

No. 88-6677

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LOU SHAW and EASTBORNE PRODUCTIONS, INC.,

Plaintiffs and Appellants,

vs.

RICHARD LINDHEIM, MICHAEL SLOAN, UNIVERSAL CITY  
STUDIOS, INC., COLUMBIA BROADCASTING SYSTEMS,  
A Corporation, and MCA TELEVISION, LTD.,

Defendants and Appellees.

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On Appeal From The United States District Court  
For The Central District Of California  
The Honorable Alicemarie H. Stotler, Judge Presiding  
D.C. No. SA CK 87-06926 AHS

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APPELLANTS' OPENING BRIEF

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NO. 88-6677

SHAW, ET AL. V. LINDHEIM, ET AL.

CERTIFICATE REQUIRED BY CIRCUIT COURT RULE 28-2.1

The undersigned, counsel of record for plaintiffs/  
appellants, certifies that the following parties have an interest in  
the outcome of this case:

Lou Shaw, Eastborne Productions, Inc., Richard Lindheim,  
Michael Sloan, Universal City Studios, Inc., Columbia Broadcasting  
Systems, A Corporation, and MCA Television, Ltd.

These representations are made to enable the judges of the  
court to evaluate possible disqualification or recusal.

DATED: January 8, 1990

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APPELLANTS' OPENING BRIEF

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INTRODUCTION

Plaintiff Lou Shaw, a successful television writer and producer, created and copyrighted, on behalf of himself and plaintiff Eastborne Productions, Inc., both the format and the pilot script for a proposed television series which he entitled "The Equalizer." The proposed series was about a lone man working outside the system to protect his underdog clients, who are victimized by situations and forces in a contemporary urban American environment with which they cannot cope and which are beyond the help of the police or a private investigator, and to resolve his clients' predicaments as a part of his rough notion of justice.

Shaw presented his "Equalizer" format and pilot script to defendant Richard Lindheim who read them both. Later, without plaintiffs' knowledge or permission, Lindheim and other defendants boldly plagiarized plaintiffs' works. Defendants prepared a format and pilot script for a television series which they also called "The Equalizer," about a lone man working outside the system to protect his underdog clients, who are victimized by situations and forces in a contemporary urban American environment with which they cannot cope and which are beyond the help of the police or a private investigator, and to resolve his clients' predicaments as a part of his rough notion of justice. "The Equalizer" became a successful television series. The title, theme, plot, dialogue, mood, setting, pace and cast of characters of defendants' pilot script were strikingly similar to plaintiffs' Equalizer pilot script, with at least eight sets of parallel characters and 26 similar events occurring in similar sequence. Nevertheless, defendants gave plaintiffs no credit, on screen or off.

Plaintiffs brought suit for copyright infringement and, under the Lanham Act, for misleading the public as to the origin of "The Equalizer." Defendants moved for summary judgment, contending there were sufficient dissimilarities between the two Equalizer works to avoid liability.

The district court ruled that reasonable minds might differ as to the substantial similarity between the "protected ideas" of the two Equalizers but that reasonable minds could not differ "as to whether the total concept and feel of the respective Equalizer works is substantially similar." The court concluded that plaintiffs did

not establish "enough protected expression is infringed to warrant denial" of the summary judgment motion.

As plaintiffs will show on this appeal, summary judgment for defendants was improper. The evidence and inferences from the evidence before the Court demonstrate that reasonable minds can differ whether defendants infringed plaintiffs' copyright and pirated plaintiffs' Equalizer works.

Copyright laws serve to protect the labors of authors of original works and thereby ensure the profitability of the authors' endeavors. Plaintiffs, as the authors of "The Equalizer," have been denied that protection here. They could not now market their own Equalizer television series: it would be seen as an obvious ripoff. However, the real ripoff came first, when defendants misappropriated not just plaintiffs' idea for "The Equalizer," but the expression of the idea through title, names, characters, plot, mood, dialogue, setting and pace, and even a virtually identical sequence of events for the Equalizer pilot television script. Plaintiffs are entitled to a trial on the merits of their claims.

## STATEMENT OF THE CASE

### A. Factual Summary.

In part 1. of this factual summary, plaintiffs show defendants' access to and copying of plaintiffs' "Equalizer" works. In part 2., plaintiffs show the remarkable similarities between plaintiffs' and defendants' "Equalizer" works. As appropriate on appeal from a summary judgment, plaintiffs state the evidence and all reasonable inferences from the evidence in a light most favorable to themselves. Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985)

#### 1. Defendants' Access And Copying Of Plaintiffs' Copyrighted "Equalizer" Works.

Plaintiff Lou Shaw is a well-known, well-respected, and very successful writer and producer in the entertainment industry in Los Angeles. Plaintiff Eastborne Productions, Inc., is Shaw's "loan-out" corporation which supplies his services as a writer<sup>1/</sup> and producer to others, such as studios and production companies. (ER 284-285.)

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1/

"ER" refers to appellants' Excerpts of Record. To avoid confusion with existing page numbering, the Excerpts are numbered consecutively at the bottom left of each page. To keep the Excerpts within manageable size, appellants have not included redundant exhibits or memoranda containing only legal arguments. Ninth Circuit Rule 30-1.3.

Since 1958, Shaw has written and/or produced hundreds of programs for network television, including some of the most memorable programs in television history.<sup>2/</sup> In 1977, Shaw was awarded the Edgar, the top honor of the Mystery Writers of America, for a script he authored for the "Quincy" television series. (ER 284-285.)

In the same year, 1977, Shaw began creative work for a television series that he subsequently reduced to a written treatment and a pilot script <sup>3/</sup> entitled "THE EQUALIZER." (This treatment and pilot script are sometimes referred in this brief to as "plaintiffs' works" or "plaintiffs' 'Equalizer'" or, as a citation to the pilot script, "PE".) Shaw independently created this original work for television with a theme and plot revolving around a unique lead

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2/ Shaw was the co-creator, producer and writer for the "Quincy" television series; he was a writer and producer for the television series "The Fall Guy" (and received prestigious Media Access Awards for his work on a "Fall Guy" episode), the Smothers Brothers' "Fitz and Bones," "Lobo," "McCloud" and "The Nancy Drew Mysteries"; he was the creator and executive producer of the television series "Beyond Westworld" and co-creator of "Half-Nelson"; he was the creator, writer and executive producer of the television pilot "Pleasure Cove"; and, in alphabetical order, he was a writer for: "Alfred Hitchcock Presents," "Barnaby Jones," "Ben Casey," "The Bill Cosby Show," "Columbo," "The Donna Reed Show," "Dr. Kildare," "Have Gun Will Travel," "Ironside," "Kraft Mystery Theater," "Love American Style," "Maude," "Mannix," "Mission: Impossible," "The Munsters," "Naked City," "The New Perry Mason," "Rawhide," "The Rebel," "The Six Million Dollar Man," "Switch," "The Virginian" and many other television shows. At one time during the 1976-77 television season alone, there were eight network television programs on the air which Shaw had created, written for and/or produced: "Quincy," "Nancy Drew," "McCloud," "Columbo," "Switch," "Maude," "Six Million Dollar Man," and "Barnaby Jones." (ER 284-285.)

3/ In television parlance, a "treatment" is a prose outline or description of a proposed series, while a "pilot" is a fully-scripted television program which presents a proposed series and serves to introduce the main character(s) and theme of the series.

character -- the "Equalizer" of the title --and registered the pilot script for this work with the U.S. Copyright Office under that title and listing both plaintiffs as the authors of that work. The title, "The Equalizer," had special significance because it not only identified the series but also described its theme and lead character. (ER 286-287.)

In late 1977 or early 1978, Shaw began discussing his proposed "Equalizer" television pilot with defendant Richard Lindheim. (ER 285.) At that time, Lindheim did not have any writing credits, but was an executive in the Dramatic Programming Division of NBC Television, a position to which he was promoted apparently due to his background in statistical research work for the network. (ER 285, 376, 438.) In meetings with Lindheim in late 1977 and early 1978, Shaw described the details of his proposed "Equalizer" pilot (ER 285-287) and presented a 6-page treatment to Lindheim of the pilot. (ER 298-304.) After a period of meetings and negotiations between Lindheim and Shaw, Lindheim approved an option contract with plaintiffs in February 1978. Pursuant to this contract, Shaw would create and write a pilot script and NBC would purchase an option to further develop plaintiffs' "Equalizer" pilot into a television series. (ER 285-289.)

The terms of the option contract were set forth in a "deal memorandum." The contract included a "30-day turnaround," which meant that if the network did not decide to produce the "Equalizer" within 30 days of delivery of the pilot script, all rights in the works would revert back to Shaw and Eastborne. (ER 287-288.)

On July 27, 1978, Shaw delivered to Lindheim and NBC the pilot script entitled "THE EQUALIZER." (ER 287-288.) This was at the same time that the NBC programming department was being restructured due to the arrival of Fred Silverman as the new President of NBC.<sup>4/</sup> (ER 404.)

Sometime later in 1978, Lindheim read Shaw's "Equalizer" pilot script. (ER 384-385.) According to Lindheim's general practice, he dictated notes on Shaw's script which were typed up, and then discussed the script with several others at NBC. (ER 385.) NBC did not produce Shaw's "Equalizer" pilot script and therefore all rights in the works reverted back to plaintiffs.

After NBC fired Lindheim around January 1979, he became a television producer for Universal Television on a program called "BJ and the Bear." (ER 378.) At Universal, Lindheim came into daily contact with defendant Michael Sloan, whom Lindheim had previously known while at NBC. (ER 377-378, 390-391.) While working on "BJ," Lindheim obtained his first and only writing credits until his work on the "Equalizer" television series. (ER 376, 438.)

In 1980 or 1981, Lindheim purportedly conceived of, and then in 1981 wrote, a television series treatment about an Equalizer character. (ER 376, 380.) The title of this treatment was "THE EQUALIZER," which Lindheim admits he took from Shaw's "Equalizer" works. (ER 381-382.) The treatment described the lead character and the continuing theme of a proposed television series. That lead

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<sup>4/</sup> Lindheim testified that he and Silverman disliked each other. Apparently as a result, Lindheim was trying to leave NBC as early as August 1978, immediately after Shaw's pilot script was delivered. (ER 404-405.)

character became the Equalizer of the CBS television series of the same name. (ER 394-395.)

Significantly, Lindheim first described the theme and lead character of defendants' "Equalizer" to Sloan in 1981 in the identical terms that he later described plaintiffs' proposed "Equalizer" theme and lead character. (ER 375-376.)

In early 1982, defendant Sloan expanded the description of the theme and lead character for defendants' "Equalizer," based upon Lindheim's 1981 treatment. Thereafter, Lindheim and Sloan together purportedly wrote, by exchange of materials and personal collaboration, a revised treatment for defendants' "Equalizer" and delivered it to Universal Television on or about July 7, 1982. (ER 439-440.)

In late 1983 or early 1984, Sloan purportedly derived or adapted a teleplay from the "Equalizer" treatment that Lindheim and he had previously submitted to Universal. After revisions, this teleplay became the pilot script for the "Equalizer" television series. (ER 158-236.)

The pilot episode for defendants' "Equalizer" series was aired on defendant Columbia Broadcasting Systems ("CBS") in late 1985. A television series was derived from the pilot and was broadcast on CBS beginning in 1985. Defendant Universal City Studios, Inc. purports to be the owner of the copyright in the pilot and defendant MCA Television Ltd. purports to be the producer of the pilot. (ER 405.) (Defendants' pilot and later shows and all related materials are sometimes be referred to in this brief as "defendants' works,"

"defendants' 'Equalizer,' or, as a citation to the pilot script, "DE.")

2. The Remarkable Similarities Between Plaintiffs' And Defendants' "Equalizer" Works.

a. Theme.

The themes of the parties' respective works are strikingly similar and these themes are aptly expressed in the identical titles for both plaintiffs' and defendants' works: "THE EQUALIZER." The theme in both works is that when certain people are victimized by situations or forces in contemporary urban America with which they cannot cope by themselves and which are beyond the help of the police or a private investigator, they need the special services of "The Equalizer"--a man who will "equalize" the odds, a lone man working outside the system to protect his underdog clients and to resolve their predicaments as a part of his rough notion of justice. (ER 286-287, 290-294, 311-314.)<sup>5/</sup>

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<sup>5/</sup> Some of the record references here are to the declaration of Dr. Linda Seger, offered by plaintiffs in opposition to defendants' motion for summary judgment. Dr. Seger's declaration was the only expert analysis of the two "Equalizer" works presented to the district court. Dr. Seger has degrees in English, Dramatic Arts and Dramatic Literature. As a college professor, she taught dramatic literature, dramatic criticism, directing and acting. She is now a professional script consultant and a noted writer and lecturer on scriptwriting. Dr. Seger has read and studied over 2,000 motion picture, television and theatrical scripts and consulted on over 700 motion picture and television projects. (ER 307-308.)

In addition to being expressed in the identical titles of the respective works, these identical themes are expressed in the physical conduct, the psychological portrayal, and the language of the lead character, the "Equalizer." (ER 313-314.) In describing his job and why he does it, plaintiffs' lead character says: "the greatest thing a man could do with his life was to be some kind of equalizer . . . help give somebody an even shot, shake up the odds a little" (ER 99); while defendants' lead character tells a client that his job is to: "Equalize the odds. Put the odds in your favor." (ER 209.)

b. Plot.

The plots of the parties' respective works are strikingly similar. Both works involve a coverup/blackmail conspiracy and a woman who is in jeopardy. Plaintiffs' works combine two story elements in one plot concerning one client (Tracy Rollins), while defendants' works split the same two story elements between two clients (Brad Hamilton and Colleen Randall). This difference, however, is not material because substantially all of the plot events in plaintiffs' works are repeated in defendants' works, in substantially the same sequence. (ER 335-340, 351-366.)

The following is a brief summary of the plot elements in both "Equalizer" works.

Both works involve an innocent person (a future client of the "Equalizer") who inadvertently stumbles upon a major coverup involving a criminal organization that blackmails a public official. The client refuses to stop investigating the coverup even though the client is asked and then ordered by a superior to forget it. The client perseveres with the investigation until nearly killed by a

truck. After narrowly escaping from the truck "accident," the client seeks help from the Equalizer. (PE, ER 22-23, 35; DE, ER 166-167, 176-177.<sup>6/</sup>)

In both works, after the Equalizer and the client meet, the Equalizer immediately spirits the client away by private plane to a safe hiding place. Before the client can get safely away, the client and the Equalizer are shot at by two henchmen associated with the chief coverup villain. The Equalizer, however, eludes them. (ER 31-32; DE, ER 189, 194-197.)

The Equalizer's modus operandi in both works is to keep the client safe while he personally investigates the nature and cause of the threats to the client. The Equalizer does this in both works by consulting a former colleague in a federal government post. Both Equalizer characters also work with a tough, world-weary police lieutenant. In the course of his work, the Equalizer in both works dons a tuxedo and crashes a party. (PE, ER 48, 59, 85, 101; DE, ER 199, 202, 216.)

The Equalizer in both works eventually penetrates the coverup and deduces the true facts. The facts in both works involve the blackmail of an official who is a candidate for high political office. Both Equalizer characters force the candidate to help him set a trap for the respective coverup villains. (PE, ER 104; DE, ER 219.)

The Equalizer in both works confronts the villains and springs his trap. After a violent and climactic showdown, both Equalizer characters defeat the coverup villains. After the showdown,

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<sup>6/</sup> As noted above, "PE" identifies plaintiffs' Equalizer works, "DE" identifies defendants' Equalizer works.

both Equalizers race off to rescue the female client from an attempted rape and/or murder. (PE, ER 111-120; DE, ER 229-230.)

In the end of both works, the blackmailed candidate withdraws from his political race and the grateful client(s) thank the Equalizer because they are now free to continue their lives without fear. Both works end with the smitten female client expressing her interest in exploring a romantic relationship with the Equalizer. (PE, ER 121-122; DE, ER 234-236.)

c. Sequence of Events.

In both works, the foregoing plot is expressed in at least 26 strikingly similar events, which appear in substantially the same sequence.

1. Show begins with a sudden, unexpected, violent killing of a young Hispanic man. (PE, ER 23; DE, ER 165.)

2. Client inadvertently discovers and then investigates a coverup involving a criminal organization and a blackmailed public official. (PE, ER 35, 61; DE, ER 166, 173.)

3. Two of Client's affiliates suggest that Client abandon the investigation, but Client refuses. (PE, ER 35; DE, ER 166, 174.)

4. Because of the investigation, Client is nearly killed by an oncoming truck. (PE, ER 23, 36; DE, ER 177.)

5. After the truck "accident," Client comes to the realization that someone is trying to kill client because of the investigation. (PE, ER 28; DE, ER 182.)

6. Client seeks help from the Equalizer. (PE, ER 29; DE, ER 182.)

7. At Client's initial meeting with the Equalizer, Client tells the Equalizer about the coverup and how it led to the attempt on Client's life. (PE, ER 35-36; DE, ER 189.)

8. Equalizer insists that Client immediately relocate to a safe hiding place. (PE, ER 31; DE, ER 190.)

9. Before Client can be flown to the hideout, two villains shoot at the Equalizer and Client, but the Equalizer spirits them safely away in his vehicle. (PE, ER 32; DE, ER 196.)

10. Equalizer orders Client to stay locked in at the hideout and not to use the telephone. (PE, ER 37-38; DE, ER 191.)

11. Chief villain in coverup ("Coverup Villain") learns that Equalizer is on the case and vows to thwart and/or kill him. (PE, ER 63; DE, ER 198.)

12. A villain threatens and forewarns female Client by telephone of her impending rape and/or murder. (PE, ER 67; DE, ER 205.)

13. Equalizer openly and boldly infiltrates well-protected enemy territory to search for further information and sneaks out the information he seeks by means of a clever trick. (PE, ER 58-59; DE, ER 203-204.)

14. Female Client, frustrated with the powerlessness of the police, has an angry confrontation with them. (PE, ER 68; DE, ER 202.)

15. After female client is traumatized, the Equalizer comforts his scared Female Client, saying he will take care of her. (PE, ER 68-71, DE, ER 208-211.)

16. Equalizer anticipates and avoids an attack on the Female Client at her residence, creating a false sense of security. (PE, ER 79-81, 93-94; DE, ER 214-215.)

17. Female Client is captured by a villain who intends to rape and/or murder her. (PE, ER 94-95; DE, ER 228-232.)

18. Equalizer investigates the coverup and obtains information with the help of a former government colleague. (PE, ER 48; DE, ER 211.)

19. Equalizer deduces who is being blackmailed, why, and what is at stake. (PE, ER 83-86; DE, ER 216-217.)

20. In pursuit of information, Equalizer dons a tuxedo and crashes a party. (PE, ER 102-104; DE, ER 202-204.)

21. After giving a campaign speech, candidate is confronted by the Equalizer who tells him that he knows about the blackmail secret. (PE, ER 104; DE, ER 220.)

22. Candidate helps Equalizer to set a trap for the Coverup Villain. (PE, ER 109; DE, ER 219.)

23. Equalizer springs his trap and has a violent and victorious showdown with the Coverup Villain and his cohorts. (PE, ER 108-114, 116-120; DE, ER 223-228.)

24. After the showdown, Equalizer races off to save the female Client from rape and/or murder. (PE, ER 120; DE, ER 230.)

25. Candidate withdraws from the political race. (PE, ER 110; DE, ER 205.)

26. With nothing more to fear, Client(s) are free to go on with their lives, and Female Client expresses her interest in a romantic relationship with the Equalizer. (PE, ER 122;

DE, ER 234-235.)

d. Characters and Dialogue

There are at least 8 sets of parallel and substantially similar characters in the parties' respective works: (1) The Equalizer (Jericho and McCall); (2) the Clients (Tracy Rollins and Colleen Randall/Brad Hamilton); (3) the Threatened Family Member (Aunt Jane and Sarah Randall); (4) the Candidate (Kale and Blanding); (5) the Coverup Villain (Rivera and Morgan); (6) the Henchman of the Coverup Villain (Jorge/Mike/Frank and Olsen/Gardener/Carter); (7) the Former Colleague/Inside Contact (Fleming and Brahms); and (8) the Police Lieutenant (Jackson and Burnett). Many of the similarities between the parallel characters are expressed by the similar actions taken by the parallel characters, by the similar personality traits shared by the parallel characters, by the similar interplay of the characters, and by the similar language used in the dialogues of the two Equalizer works. (ER 323-351.)

(1) The Equalizer.

Jericho and McCall share strikingly similar personality traits. (ER 316-317, 319-322.) They are both described or depicted as a loner; as an idealist but also a cynic; as deadly and comforting; and as a mysterious man who has intelligence, culture and the heart and conscience of a philosopher, but is a hired gun. Jericho is described as "[a] born loner" (PE, ER 50), while McCall says: "I work alone" (DE, ER 200).

Jericho and McCall share similar professional experiences and motivations. (ER 291-294, 318, 322-323.) They both have been

engaged in international high risk, high stakes and high profile rescue operations, including the rescuing of hostages from terrorists. (PE, ER 50; DE, ER 170-173.) Both have experienced disenchantment with the Establishment which led each of them to go into their special and unique calling. (PE, ER 49; DE, ER 170.) They "sell" protection to unfairly oppressed or endangered victims who face formidable odds and have no one else to turn to. (PE, ER 29, 32, 68, 70; DE, ER 182, 201, 209.) They both do it to see a rough justice done, often without concern for the monetary fee. (PE, ER 27-28, 71; DE, ER 235.) In describing his job and why he does it, Jericho says: "the greatest thing a man could do with his life was to be some kind of equalizer . . . help give somebody an even shot, shake up the odds a little" (PE, ER 99); while McCall tells a client that his job is to: "Equalize the odds. Put the odds in your favor." (DE, ER 209.)

Jericho and McCall also have substantially similar relationships and interplay with women. (ER 319-322.) Despite the interest of the Female Client, they both resist romantic overtures because of the nature of their job and because each carries a torch for a former wife. Jericho does not make love to or even kiss his female client Tracy at any time, despite the sexual tension in plaintiffs' works. (ER 293, 368; PE, ER 56-58, 72-81.) Similarly, despite the sexual tension in defendants' works, McCall and his female client Colleen touch and embrace, but do not kiss. (DE, ER 205, 211, 215, 231.)

Jericho and McCall share substantially similar modus operandi. (ER 329-334.) They both meet and question their Clients closely to ascertain their problem. (PE, ER 29-36; DE, Er 188-192,

208-211.) They both have a private plane available to spirit their Clients away to a safe place. (PE, ER 32, 37-38; DE, ER 191, 195-196.) They instruct their Clients to stay behind locked doors and forbid their Clients to use the telephone. (Jericho tells Tracy: "No calls," and "stay in your room." (PE, ER 38, 57); McCall tells Brad: "Don't use your phone. . . . Don't go out anywhere." (DE, ER 191.) They anticipate and warn their Clients of murder attempts, and save themselves and their Clients from such attempts. (PE, ER 32; DE, ER 195-196.) They follow-up on their Clients' leads, solicit and receive help from former colleagues high in the federal government, work with an urban, world-weary police lieutenant; infiltrate the villains' lair and extract information by trickery; openly confront the Candidate with knowledge of the blackmail; set a carefully planned trap for a showdown with the Coverup Villain; trick their way to an advantage against the villains; defeat the villains; rush off to rescue the Female Client from a rape and/or murder; and wrap up the case with a final meeting with the Clients. (ER 318-321.)

(2) The Clients.

Defendants have basically taken plaintiffs' Client character, Tracy Rollins, and split her personality traits and plot functions into two characters, Brad Hamilton and Colleen Randall, who are the Clients in defendants' "Equalizer." However, the composite of Brad and Colleen is substantially similar to Tracy. (ER 335-340.)

Tracy and Brad are both portrayed as persistent researchers, and as innocent victims who inadvertently stumble upon information that is so volatile that it can blow the lid off a longtime coverup racket; wreck an important Candidate's political campaign; and topple

a covert criminal organization which has been blackmailing the Candidate in order to acquire even greater power and money. Thus, both Tracy and Brad become the immediate target for the respective criminal organization's hit men. Tracy and Brad are both urged by associates, including at least one supervisor, to drop their respective investigations. Yet they both persist, and consequently each is almost killed "accidentally" by a truck. Each of them seeks help from the Equalizer, and each is spirited away by the Equalizer to a safe hiding place. Ultimately, the Equalizer exposes the coverup and disposes of the men who have threatened Tracy and Brad. The Clients are thankful and are able to resume their normal lives with their persecution ended and nothing more to fear. (ER 336-340.)

Colleen Randall, the Female Client in defendants' works, is the innocent, unattached, beautiful, intelligent, vulnerable and menaced woman who is substantially similar to the innocent, unattached, beautiful, intelligent, vulnerable and menaced Female Client in plaintiffs' works. (ER 335-336.) Both Female Clients are seemingly independent, yet both have been forced by circumstances to seek the Equalizer's help. One is a teacher (Colleen) and the other is about to become a teacher (Tracy). In both works, as the Equalizer repeatedly saves the Female Client, she develops a romantic interest in him. In part, her curiosity and interest are piqued by the Equalizer's refusal to give her details about himself. Each Female Client is first warned, then captured and threatened with rape and/or murder, but the Equalizer rescues her from the hostage situation. Both plaintiffs' and defendants' works end with the Female Client free to return to her normal life, no longer sexually or physically

threatened by twisted perverts, and with each expressing her wish to explore a romantic relationship with the Equalizer. Tracy tells Jericho that its "[t]oo bad I didn't have more time" to get to know you better (PE, ER 121), while Colleen tells McCall: "I'd like to get to know you better. . . . Will I ever see you again?" (DE, ER 236). In each, however, it is clear that the Female Client cannot be successful in reaching the Equalizer's heart because he has reserved such feelings for his former wife.

(3) The Threatened  
Family Member.

Important to the forbidding, psychologically threatening mood of each work is the fact that each of the Female Clients in plaintiffs' and defendants' works has a substantially similar family member who is threatened by the same villain(s) who threaten the respective Client. This threat to the family member is a key element in heightening the Client's fear. Just as Aunt Jane is Tracy's only remaining family, so Sarah Randall is Colleen Randall's only remaining family. In plaintiffs' works, the villains who stalk Tracy intimidate and terrorize her by attacking Aunt Jane while she is alone and helpless in her home away from Tracy. Similarly, in defendants' works, the villain who stalks Colleen tries to intimidate and terrorize her by threatening Sarah while she is alone and helpless in a playground away from Colleen. (ER 340.)

(4) The Candidate.

The political candidates in plaintiffs' and defendants' works, Kale and Blanding, respectively, are substantially similar. (ER 341-348.) Kale and Blanding are both public officials running for

a chief executive office (Governor and President, respectively) and both are confronted by the Equalizer about the blackmailing just after making a campaign speech. One is depicted as "slim" and "dynamic," the other as "lean" and "charismatic." (PE, ER 40; DE, ER 217.) Both are middle-aged. Neither Candidate is actively dishonest, but both have had lapses of judgment which will now prove embarrassing and devastating to their candidacy if aired publicly. They have let their ambitions for high office take over so that they yield to blackmail over their secret wrongdoing. Thus, the threat to each is not a threat of violence, but a threat of ridicule, humiliation and ignominious political defeat. What the Equalizer knows about the Candidate's secret forces the Candidate to help the Equalizer set up a trap for the Coverup Villain. The Equalizer does this to extricate his client from trouble by tricking the Coverup Villain, but not to save the Candidate. Both of the Candidates ultimately abort their campaigns, even though the Equalizer has stopped the blackmailers. (ER 341-344.)

(5) The Coverup Villain.

At the head of the criminal organizations in both plaintiffs' and defendants' works is a powerful and ruthless man, Rivera and Morgan, respectively. To achieve their criminal ends, they both contact and blackmail the respective Candidate in each work. Plaintiffs' Rivera (with the necessary help of a Captain Morgan) and defendants' Morgan<sup>7/</sup> mastermind the attempted killings of the Client

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<sup>7/</sup> In one of defendants' earlier versions of their pilot script, defendants' Morgan character was the facilitator for an unseen boss, and therefore, like the Morgan character in plaintiffs' works, he was a subordinate to the chief coverup

and the Equalizer, including the substantially similar attempted killing of the Client by a truck "accident." Each operates from inside a physical location that would seem an unlikely source of "outside" crimes: a prison in plaintiff's works and a phone company building in defendant's works. Both Coverup Villains walk into a trap set by the Equalizer and the Candidate. After the climactic showdown with the Equalizer, both Coverup Villains are defeated and their respective reigns of terror are vanquished. (ER 344-347.)

When Rivera learns of the Equalizer's investigation of his coverup, he tells his two henchmen: "I'll handle it" (PE, ER 63) and "I'll handle the rest." (PE, ER 75). When Morgan learns of the Equalizer's investigation of his coverup, he tells his two henchmen: "We'll handle it" (DE, ER 184) and "I'll take care of this personally" (DE, ER 198).

(6) The Three Henchmen.

Both of the Coverup Villains have three male henchmen, Jorge, Mike and Frank in plaintiffs' work, and Olsen, Gardener and Carter in defendants' work. Both sets of henchmen are substantially similar in that they follow the commands of respective bosses and do his bidding, including several attempts at murder. (ER 347.)

(7) The Former Colleague/Inside Contact.

Both Equalizers consult with a substantially similar former male colleague, U.S. Attorney Fleming in plaintiffs' work and U.S. Agent Brahms in defendants' work, both of whom work for the Federal Government. (ER 347-350.) The Equalizer in both works calls on the

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villain. (ER 407.)

Former Colleague for inside information and favors not otherwise available to the Equalizer. These Former Colleagues admire and seem to envy the Equalizer for his independence and courage, but each has become jaded and has opted to remain inside the Establishment and fears reprisal from "higher-ups" for helping the Equalizer. Each balks at helping, but does ultimately provide the Equalizer with needed assistance. Fleming tells Jericho that "[i]ts narrowed down to keeping my job" (PE, ER 99) and "I don't need to get my head handed to me" (PE, ER 51), while Brahms tells McCall: "You want me put up against a wall and shot?" (DE, ER 212).

(8) The Police  
Lieutenant.

Both plaintiffs' and defendants' works depict a substantially similar world-weary police lieutenant, Jackson and Burnett, respectively, who work with the Equalizer. (ER 350-351.) Both are sarcastic, work at desks piled with papers, and are not particularly excited about helping the Equalizer. Both lieutenants are somewhat resentful of the Equalizer, and both warn the Equalizer in a substantially similar way about the dangerous, organized nature of current street crime. Jackson refers to street criminals as people he would "hate to bump into in a dark alley . . . [t]hey're tight . . . efficient . . . entrenched" (PE, ER 85-86); while Burnett says: "[c]rime is organized . . . [y]ou don't know what real guerilla warfare is like until you hit these streets" (DE, ER 200). Jackson and Burnett are informed of the trap against the Coverup Villain beforehand, but neither takes a direct part in the showdown. (PE, ER 112-120; DE, ER 226-228.)

e. Setting, Mood and Pace

The idea and expression of the setting, mood and pace of the plaintiffs' and defendants' respective "Equalizer" works are substantially similar. Both are set in a big American city.<sup>8/</sup> Each begins with a violent, ominous episode of homicide, and each have a foreboding and disquieting mood for the most part until the Equalizer lifts the gloom by defeating the villains in the end. Both dwell on the fear of being victimized by criminal forces that an ordinary person is powerless to stop, and where the police are impotent to act. The fear of jeopardizing one's family is played upon in both works. Both are cynical about public officials and their integrity, but remain curiously romantic and wistful about the Equalizer's past with his wife. Both trade on the desire for a protector and avenger who will work for an average person who has become innocently caught up in situations they cannot control. Both rely on a warm, masculine setting for the Equalizer's home, playing off a hostile, realistic urban backdrop. (ER 367-368.)

The pacing in both works is especially similar. Both share a generally slow dramatic pace as the Equalizer learns the facts of the coverup. Some fast chase scenes and violent activities occur, and after the respective traps are set, the action and violence reach a climax at the respective showdowns. The pacing of both works then

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<sup>8/</sup> The setting in plaintiffs' works is Los Angeles, while the setting in defendants' pilot show and pilot script is New York City; however, at least one prior version of defendants' pilot script had Los Angeles as the setting. (ER 411.)

slows down through the respective sentimental good-byes in each work.  
(ER 368-369.)

B. The Lawsuit.

1. The Pleadings.

On October 16, 1987, plaintiffs filed the instant action alleging that defendants' production, broadcast and distribution of defendants' version of the "Equalizer" pilot and all subsequent shows and related materials derived therefrom (draft scripts, treatments, promotional materials and the like) constituted infringement of the copyright in plaintiffs' Equalizer works. Plaintiffs also alleged that defendants' failure to designate plaintiffs as the creators or originators of defendants' works constituted a violation of the Lanham Act's prohibition against the false designation of the origin of products and services.<sup>9/</sup> A First Amended Complaint, which is the operative complaint, was filed on November 19, 1987. (ER 1.)

2. The Motion For Summary Judgment.

Defendants filed a motion for summary judgment or summary adjudication of issues on August 8, 1988. Defendants contended that the parties' respective works lacked substantial similarity of "protectable" expressions and that this purported lack of substantial

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<sup>9/</sup> Plaintiffs' action also alleged certain pendent claims, but these were dismissed and refiled as part of a state court action between these same parties.

similarity entitled defendants to summary adjudication or judgment.  
(ER 136.)

Plaintiffs opposed the motion with the declarations of plaintiff Lou Shaw and of Dr. Linda Seger, a Professor of Drama and a Script Consultant in the television and motion picture industry. (See footnote 4, above.) Dr. Seger gave extensive expert opinion as to originality, uniqueness and "protectable" nature of numerous parts of plaintiffs' works, as well as to the substantial similarity between the themes, plots, sequence of events (including 26 substantially similar plot events), characters, dialogue, settings, moods and paces of the respective works. (ER 306.) Plaintiffs also presented the deposition testimony of defendant Lindheim, wherein he admitted to actually reading plaintiffs' works and admitted to consciously taking the title of "The Equalizer" from plaintiffs' works for use in defendants' works of the same title. (ER 381-382.)

At the October 24, 1988, hearing on defendants' motion, the district court admitted its lack of familiarity with television programs, as well as with the television industry generally, proclaiming itself an "inveterate non-TV watcher." Indeed, the court confessed it "wouldn't purport to know" anything about the various characteristics of a television series. (ER 485.)

### 3. The Summary Judgment.

On October 28, 1988, the court filed its order granting summary judgment to defendants. (ER 457.) The court indicated that it had read plaintiffs' and defendants' pilot scripts and that it had viewed a videotape of defendants' pilot broadcast of "The Equalizer."

(ER 469.) There was, of course, no videotape of plaintiffs' works for direct comparison.

The court found that plaintiff Shaw "independently created" a written treatment and pilot script entitled "The Equalizer" for a proposed television series "with a theme and plot revolving around a unique lead character, the Equalizer of the title." (ER 457-458.) The court also found that on July 27, 1978, plaintiff Shaw delivered his pilot script entitled "The Equalizer" to defendant Lindheim, that "Lindheim read Shaw's Equalizer pilot script, . . . [and] dictated notes on Shaw's script which were later typed up. . . ." (ER 458.) The court further found that in 1981, defendant Lindheim prepared a treatment for a television pilot series with the title "The Equalizer," which title Lindheim admits he took from Shaw's Equalizer works. According to the court, this treatment was subsequently expanded into a teleplay and then became the pilot script for defendants' Equalizer television pilot and series. (ER 459.)

Before deciding the issue of infringement, the court purported to eliminate from consideration various "characters, scenes and dialogue in plaintiffs' script" which the court believed "are so commonly used in the television medium they are unprotectable from [copyright] infringement." (ER 465.)

The district court then concluded: the themes of the respective works share "some similarity"; the plot and sequence of events of the respective works "do parallel each other" and do "share a common sequence [of events] and rhythm [or pacing]"; the respective scripts "have similar lead characters" and many other characters in defendants' works "share similar traits with plaintiffs' characters";

and "[t]he dialogue in the respective works do share some striking similarities." The court ruled that "reasonable minds might differ as to the substantial similarity between the protected ideas of the respective works." (ER 465-468.)

Without further analysis or explanation, however, the court also ruled that "plaintiffs have failed to establish that enough protected expression is infringed to warrant denial of defendants' Motion for Summary Judgment," and it granted defendants' motion as to the copyright claim. (ER 469-470.)

As for plaintiffs' Lanham Act claim, the court ruled that "[b]ecause plaintiffs [here] have failed [to] demonstrate that reasonable minds could differ on the issue of substantial similarity, defendants' motion for summary adjudication of the Lanham Act claim is granted." (ER 470.)

### C. The Appeal.

#### 1. Jurisdiction and Appealability.

The district court had subject matter jurisdiction in an action under the laws of the United States pursuant to 28 U.S.C. § 1331. This Court has appellate jurisdiction on appeal from a final judgment of the district court pursuant to 28 U.S.C. § 1291.

The district court's October 28, 1988 order granting defendants' motion for summary judgment is appealable pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The order was entered on October 31, 1988. (ER 519.) Plaintiffs filed timely notice of

appeal within thirty days, on November 22, 1988, pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure. (ER 474.)

2. Standard of Review.

On appeal from an order granting summary judgment, this Court conducts de novo review. Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th Cir.), cert. denied, 108 S.Ct. 346 (1987) [copyright]; Lamothe v. Atlantic Recording Corp., 847 F.2d 1403, 1404 (9th Cir. 1988) [Lanham Act].

## QUESTIONS PRESENTED

1. Based on the evidence and reasonable inferences from the evidence before the Court, can reasonable minds differ as to whether defendants' "Equalizer" television pilot script and series copy protectable expression of ideas through the title, theme, main characters, mood, pace and setting of plaintiffs' "Equalizer" television program format and the plot, dialogue and sequence of events of plaintiffs' "Equalizer" television pilot script?

2. Based on the evidence and reasonable inferences from the evidence before the Court, can reasonable minds differ as to whether defendants misrepresented the origin of their "Equalizer" television series by failing to give credit to plaintiffs for developing the title, theme, main characters, mood, pace and setting of the series and the plot, dialogue and sequence of events of the pilot script?

As plaintiffs now demonstrate, both of these questions must be answered in the affirmative, and the summary judgment for the defendants should therefore be reversed.

## LEGAL ARGUMENT

### II.

THE DISTRICT COURT ERRED IN GRANTING  
SUMMARY JUDGMENT TO DEFENDANTS ON  
PLAINTIFFS' COPYRIGHT CLAIM: BASED ON  
THE EVIDENCE AND REASONABLE INFERENCES  
FROM THE EVIDENCE, REASONABLE MINDS CAN  
DIFFER AS TO WHETHER DEFENDANTS'  
"EQUALIZER" WORKS COPY THE PROTECTABLE  
EXPRESSION OF IDEAS IN PLAINTIFFS'  
"EQUALIZER" WORKS.

Plaintiffs will first briefly review the substance and procedure of copyright law necessary to a proper resolution of the issues presented by this appeal. Plaintiffs then demonstrate that on the facts of this case summary judgment for defendants is unwarranted: reasonable minds can differ whether defendants' Equalizer works copy the protectable expression of ideas in plaintiffs' Equalizer works.

A. General Principles Of Law and Procedure In  
Copyright.

1. Copyright Protects The Expression Of  
Ideas.

There are two elements to a copyright infringement claim:

(a) plaintiffs' ownership of copyright in a work, and (b) defendants' copying of the work. Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th Cir. 1987), cert. denied 108 S.Ct. 346. In this case, defendants concede the first element, plaintiffs' ownership of copyright in his Equalizer works. (ER 260.)

The element of copying actually encompasses two distinct issues: (a) whether the defendants copied plaintiffs' Equalizer works at all, and (2) whether what the defendants copied from plaintiffs' Equalizer works was protected by plaintiffs' copyright. Stillman v. Leo Burnett, Co., Inc., 720 F.Supp. 1353 (N.D. Ill. 1989).

The first copying issue, whether the defendant copied at all, may be determined by direct or circumstantial evidence. The circumstantial evidence usually consists of proof of the defendants' prior access to the plaintiffs' work and substantial similarity between the plaintiff's and defendant's works. Baxter v. MCA, Inc., supra, 812 F.2d 421, 424, fn. 2. In this case, for purposes of summary judgment, defendants concede they had access to plaintiffs' works and that "any similarities resulted from copying." (ER 260.) Defendants could hardly claim otherwise, given defendant Lindheim's admission that he read plaintiffs' Equalizer works and copied at least the title. (ER 381-384.)

The second copying issue, whether what the defendants copied from plaintiffs' works infringed plaintiffs' copyright, depends on the nature of what was copied. Copyright does not protect abstract ideas; it protects the author's expression of these ideas. 17 U.S.C. sect. 102, subd. (b); Mazer v. Stein, 347 U.S. 201, 217-218, 74 S.Ct. 460 (1954). This is the issue which defendants raise on their motion for

summary judgment. Defendants contend the evidence shows as a matter of law they copied only plaintiffs' ideas, not plaintiffs' expression of those ideas, in their Equalizer works. Plaintiffs reply that, at the least, reasonable minds can differ as to whether defendants copied their protectable expression of ideas.

2. Tests For Determining Whether There Has Been Copying Of Protected Expression.

The determination whether there has been copying of the protectable expression of an idea "sounds simple and straightforward. It is not." Data East USA, Inc. v. Epyx, Inc., 862 F.2d 204, 206 (9th Cir. 1988); Whelan Assoc. v. Jaslow Dental Laboratory, 797 F.2d 1222, 1235 (3rd Cir. 1986), cert. denied 107 S.Ct. 877 (1987) ["the line between idea and expression is elusive"]; C.Blore & D.Richman, Inc. v. 20/20 Advertising, 674 F.Supp. 671, 676 (D.Minn. 1987) ["The second axiom of copyright is that the first axiom [copyright protects expression, not ideas] is more of an amorphous characterization than it is a principled guidepost"].

As commentators have noted, it is not possible to completely segregate the idea from the expression of the idea. As explained by Knowles and Palmieri, "Dissecting Krofft: An Extension of New Ideas in Copyright", 8 San Fernando Valley Law Review 109, 126 (1980) (original emphasis):

"[T]he 'expression of an idea' is nothing more than description or discussion of the idea itself. Thus, whenever someone states an idea, he

has necessarily expressed that idea. To claim the law of copyright protects only the 'expression of the idea' and never the 'idea' itself defies reason since an idea stated is an idea expressed."

The impossibility of entirely separating idea from expression of the idea results in findings that certain forms of expression are not protected by copyright, for to copyright the expression would in effect copyright the idea, too. Thus, when an idea is a simple concept, this Court has found that the simple expression of the idea is not protectable. Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) [bee-shaped jewelry pin]. Cf., Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) ["When idea and expression coincide, there will be protection against nothing other than identical copying of the work."]. Similarly, this Court has found that certain "stock" forms of expression in literature and plays, referred to as scenes a faire, are so standard and necessary to the expression of the ideas which they represent that the expression itself is not protectable. See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983).

For similar reasons, the protectability of expression may depend on whether the works are fact or fiction. This is so because facts are deemed to be ideas and can be stated accurately only in limited ways. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1972). In fiction, on the other hand, many variations on the expression of an idea are possible without substantially altering the form of the expression. Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir. 1984). This Court

therefore concluded in McCulloch v. Albert E. Price, Inc., 823 F.2d 316, 321 (9th Cir. 1987):

"Works that are not factual receive much broader protection under the copyright laws because of the endless variations of expression available to the artist."

In the case of works of multiple modes of expression, such as a television program which is comprised of literary, visual and musical elements, copying of protectable expression may occur even when there is no copying at all of some aspects of expression. For example, in C.Blore & D.Richman, Inc. v. 20/20 Advertising, supra, 674 F.Supp. 671, the court found a triable issue of fact as to whether one television commercial infringed the protectable expression of the style, camera angle, framing, decor and background in another, although the infringing commercial used none of the same words or even related to the same type of product.

Thus, there is and can be no one dispositive test, for all cases and all types of works, to separate permissible copying of ideas from impermissible copying of expression of ideas. Nevertheless, the courts have tried to formulate tests for various contexts. Judge Learned Hand articulated an "abstractions test" for a case involving literary works in Nichols v. Universal Pictures Corporation, 45 F.2d 119, 121 (2d Cir. 1930) cert. denied, 282 U.S. 902 (1931):

"Upon any work, and especially upon a play, 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 play is about, 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 playwright could prevent the use if his 'ideas', to which, apart from their expression, his property is never extended."

Judge Hand later concluded, however, that "no principle can be stated as to when an imitator has gone beyond copying the 'idea' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

Another authority, Professor Zechariah Chafee, attempted a "pattern" test in "Reflections on the Law of Copyright," 45 Columbia Law Review 503, 513-514 (1945):

"No doubt the line does lie somewhere between the author's idea and the precise form in which he wrote it down. I like to say that the protection covers the 'pattern' of the work . . . the sequence of events, and the development of the interplay of characters."

In Sid & Marty Krofft Television v. McDonald's Corp., *supra*, 562 F.2d 1157, 1164-1167 ("Krofft"), while upholding a finding that a television commercial infringed the copyright of a television puppet show, this Court articulated two tests for determining whether one such visual work infringes on the protectable expression of ideas in another. The first test was an "extrinsic" test for similarity of

ideas. This was viewed as an "objective" test, to be resolved by the trier of fact, but subject to analytic dissection of the two works and guidance by expert opinion. The second test was an "intrinsic" test for similarity of expression of ideas. This was a "subjective" test depending upon the response of the ordinary reasonable person. This test was stated as whether the "total concept and feel" of the two works were substantially similar.

This Court has continued to grapple with the idea-expression distinction and with the meaning and utility of the two tests announced in Krofft. While Krofft suggested that for a work to infringe it must meet both tests, later decisions have implicitly treated the tests as alternatives. In Olson v. National Broadcasting Co., Inc., 855 F.2d 1446 (9th Cir. 1988), for example, this Court applied both tests before affirming a judgment notwithstanding the verdict in favor of the alleged infringers. See also, Berkic v. Crichton, 761 F.2d 1289, 1294 (9th Cir. 1985); Worth v. Selchow & Righter, 827 F.2d 569, 574, fn. 7 (9th Cir. 1987); 3 Nimmer On Copyright, section 13.03[A], at 13-30 to 13-31 ["It should not be understood to mean that what would otherwise constitute an actionable similarity is rendered defensible because of a different 'concept and feel.'"].

Applying a subjective test, of course, leads to a serious problem of unpredictability. It may be impossible to predict in advance how an ordinary reasonable audience would react to a comparison of literary works. For this reason, the utility, if any, of Krofft's "intrinsic" test would seem to be limited to cases involving more visual than literary works, such as television puppets,

as in Krofft, fabric designs as in Spectravest, Inc. v. Mervyn's Inc., 673 F.Supp. 1486 (N.D. Cal. 1987), greeting cards as in Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970), or children's video games as in Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 619 (7th Cir. 1982), where similarities are less quantifiable in traditional terms.

Cases after Krofft also have not successfully delineated what elements factor into the "extrinsic" and "intrinsic" tests and whether these elements apply only to one, or both, tests. For example, some cases have said the extrinsic test for similarity of ideas in literary works requires comparison of plot, theme, dialogue, mood, setting, page and sequence. Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985); Litchfield v. Spielberg, 736 F.2d 1352, 1356-1357 (9th Cir. 1984); Jason v. Fonda, 526 F.Supp. 774, 777 (C.D. Cal. 1981), incorporated by reference, 698 F.2d 966 (9th Cir. 1982). However, in actually applying the intrinsic test, the cases have nevertheless pointed to similarities and dissimilarities among those very same factors, plot, themes, dialogue, mood, setting, pace, characters and sequence of events. Berkic v. Crichton, supra, 761 F.2d 1289 at p. 1294 [substantial dissimilarity in mood]; Krofft, supra, 562 F.2d 1157 at 1167, fn. 9 [similarities as to characters and settings "go beyond that of the idea into the area of expression"]; Walt Disney Productions v. Air Pirates, 581 F.2d 751, 754-755 (9th Cir. 1978) cert. denied sub nom. O'Neil v. Walt Disney Productions, 439 U.S. 1132 (1979) [cartoon character may be independently protectable]; see also, Landsberg v. Scrabble Crossword Game Players, Inc., supra, 736 F.2d 485, 488 ["A resemblance in details of setting,

incident, or characterization that falls short of close paraphrase may be enough to establish substantial similarity and infringement"]; 3 M. Nimmer, Nimmer On Copyright, § 13.03[E] at 13-60 n. 121.9 [a comparison of "plot, dialogue and sequence . . . would appear to go beyond a comparison of mere ideas, and enter the sphere of expression"]. Indeed, in the case of literary works such as novels or television scripts, it would seem impossible to measure the expression of ideas by eliminating consideration of plot, theme, characters, dialogue, setting, mood and pace, since in a literary work those elements are the expression of the author's ideas.

A final necessary principle is that copyright infringement is not measured by the amount of protectable expression which is copied. Copying of even a few words or a few notes of music is sufficient to constitute copyright infringement where those words or music are a qualitatively important part of the plaintiff's work. As this Court stated in Baxter v. MCA, Inc., supra, 812 F.2d 421, 425:

"Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity."

3. Summary Judgment Is Improper If The Evidence And Reasonable Inferences From The Evidence Show That Reasonable Minds May Differ Whether Protectable Expression Of Ideas Has Been Copied.

On a motion for summary judgment in a copyright case, the court need not come to an opinion as to whether one work infringes on the protectable expression of ideas in another; instead, the court need only find that "reasonable minds could differ on those key factual issues." Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1329 (9th Cir. 1983) ("Fox"); Goodson-Todman Enterprises, Ltd. v. Kellogg Co., 513 F.2d 913, 914 (9th Cir. 1975).

While there is no absolute rule against summary judgment in copyright cases, Narell v. Freeman, 872 F.2d 907, 909-910 (9th Cir. 1989), since the issues in such cases usually involve an "extremely close question of fact," this Court emphasizes that "summary judgment has traditionally been disfavored in copyright litigation." Fox, 715 F.2d at 1330, fn. 6.

Fox reversed a summary judgment for the defendants because a comparison of the defendants' television series "Battlestar: Galactica" with plaintiff's motion picture "Star Wars" raised "genuine issues of material fact as to whether only [plaintiff's] Star Wars idea or the expression of that idea was copied." Id. at 1329.

Similarly, in Baxter v. MCA, Inc., supra, 812 F.2d 421, 425, this Court reversed a summary judgment granted in favor of the defendants in a dispute over the origin of a musical theme, stressing

that substantial similarity is a classic jury question because "no bright line rule exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity."

B. General Principles Applied.

1. Reasonable Minds Can Differ Whether Defendants' Equalizer Works Copy Protectable Expression From Plaintiffs' Equalizer Works.

As plaintiffs have explicated at length in the Statement of the Case, above, there is remarkable similarity at every level of expression between defendants' and plaintiffs' Equalizer works. Plaintiffs' title, theme, at least eight sets of parallel characters, plot, dialogue, names, mood, setting, pace, and a sequence of at least 26 events, repeat themselves in striking detail in defendants' works. This is not, as defendants have argued, just a series of "random similarities scattered throughout the works." Litchfield v. Spielberg, supra, 736 F.2d 1352, 1356. Taken together, these similarities present a triable issue of fact whether defendants' have copied protectable expression of ideas in plaintiffs' works. Plaintiffs submit that the ordinary reasonable person would immediately be struck by the remarkable similarities in title, theme, characters, virtually identical plot, dialogue, mood, setting and pace of these works.

Indeed, since such a large percentage of the plot events in plaintiffs' "Equalizer" appear in defendants' "Equalizer," a court would be justified in holding on that ground alone that the respective works are substantially similar in terms of both ideas and expression of ideas, even without considering all the other remarkable similarities. At the very least, this almost direct taking of plot creates a triable issue as infringement. See Fox, 715 F.2d at 1329, fn.5, [summary judgment for defendant reversed because the respective works contained at least 13 similar plot events]; Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 360-61 (9th Cir. 1947) [similarity with respect to one sequence of events in plaintiffs' motion picture, which represented just 20 percent of the entire film, was sufficient to establish infringement].<sup>10/</sup>

In addition, the Equalizer character itself is so distinctive that it may be independently protectable under copyright law. In Walt Disney Productions v. Air Pirates, supra, 581 F.2d 751, 754-55, this Court held that the reproduction in defendant's works of certain cartoon characters which were substantially similar to plaintiff's distinctly delineated characters could constitute copyright infringement, even though the theme, story line and setting

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<sup>10/</sup> Professor Nimmer compares the sequence of events in "Romeo & Juliet" with the events in "Westside Story," finds a pattern of 13 similar plot events, and concludes that the latter would infringe on the former. 3 Nimmer On Copyright at 13-26 to 13-28. Professor Nimmer also states: "Where plot is more properly defined as 'the "sequence of events" by which the author expresses his "theme" or "idea,"' it constitutes a pattern which is sufficiently concrete so as to warrant a finding of substantial similarity if it is common to both plaintiff and defendant's works". 3 Nimmer On Copyright at 13-29.

in defendant's works were entirely different from that in plaintiff's works.

Defendants, of course, argued to the trial court and will no doubt argue again on appeal that despite all the remarkable similarities of expression between the respective Equalizer works, there are some dissimilarities, too. But even numerous superficial differences between fictional works provides no basis for summary judgment. A reasonable jury could still find that the expression of ideas in defendants' works (as to such critical elements such as title, characters, setting, plot, sequence of events and dialogue) are, as a whole, substantially similar to those in plaintiffs' works. See v. Durang, supra, 711 F.2d 141, 143 ["where substantial similarity in protected expression does exist, it is not excused by the presence of additional, dissimilar materials"]; Krofft, supra, 562 F.2d 1157, 1167 ["Duplication or near identity is not necessary to establish infringement. . . . [C]opyright 'cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.'"]. As Professor Nimmer explains, 3 Nimmer On Copyright, section 13.03 [B], at 13-41 to 13-42:

"It is entirely immaterial that in many respects plaintiff's and defendant's works are dissimilar if in other respects similarity as to a substantial element of plaintiff's work can be shown. 'No plagiarist can excuse the wrong by showing how much of his work he did not pirate.' If substantial similarity is found, the defendant will not be immunized from liability by reason of

the addition in his work of different characters or additional and varied incidents . . . ."

And as this Court affirmed in Universal Pictures Co., Inc. v. Harold Lloyd Corp., 162 F.2d 354, 360 (9th Cir. 1947):

"[A]n infringement is not confined to literal and exact repetition and reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced, with more or less colorable alteration to disguise the piracy."

On this point Krofft, 562 F.2d 1157, 1165, quotes from the landmark case of Arnstein v. Porter, 154 F.2d 464, 468-69 (2d Cir. 1946), cert. denied, 330 U.S. 851 (1947):

"The question . . . 'is whether defendant took from plaintiff's works so much of what is pleasing to the [eyes and] ears of lay [persons] . . . that defendant wrongfully appropriated something which belongs to the plaintiff. Surely, then, we have an issue of fact which a jury is peculiarly fitted to determine.' . . ."

Despite the general inappropriateness of deciding this infringement issue on summary judgment, defendants have argued that theirs is an exceptional case and asked the district court to decide this issue as a matter of law. Defendants' case, however, is exceptional only because it is extremely weak; defendants' "Equalizer" works have taken from plaintiffs' "Equalizer" works so much of what would be pleasing to lay persons that reasonable minds would conclude

that the expression of ideas in the respective "Equalizer" works is substantially similar. Indeed, reasonable jurors would likely conclude that defendants have taken from plaintiffs' works so much of what is pleasing and valuable that plaintiffs' once valuable Equalizer works no longer have any value because plaintiffs can not sell their Equalizer works in view of the defendants' exploitation of substantially similar "Equalizer" works.

Summary judgment for defendants was, therefore, entirely unwarranted and improper. The judgment should be reversed.

2. The District Court Misunderstood The  
Applicable Substantive And Procedural  
Rules.

Plaintiffs do not have to show why the district erred in granting summary judgment, only that it did err. Nevertheless, a brief review of the flaws in the district court's reasoning leads to a further understanding why summary judgment for defendants is unwarranted.

The district court granted defendants' motion on the ground that "plaintiffs have failed to establish that enough protected expression is infringed to warrant denial of defendants' Motion for Summary Judgment." (ER 470.) But plaintiffs did not need to "establish" such infringement to be entitled to such a denial of summary judgment -- they needed only to raise a triable issue of material fact, Fox, 715 F.2d at 1329, which they clearly did.

Indeed, the district court implicitly acknowledged that defendants failed to satisfy their burden as to infringement when the court found that the themes of the respective works share "some similarity"; the plot and sequence of events of the respective works "do parallel each other" and do "share a common sequence [of events] and rhythm [or pacing]"; the respective scripts "have similar lead characters" and many other characters in defendants' works "share similar traits with plaintiffs' characters"; and "[t]he dialogue in the respective works do share some striking similarities." (ER 465-468.) The court went off track, however, by viewing these as substantial similarities "between the protected ideas of the respective works." It is unclear what the court meant by "protected ideas." Moreover, what the court actually described was substantial similarity of protected expression, not mere ideas.

Next, it appears that the district court erroneously eliminated from consideration all parts of plaintiffs' works the court believed was unprotectable expression. (ER 465.) While this may have been appropriate in its initial review for similarity of ideas between the two Equalizer works, it was not appropriate in determining, if such a separate determination was necessary at all, the similarity of the "total concept and feel" of the two works. This Court has repeatedly held that "even unprotectable material should be considered when determining if there is substantial similarity of expression" between the respective works under the intrinsic test. Aliotti v. R. Dakin & Co., 831 F.2d 898, 901 (9th Cir. 1987); McCulloch v. Albert E. Price, Inc., supra, 823 F.2d 316, 320-32; Roth Greeting Cards v. United Card Co., supra, 429 F.2d 1106.

The obvious vice in examining only isolated elements of a work, as the district court apparently did, is that it denies protectability to unique works built on simple ideas. Seurat's "Sunday In The Park" would be no more than a collection of unprotectable dots, and Beethoven's "Fifth Symphony" would be merely an agglomeration of unprotectable notes. The district court should have considered not only isolated elements of the two works, but the works as a whole.

Finally, the ultimate decision of the district court apparently turned on the court's personal perception, after reading plaintiffs' and defendants' pilot scripts and viewing a videotape of defendants' pilot program, how the "ordinary reasonable person" would respond to the two works. (ER 469-470.)<sup>11/</sup> The "ordinary reasonable person" is the audience to which the respective works are directed. Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 18 (9th Cir, 1933). The court, however, by its own admission, was not competent to make such a determination. The court was a self-proclaimed "inveterate non-TV watcher" who "wouldn't purport to know" anything about the characteristics of television programs. (ER 485.) Defendants provided the court with no evidence upon which otherwise to base such

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<sup>11/</sup> It is unclear how a court or jury can compare the "total concept and feel" of a written work, such as a script, with the "total concept and feel" of a visual work, such as a videotape. The medium of expression alone can appear to alter the look and feel of a work. For example, the addition of music, sets, lighting, angles and editing may give a look and feel to a work which the reader of the script alone may not have imagined. But it is still the identical script, and the visual performance still infringes on the copyright of the script.

Thus, in retrospect, it seems unfair for the court to have attempted to compare plaintiffs' written script directly with defendants' videotape.

a determination. Plaintiffs' evidence supported only a determination that the two works were substantially similar in every important respect.

Plaintiffs submit that the ordinary television viewer would immediately identify defendants' Equalizer works as a copy of plaintiffs' Equalizer works. Defendants could have expressed their theme, plot, sequence of events and characters (and other elements) in an endless variety of different ways. But instead of choosing an original or different way of expressing ideas in their works, they expressed their "Equalizer" ideas in substantially the same ways that plaintiffs had expressed them in their "Equalizer" works. Summary judgment for defendants was clearly improper.

### III.

THE DISTRICT COURT ERRED IN GRANTING  
SUMMARY JUDGMENT TO DEFENDANTS ON  
PLAINTIFFS' LANHAM ACT CLAIM: IT IS A  
TRIABLE ISSUE OF FACT WHETHER DEFENDANTS  
FALSELY DESIGNATED THE ORIGIN OF THE  
"EQUALIZER" BY FAILING TO GIVE  
PLAINTIFFS ANY CREDIT FOR THEIR  
CONTRIBUTIONS TO THE "EQUALIZER".

The district court also granted summary judgment to defendants on plaintiffs' Lanham Act claim for false designation of origin of defendants' Equalizer works. Relying on the cases of Litchfield v. Spielberg, supra, 736 F.2d 1352, 1358, and Berkic v.

Crichton, supra, 761 F.2d 1289, 1291, fn.1, the court ruled that there can be no Lanham Act claim without substantial similarity between plaintiffs' and defendants' works, and "[b]ecause plaintiffs have failed [to] demonstrate that reasonable minds could differ on the issue of substantial similarity, defendants' motion for summary adjudication of the Lanham Act claim is granted." (ER 470.)

Since, as plaintiffs have demonstrated in Point I above, substantial similarity between the parties' respective works is a triable issue of material fact, summary adjudication of plaintiffs' Lanham Act claim on the ground stated was erroneous. See, Kisch v. Ammirati & Puris, Inc., 657 F. Supp. 380, 384-85 (S.D.N.Y. 1987) [summary judgment on Lanham Act claim improper where there triable issue of fact as to substantial similarities between the plaintiffs' and defendants' works].

Moreover, even if the respective works were not substantially similar, summary adjudication would still be erroneous here. The Lanham Act protects consumers from false claims of originality. As the court in Walker v. Time Life Films, Inc., 615 F. Supp. 430, 440 (S.D.N.Y. 1985) aff'd on other grounds, 784 F.2d 44 (2d Cir. 1986), cert. denied, 476 U.S. 1159 (1986), reasoned:

"[L]ack of substantial similarity is not a blanket reason for dismissal of a Lanham Act claim. . . . A claim of 'passing off' or 'palming off' may be established even if the goods are not confusingly similar. The wrong lies in the misrepresentation of a common source."

Accord, Lamothe v. Atlantic Recording Corp., supra, 847 F.2d 1403, 1406 [under section 43(a) of the Lanham Act, "[e]xpress passing off occurs when a business . . . expressly misrepresents the origin of the goods or services"]; See also, Smith v. Montero, 648 F.2d 602, 604 (9th Cir. 1981).

In the instant case, there is at least a triable issue of material fact whether plaintiffs' 1978 "Equalizer" works were the source or origin of defendants' post-1980 "Equalizer" works. Defendant Lindheim has expressly admitted that in 1978 he read plaintiffs' pilot script for a proposed television series entitled "The Equalizer" and that he used that title in defendants' later development of their television pilot and series of the same title. (ER 381-384.)

A trier of fact could reasonably conclude defendants have falsely designated the origin of their pilot and series when they failed to give any screen credit or any other recognition to plaintiffs for plaintiffs' contributions to the origin of the Equalizer pilot and series.

#### CONCLUSION

The line between idea and expression of idea must be drawn with the purposes of copyright in mind. As the Supreme Court reaffirmed in Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 558, 105 S.Ct. 2218, 2229 (1985):

"[T]he Framers intended copyright itself to be the engine of free expression. By establishing

a marketable right to the use of one's expression,  
copyright supplies the economic incentive to  
create and disseminate ideas."

Plaintiffs could not now market their own Equalizer works;  
no television network would undertake a new Equalizer series with the  
same name, theme, characters, plot, mood, setting and pace as the  
series already presented by defendants. It must be concluded,  
therefore, that defendants have pirated not just plaintiffs' idea for  
an Equalizer television series, but the protectable expression of that  
idea.

For all the foregoing reasons, the district court's order  
granting summary judgment to defendants on plaintiffs' copyright and  
Lanham Act claims should be reversed.

DATED: January 8, 1990

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellants know of no related cases pending in this Court.