very little action and/or adventure in the defendant's script, as the protagonist's life is never in danger and there is neither violence nor threat of violence portrayed as he carries out his investigation.<sup>159</sup> More importantly, the court found the defendant's script to be largely character and relationship driven, leading the court to describe it as "more thoughtful and reflective than tension-filled."<sup>160</sup>

Courts certainly need to pay more attention to mood in determining substantial similarity. Mood is often overlooked because it usually is a function of a script's plot and theme, which are more readily apparent and easier to characterize. While there is some overlap between mood and theme, each element stands on its own accord.

## VII. THEME

A movie's theme is its underlying message. It can usually be summed up in a few words. The plot is the brick and mortar that lays the theme's foundation. A theme is not tangible like a specific scene or line of dialogue, but rather an intuitive statement that a script or movie makes about life or society in general. Themes are important in copyright infringement suits because two screenplays may have similar plots or characters, but use those devices to express totally different parables.

In *Segal v. Paramount Pictures*, the plaintiff alleged that his script "Star Trek IV: Inside the Klingon Empire" was infringed by the defendant's movie "Star Trek

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traditional romantic comedy); *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 461 (11th Cir. 1994) (holding plaintiff's work was serious with few light overtones while defendant's was the quintessential light romantic comedy); *Anderson v. Paramount Pictures Corp.*, 617 F. Supp. 1, 2, 226 U.S.P.Q. 131 (C.D. Cal. 1985) (coining one script as a social comedy and the other as a romantic melodrama). *But see Shaw v. Lindheim*, 919 F.2d 1353, 1363 (9th Cir. 1990) (describing both works as fast-paced, with ominous and cynical moods that are lightened by the Equalizer's victory). However, the court found these similarities common to many action adventure series and did not weigh them heavily in its analysis. *Id.*

<sup>155</sup> *Herzog*, 193 F.3d at 1260.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Herzog*, 193 F.3d at 1260.

VI: The Undiscovered Country.”<sup>161</sup> According to the court, the plaintiff’s screenplay is “a story of territorial aggrandizement which fuels violent confrontation among the nations.”<sup>162</sup> In contrast, the “Undiscovered Country” is a tale of efforts of enemy empires to “beat swords into plowshares and to forge a fundamentally new relationship founded on peace.”<sup>163</sup> While the scripts also appear to have different plots, the court concentrated on the irreconcilable thematic difference between the two works. Although set in the twenty-third century, the court believed that the defendant’s film was a metaphor for the end of the Cold War.<sup>164</sup> It expressed a new vision of glasnost and peaceful relations among former enemies.<sup>165</sup> The plaintiff’s script expressed a vastly different theme, one premised on prejudice toward an enemy and “the concomitant need to relate to those ‘others’ through war.”<sup>166</sup> The themes of the two works are polar opposites of each other and go a long way toward disproving any substantial similarity.<sup>167</sup>

Similarly, in *Herzog v. Castle Rock Entertainment*, the court found significant thematic differences.<sup>168</sup> While acknowledging that both scripts shared the basic theme of the past having the power to influence the present, the court stated that “this truism is not entitled to copyright protection.”<sup>169</sup>

The court went on to find that the theme of the plaintiff’s script “Concealed” was about the protagonist putting past demons to rest in order to regain her self-confidence.<sup>170</sup> “Lone Star,” the defendant’s movie/screenplay, views the past from different racial perspectives and employs those perspectives to examine contemporary questions involving how morality and prejudice influence identity and love.<sup>171</sup> *Herzog* is a good illustration of the idea/expression dichotomy at

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<sup>161</sup> *Segal v. Paramount Pictures*, 841 F. Supp. 146, 147-48, 29 U.S.P.Q.2d (BNA) 1949 (E.D. Pa. 1993). The plaintiff submitted his script in 1983, when “Star Trek” was gearing up for its fourth installment, but the suit actually alleges that the sixth movie in the series, released in 1991, was the one that infringed upon his screenplay. *Id.*

<sup>162</sup> *Id.* at 149.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Segal*, 841 F. Supp. at 149 (noting that when the plaintiff wrote his screenplay, the end of the Cold War was still years away).

<sup>166</sup> *Id.*

<sup>167</sup> 193 F.3d at 1259. *But see* *Robinson v. New Line Cinema Corp.*, 2000 U.S. App. LEXIS 6848, at \*6-7, 59 U.S.P.Q.2d (BNA) 1150, 1152 (4th Cir. 2000) (finding the same “overriding theme of violent retaliation against the perceived socioeconomic and racial injustices of society, as experienced by a group of predominantly lower-income black women”).

<sup>168</sup> *Herzog*, 193 F.3d at 1259.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

work in the thematic setting. While both scripts share the same generalized theme of the past influencing the present, the expression of that theme is not substantially similar.

While there is some overlap between plot, theme, and mood, each is a separate and unique element of expression that deserves individual analysis. However, theme in particular seems to be a good tool to separate similar plots from each other. It is very unlikely that two scripts are going to be able to have substantially similar plots, yet maintain substantially different themes. Most likely, if the two themes are substantially different, the plot similarities are probably not concrete and consist of only the same generalized idea. Consequently, theme acts as its own concrete element yet also serves as a benchmark to gauge the idea/expression dichotomy during plot analysis.

### VIII. THE MINOR ELEMENTS

Of the eight concrete elements of expression that courts compare, some can best be characterized as minor elements. Generally, these elements receive less weight than character, plot, theme, or mood. Moreover, the minor elements usually do not have independent significance and are mainly relevant to help substantiate similarities in the more substantive categories.

Setting is one such minor element. Geographic settings can be easily changed and most script thieves have enough common sense to do so. However, there are exceptions that prove the rule. For instance, the producers of the film "Jaws" successfully sued the makers of a knock-off movie entitled "Great White."<sup>172</sup> Both movies were centered around small coastal towns on the Atlantic seaboard being attacked by killer sharks.<sup>173</sup> In that case however, setting was an important part of the overall plot and just one example of a larger pattern of infringement. Generally speaking, geographic setting itself is not going to be a protectable element of expression.<sup>174</sup> In a case involving the film "Groundhog Day," differences in geographic setting spoke to larger differences in plot and theme. While the plaintiff's novel was set in New York City, "Groundhog Day" was set in Punxsutawney, a small town in Pennsylvania.<sup>175</sup> The small town served a comedic function, as the Bill Murray character was particularly aggravated by the fact that he was a big-city television celebrity stuck in hick heaven.<sup>176</sup> Of course,

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<sup>172</sup> Universal City Studios, Inc. v. Film Ventures Int'l, Inc., 543 F. Supp. 1134, 214 U.S.P.Q. (BNA) 865 (C.D. Cal. 1982).

<sup>173</sup> *Id.* at 1136.

<sup>174</sup> See *Sinicola v. Warner Bros., Inc.*, 948 F. Supp. 1176, 1189 (E.D.N.Y. 1996) (holding that setting in New York City was not a protectable element of expression).

<sup>175</sup> *Arden v. Columbia Pictures Indus., Inc.*, 908 F. Supp. 1248, 1262 (S.D.N.Y. 1995).

<sup>176</sup> *Id.*

setting is not limited to the geographic location of a story. Courts also analyze setting in terms of where specific scenes occur in a screenplay. This analysis is often beneficial to a defendant trying to disprove substantial similarity. For example, in *Beal v. Paramount Pictures*, the court compared two scripts about wealthy African princes who come to America.<sup>177</sup> In the plaintiff's script, the prince has modest but comfortable living quarters in a pleasant neighborhood near Georgia Tech University.<sup>178</sup> The defendant's prince lives in a slum apartment (recently vacated due to the previous tenant's murder) in an extremely run-down area of Queens.<sup>179</sup> This is played for comedic effect and helps to spotlight the fish-out-of-water story line whereas the living quarters in the plaintiff's script serves no particular function. In addition, plaintiffs often provide a laundry list of settings common to both scripts (i.e., both scripts have scenes that take place in restaurants, theaters, bars, etc.). Without more concrete and specific similarity of dialogue or plot within those settings, courts will dismiss the settings as generic and uncopyrightable. Furthermore, if the settings naturally flow from a common theme, they will be dismissed under the scenes *a faire* doctrine.

Similarly, pace is a minor element. By itself, pace has no independent significance. Two scripts would never be found substantially similar just because they were both fast-paced or slow and plodding. Furthermore, pace is often a function of the genre of a story. For example, in both *Shaw* and *Olson*, the court found that a fast pace was common to the genre of an action-adventure television show and therefore not an actionable similarity.<sup>180</sup> Usually, pace is most effective when analyzed in tandem with plot or another major element. In *Herzog*, the court said that although the defendant's story occurs over a two day period, the pace was slow and stately.<sup>181</sup> This was largely a result of the film's mood, which was "more thoughtful and reflective than tension-filled."<sup>182</sup> While the plaintiff's script also took place over a couple day period, the court described it as "rapid and tense."<sup>183</sup> The differences in pace made it easier to delineate one script as a character driven drama and the other as a thriller.

Additionally, sequence of events, while recognized as one of the eight concrete elements, falls on the minor side of the line. This is not because sequence of events is unimportant. Quite the contrary, two scripts that share the exact same sequence of events are probably defacto substantially similar. The reason why sequence of events is a minor element is because courts often lump analysis of it

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<sup>177</sup> *Beal*, 20 F.3d at 454.

<sup>178</sup> *Id.* at 463.

<sup>179</sup> *Id.*

<sup>180</sup> *Shaw*, 919 F.2d at 1363; *Olson*, 855 F.2d at 1451.

<sup>181</sup> *Herzog*, 193 F.3d at 1260.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

in with plot. Clearly, there is a lot of overlap between the two elements. Courts reject efforts of plaintiffs to juxtaposition scenes occurring at different points in two works to show a sequence of events.<sup>184</sup> A sequence of events is just that—an extended sequence of identical or nearly identical scenes. Consequently, if both scripts share an extended sequence of events, those events are most likely being used to further a similar plot. However, sequence of events can naturally flow from a story. For example, all works involving courtship and marriage will feature a wedding, usually near the end of the story.<sup>185</sup>

Finally, the remaining concrete element courts compare is dialogue. Dialogue is not normally considered a minor element. In fact, substantial similarity in dialogue would likely be a smoking gun that does a defendant in. For the purposes of this Note, dialogue is examined under the minor elements because there is a surprising lack of analysis of it in the case law. The absence in dialogue analysis could be due to a couple of reasons. First, courts may just find it too tedious in the limited confines of an opinion to compare and contrast every line of remotely similar dialogue. Second, defendants may also realize directly copying dialogue is a smoking gun and are therefore more likely to infringe upon the other elements of a screenplay. Furthermore, similarities in dialogue are often dismissed as uncopyrightable. Ordinary phrases are not copyrightable and any copying must amount to a “sequence of creative expression.”<sup>186</sup> A romance novelist was not found to have infringed upon the plaintiff’s historical work even though both authors described a group of family relationships as a “staggering network,” a muddy street as a “cow path,” and a group of treasure hunters as “hordes of gold seekers.”<sup>187</sup> These phrases were considered ordinary and not infringing.<sup>188</sup> In addition, any dialogue that flows from a common theme will not be protected.<sup>189</sup> Once ordinary phrases and scenes *a faire* dialogue are removed from the equation, showing an extended sequence of creative expression can be a difficult challenge. Of course, dialogue does not occur in a vacuum. In a lawsuit involving the dreadfully contrived film “Jingle All the Way,” both the plaintiff’s and defendant’s script concerned workaholic/absentee fathers battling frantically on Christmas Eve to find the season’s hottest toy for their son.<sup>190</sup> Feeling guilty about not being able to find the toy, in both scripts the father breaks into a toy store, finds the toy, suddenly stops, then reflectively asks, “what am I doing” before returning

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<sup>184</sup> See *Weygand v. CBS, Inc.*, 1997 U.S. Dist. LEXIS 10613, at \*23 (C.D. Cal. 1997).

<sup>185</sup> *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 463 (11th Cir. 1994).

<sup>186</sup> *Narell v. Freeman*, 872 F.2d 907, 911, 10 U.S.P.Q.2d (BNA) 1596, 1599 (9th Cir. 1989).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1112 (E.D.N.Y. 1985).

<sup>190</sup> *Jackson*, *supra* note 6, at 12.

the item.<sup>191</sup> While “what am I doing” is surely an ordinary saying, it was part of a larger sequence that went to the heart of the story.<sup>192</sup> Even though that specific line of dialogue was not concrete enough to deserve protection, it was part of an overall sequence that helped to show substantial similarity.

## IX. CONCLUSION

Screenwriter Daniel Waters<sup>193</sup> once said the screenplay is “the most fragile art form there is, the one with the most perilous journey from cocoon to butterfly.”<sup>194</sup> That being said, many who believe their script has been stolen are victims of synchronicity, not plagiarism.<sup>195</sup> Synchronicity is the writer’s shadow, that crushing blow when “our enthusiasm in a concept, story, or screenplay [is] dashed because someone got there minutes ahead of us.”<sup>196</sup> It can be very hard for a writer to admit that this is just coincidence, not the result of skullduggery. Veteran writer/producer Stephen J. Cannell agrees:

Very often, you have a novice writer not in the business. They finally put pen to paper thinking this is going to be their big break, their lottery ticket. When they see a movie or show even remotely similar to their script, the writer convinces themselves that they’ve been taken. They want to believe it’s true so badly.<sup>197</sup>

For those screenwriters who have legitimately been the target of copyright infringement, proving it in a court of law is an onerous task. First, a plaintiff must successfully clear the access hurdle. When a screenwriter has directly given his script to the alleged infringer, that is not difficult to do. However, when there is a direct chain of people between the writer and the infringer, courts often confuse a defendant’s reasonable opportunity to see the plaintiff’s work with an actual opportunity to do so. While courts will infer access based upon a close relationship between an intermediary given the script and the alleged infringer, most courts define “close” so narrowly as to make the inference meaningless.

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Waters wrote the screenplays for such movies as “Heathers,” “Batman Returns,” and “Demolition Man.”

<sup>194</sup> WHY WE WRITE: PERSONAL STATEMENTS AND PHOTOGRAPHIC PORTRAITS OF 25 TOP SCREENWRITERS, *supra* note 1, at 70.

<sup>195</sup> See Sandor Stern, *Sex, Lies, and Synchronicity* (Mar. 2001), available at <http://www.wga.org/WrittenBy/0301/essay.html> (last visited Sept. 14, 2002).

<sup>196</sup> *Id.*

<sup>197</sup> Telephone Interview with Stephen J. Cannell, Writer/Producer (Sept. 20, 2002).

Furthermore, the rise of the Internet as a screenwriting tool is likely to complicate the situations where that chain is not so clear. If courts are willing to adopt an access theory based upon wide dissemination of a work into the public domain (such as a television broadcast, novel, or song played on the radio), courts must do the same for scripts that are widely accessible to the public on the Internet. Ultimately, courts must get back to their primary duty: determining copying via substantial similarity in concrete expression.

There is no bright line which tells a court how much substantial similarity in expression is needed to show infringement. Generally, a plaintiff is going to need a combination of many different concrete elements to prove his case.<sup>198</sup> While substantial similarity in plot alone may be enough to show infringement, character may have to be coupled with theme and mood to prove a case. As long as a plaintiff can pass the extrinsic test by showing substantial similarity among some combination of the eight elements, it is ultimately going to fall to a jury to determine if the total concept and feel of the two works are the same.

Lest a plaintiff never forget, the idea/expression dichotomy is the elephant always present in the room. The idea/expression dichotomy courses through every facet of a screenplay and is a tremendous obstacle to conquer. Simply put, "in Hollywood, as in the life of men generally, there is only rarely anything new under the sun."<sup>199</sup> Ideas, as well as expression that naturally flows from a common idea, are not copyrightable.

At the end of the day, a writer can take a number of steps to protect himself. Registering a screenplay with the Writers Guild of America or with the U.S. Copyright Office is a good start.<sup>200</sup> In addition, a writer should keep a detailed paper trail of when and to whom they submitted their screenplay.<sup>201</sup> Finally, a writer should make sure his or her personality is stamped on every page of a script.<sup>202</sup> The more distinct a screenplay is, the harder it will be for a thief to misappropriate it. Of course, a screenwriter cannot spend all his time worrying about whether or not he is going to be stolen from. If you never put yourself out there, you will never have a chance to succeed either.

NICK GLADDEN

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<sup>198</sup> See *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1136 (9th Cir. 1977).

<sup>199</sup> *Berkic v. Crichton*, 761 F.2d 1289, 1294 (9th Cir. 1985).

<sup>200</sup> *Walter*, *supra* note 7, at 2.

<sup>201</sup> *Id.* at 1.

<sup>202</sup> *Id.* at 2.