

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.

On Appeal From The United States District Court
For The Central District Of California
D.C. No. SA CK 87-06926 AHS

APPELLANTS' REPLY BRIEF

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INTRODUCTION

There are countless possibilities for fictional expression of a "defender of the weak" idea. A few examples include Robin Hood, Batman, Superwoman and even Mighty Mouse. Defendants, however, chose not to create their own expression of that idea but instead boldly copied plaintiffs' expression. Defendants pirated the unique name -- the Equalizer, the central character, a strikingly similar plot line and supporting cast, as well as mood and pace and even some of the same essential dialogue, from plaintiffs' pilot script.

As a result of defendants' highly successful plagiarism, plaintiffs cannot now publish and profit from their own creative

expression. If the goal of copyright law is to secure to the public the benefits of the works of authors, that goal will not be furthered by condoning this literary theft. If the summary judgment here were to be sustained, truly creative authors, such as plaintiffs, would only be discouraged from creating original works and sharing them with the public. Literary parasites such as defendants, on the other hand, would be encouraged to continue to feed off the originality of others. The "marketplace of ideas" would become a thrift shop of worthless imitations.

Committing the very sins of which they falsely accuse plaintiffs, defendants have, under the guise of "space limitations," provided this Court with three-page abridged "summaries" of the two Equalizer works. These abridgements, in their generality and selectivity, obscure the remarkable similarities of expression in the two Equalizer works, each of which is nearly book-length. Defendants cannot obscure, however, the identical title and lead character, 26 strikingly similar events in similar sequence, eight parallel sets of characters, and the virtually identical theme, plot, mood and pacing of the two Equalizer works.

Defendants have also attempted to obscure the applicable principles of law. Whatever usefulness the "extrinsic" and "intrinsic" tests may have in cases which involve copying of stuffed animals or video games, the ultimate test to be applied in any copyright case is still whether the defendants have copied protectable expression of ideas. In this case, the district court seemed to find that a jury could conclude the copying of protectable matter occurred in this case, yet

nevertheless dismissed the action under a "total concept and feel" test, a test even defendants acknowledge is inappropriate.

Plaintiffs submit that based upon the evidence and reasonable inferences from the evidence, it is at the least a disputed question of material fact whether defendants have plagiarized the protectable expression of plaintiffs' Equalizer works. The judgment should be reversed and the cause remanded for a trial on the merits.

LEGAL DISCUSSION

In their opening brief, plaintiffs anticipated and refuted most of defendants' arguments on appeal; plaintiffs will not repeat unnecessarily what they have already said. Plaintiffs reply as follows to defendants' remaining arguments.

I.

IT IS A TRIABLE ISSUE OF FACT WHETHER
DEFENDANTS' "EQUALIZER" WORKS COPY THE
PROTECTABLE EXPRESSION OF IDEAS OF
PLAINTIFFS' "EQUALIZER" WORKS.

A. Regarding Summary Judgment.

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986) did not change the standards against which a motion for summary judgment must be measured. Rule 56 of the Federal Rules of Civil Procedure still authorizes a court to enter judgment without a trial on merits only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Eisenberg v. Insurance Co. of North America, 815 F.2d 1285, 1288 (9th Cir. 1987); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 106 S.Ct. 2505 (1986).

Because reasonable minds easily may differ on infringement issues, such as substantial similarity of expression, summary judgment traditionally has been the disfavored means of determining copyright cases. Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1329 (9th Cir. 1983). Even those

few cases granting summary judgment acknowledge that such a remedy is the exception rather than the rule in copyright cases. Berkic v. Crichton, 761 F.2d 1289, 1292 (9th Cir. 1985); Litchfield v. Spielberg, 736 F.2d 1352, 1355 (9th Cir. 1984). In any event, contrary to defendants' suggestion, a copyright claim certainly is no more suited to determination by summary judgment than any other claim.

B. Regarding The Goals Of Copyright Law.

The limited monopoly privilege granted by the Copyright Act "is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." Sony Corp. v. Universal City Studios, 464 U.S. 417, 429, 104 S.Ct. 774 (1984). Thus, while the ultimate goal of copyright is to reward the public with the benefits of authors' creative genius, the path to that goal is paved with economic incentives to authors to create works from which they will profit. As the Court explains in Diamond v. Am-Law Pub. Corp., 745 F.2d 142, 147 (2d Cir. 1984):

"The principal purpose of the [Copyright Act] is to encourage the origination of creative works by attaching enforceable property rights to them. Absent such property rights, creation would be discouraged by the ease of reproduction and use without permission of the author."

Contrary to defendants' argument, an interpretation of copyright law which rewards plagiarism and discourages originality thus does not comport with the goal of copyright law.

C. Regarding Copyright Infringement.

1. The Test For Infringement.

In the realm of expression of ideas, courts and juries face many difficult line-drawing problems. In defamation, it is the line between fact and opinion. In obscenity, it is the line at which contemporary community standards ends. In copyright, it is the line between idea and the expression of the idea.^{1/} In each lawsuit, the line must be drawn anew, depending upon the parties, the nature of the expression, and all the surrounding circumstances. In no lawsuit, however, do courts and juries shrink from their line-drawing responsibilities simply because the problems are difficult. In no lawsuit should they exonerate violators simply because the violations allegedly fall close to the line.

In this lawsuit, it is unclear how defendants would have this Court draw the line between idea and expression of idea, if at all. Defendants do not even attempt to justify the approach taken by the district court, which found a triable issue as to

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Defendants have no refuge in a defense of "freedom of speech." "There can be no First Amendment justification for the copying of expression along with idea simply because the copier lacks either the will or the time or energy to create his own independently evolved expression." M. Nimmer, Nimmer On Freedom Of Speech, § 2.05[C], p. 2-82.

copying of "protected ideas" but no triable issue as to copying of "total concept and feel."

On the one hand, defendants assert that in comparing literary works, the Court should use the term "general ideas" as a "term of art" to include the plot, theme, dialogue, mood, setting, pace and sequence, and that similarity of these "general ideas" should not be enough to establish plagiarism. Appellees' Brief 14, 16. On the other hand, and in seeming contradiction, defendants urge the Court to apply a "pattern" test which defines plagiarism as the copying of the sequence of events and the interplay of characters in a story. Appellees' Brief 41-42. On yet a third hand, defendants ask the Court to decide whether their Equalizer works are a "picturization" or "dramatization" of plaintiffs' Equalizer works. Appellees' Brief 43.

Defendants' "general ideas" test would improperly exonerate all but the most exact copying of a literary work. There would be nothing left in a literary work, especially a fictional work, if the plot, theme, dialogue, mood, setting, pace and sequence were removed. Such purported "general ideas" are the creative expression in a literary work. That is why the cases say that less direct copying need be shown in the case of a fictional work. McCulloch v. Albert E. Price, Inc., 823 F.2d 316, 321 (9th Cir. 1987).

Defendants' "picturization" or "dramatization" test seems equally flawed when applied to literary works. If defendants have plagiarized protectable expression from plaintiffs' works, that plagiarism cannot be vitiated by the fact that defendants' resulting Equalizer television program does not "look" like a

reader of plaintiffs' Equalizer works would have imagined it would. Clever editing, lighting and music can change the look and feel of a television program without changing the plot, theme and dialogue.

If a plagiarist has copied these fundamental aspects of a work, he should not be exonerated simply because he managed to change superficial appearances. Defendants indeed concede that the "total concept and feel standard is most properly applied in cases involving non-dramatic, graphic works," Appellees' Brief 46, n. 43, yet at the same time defendants state that "[t]here is no reason for the Court to shy away from continued application of the intrinsic test, which has an established track record in this Circuit." Appellees' Brief 42-43, n. 37. If in fact there has been copying of protectable expression in a literary work, there should be no additional criteria to be applied in an "intrinsic test." Application of additional criteria would have as its only effective use the exoneration of illegal copying of protectable expression.

Defendants cite no case involving a literary work in which the court found the extrinsic test was satisfied but the intrinsic test was not. The cases defendants do cite, Appellees' Brief 5-6, n. 3, do not support their claim. Olson v. National Broadcasting Co., Inc., 855 F.2d 1446 (9th Cir. 1988), compared two television programs, "The A-Team" and "Cargo," and found the programs were not substantially similar under either the extrinsic or intrinsic test. 855 F.2d at p. 1453. Data East USA, Inc. v. Epyx, Inc., 862 F.2d 204 (9th Cir. 1988) compared two video games based on the sport of karate, and again found no copying under either test. 862 F.2d at pp. 209-

210. Similarly, in Berkic v. Crichton, supra, 761 F.2d 1289, this Court found that the defendant's film "Coma" did not share either ideas of expression with the plaintiff's screen treatment for a film entitled "Reincarnation."

Finally, defendants' "pattern" test seems, for all practical purposes, equivalent to Judge Learned Hand's famous "abstractions" test in this context. Nichols v. Universal Pictures Corporation, 45 F.2d 119, 121 (2d Cir. 1930) cert. denied, 282 U.S. 902 (1931). See Appellants' Opening Brief 34-35. The "pattern" test at least acknowledges that copying of the basic building blocks of a fictional literary work should constitute copyright infringement. As plaintiffs have noted, however, even Judge Hand later conceded that no firm principle can be stated for every case when an imitator has copied expression as well as idea. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

As plaintiffs next discuss, whatever test this Court applies, in light of the remarkable similarities in every level of abstraction, in "concrete pattern," and even in "total concept and feel," it is at the least a disputed question of material fact from the evidence and reasonable inferences from the evidence which preclude summary judgment for defendants.

2. The Infringement In This Case.

Defendants claim that Olson v. National Broadcasting Co., Inc., supra, 855 F.2d 1446, controls this case. Appellees' Brief 34. Olson found that two television programs shared only a common idea: A group action-adventure series designed to show Viet Nam veterans in a positive light. Beyond that, the Court

could find no similarity in terms of overall plot, sequence, dialogue, or setting. The Court noted that while the programs could be described as similar in terms of theme, mood and pace, those few similarities were common to the genre of action-adventure televisions series and movies. Finally, the Court found that loose correspondences among the characters of the two works was not alone sufficient to afford copyright protection.

Olson does not control here. The similarities between plaintiffs' and defendants' Equalizer works go far beyond a vague general concept and stock action scenes and characters. They share an inherent overall structure, plot, sequence, dialogue and setting, as well as theme, mood and pace. And the correspondence among unique characters is almost one-to-one, from the central figure (the Equalizer) to the lead characters (the Client and the Candidate) down to the supporting roles (the Henchman, the Former Colleague, and the Police Lieutenant).

Defendants did not steal just a general idea which can be expressed in a line or two. Following an analysis by a well-respected author, lecturer and script-consultant, Appellants' Opening Brief, pages 9-24, reviews in detail and at length the crucial similarities of structure and expression between the two Equalizer works. Defendants cannot legitimately argue that it is a mere general "idea" for a fictional story to involve a central character, known as the Equalizer, who is a lone, somewhat mysterious hero in the unique business of helping those who are victimized by elements of modern urban society who are beyond the reach or ordinary law enforcement or mere private detectives; who is retained by a client who has discovered a criminal organization, functioning within a larger legitimate

organization, which is involved in a conspiracy to blackmail an official who is a political candidate for high executive office; who protects his client from physical violence while forcing the candidate to help set a trap for the coverup villains; who defeats the villains in a violent confrontation with the assistance of his law enforcement friends; who causes the political candidate to withdraw from his campaign; who saves his client from last-minute danger; and who does all this in 26 turns of plot and involving seven other particularized characters.

Warner Bros. v. American Broadcasting Companies, 720 F.2d 231 (2d Cir. 1983), notes that plagiarism may occur simply in the copying of a strongly-defined character, such as the Equalizer. The Court states, id. at p. 243:

"An infringement claim would surely be within the range of reasonable jury fact issues if a character strongly resembled Superman but displayed some trait inconsistent with the traditional Superman image. If a second comer endowed his character with Superman's general appearance, demeanor, and skills, but portrayed him in the service of the underworld, a jury would have to make the factual determination whether the second character was Superman gone astray or a new addition to the superhero genre."

Warner Bros. also belies defendants' argument that in a case of "non-literal taking" they are entitled to emphasize the dissimilarities between the works. Appellees' Brief 24, n. 17. Dissimilarities matter more when the nature of work makes it

impossible to separate idea from expression, as in the case of a non-fiction work or compilation of factual material. Warner Bros. reaffirms that, in a case involving a fictional literary work, dissimilarities do not vitiate similarities. Warner Bros. cites Judge Learned Hand's phrase, "[N]o plagiarist can excuse the wrong by showing how much of his work he did not pirate." Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir.), cert. denied, 298 U.S. 669, 56 S.Ct. 835 (1936). As Warner explains, 720 F.2d at p. 241 (emphasis added):

"A story has a linear dimension: It begins, continues, and ends. If a defendant copies substantial portions of a plaintiff's sequence of events, he does not escape infringement by adding original episodes somewhere along the line."

See also, Burroughs v. Metro-Goldwyn-Mayer, Inc., 683 F.2d 610, 624, n. 14 (2d Cir. 1982) [copyright infringement may occur by reason of similarity that involves only a small portion of each work]; Steinberg v. Columbia Pictures Industries, Inc., 663 F.Supp. 706, 713 (S.D.N.Y. 1987) [same].

One final factor for the Court to consider is defendants' theft of the title of plaintiffs' works.^{2/} The title bears significance beyond its physical prominence. In this case, the

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The Court stated in Wihtol v. Wells, 231 F.2d 550, 553 (2d Cir. 1956):

"We agree that the title, in itself, is not subject to copyright protection. We think, however, that the title of a copyrighted work should be taken into account when the same title is applied to a work copied from it."

title reveals instantly who the central character is and what he and the whole work is about. Defendants stole far more than the title and lead character from plaintiffs' work, but their inability or unwillingness to even attempt to change that aspect of plaintiffs' work highlights the fundamental depth of their copyright infringement.

In these circumstances, defendants are not entitled to summary judgment on plaintiffs' copyright claim. The judgment should be reversed and the cause remanded for a trial on the merits.

II.

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."

If, as plaintiffs have shown, there is substantial similarity between the two Equalizer works, defendants' primary argument against plaintiffs' cause of action under the Lanham Act, 15 U.S.C. section 1125, evaporates. In any event, plaintiffs submit that by failing to give them any credit for the Equalizer television series, defendants have misled the public as to the true origin of that work and harmfully deprived plaintiffs of the publicity and acknowledgement such credit rightfully entails.

An analogous case is Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981). The plaintiff in Smith had acted in a motion

picture which was distributed by defendants using a fictitious name as the actor playing plaintiffs' part. The court held that the plaintiff stated a Lanham Act claim for "passing off" plaintiffs' work under a false name. The court explained exactly how the plaintiff was injured, *id.* at p. 607:

"Since actors' fees for pictures, and indeed, their ability to get any work at all, is often based on the drawing power their name may be expected to have at the box office, being accurately credited for films in which they have played would seem to be of critical importance in enabling actors to sell their 'services,' i.e., their performances. We therefore find that appellant has stated a valid claim for relief under section 43(a) of the Lanham Act."

The same holds true here. Plaintiff Lou Shaw's ability to work as a writer in the entertainment industry is at least in part dependent on the credits he has received for his past work. His contributions to defendants' Equalizer works were fundamental, including, even by defendants' admission, the title and nature of the lead character. The Equalizer television pilot and resulting series were highly successful. Defendants did not create the Equalizer, and they deceive the public, to plaintiffs' material detriment, by claiming they did.

Even if plaintiffs do not have a valid copyright claim, there remains disputed issues of material fact from the evidence and reasonable inferences from the evidence on their Lanham Act claim. The summary judgment on this claim also should be reversed.

CONCLUSION

For each of the reasons stated here and in plaintiffs' opening brief, the summary judgment in favor of defendants should be reversed and the cause remanded for a trial on the merits of all of plaintiffs' claims.

Respectfully submitted,

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