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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-04073 GAF (JEMx)	Date	June 21, 2012
Title	CBS Broadcasting, Inc. v. American Broadcasting Companies, Inc. et al.		

Present: The Honorable	**GARY ALLEN FEESS**	
Renee Fisher	None	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers)**

ORDER RE: APPLICATION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

For the past 13 years, CBS Broadcasting, Inc. ("CBS") has aired a so-called "reality" television program called Big Brother. The action in Big Brother takes place on a sound stage constructed to resemble a house, where 12 to 14 participants live in full view of cameras that are placed in every room, operate day and night, and record all of the events and interactions that occur among the participants. Within the rules established at the beginning of a season, the participants compete to see who can outlast the others in a series of eliminations ("evictions"), which occur once per week over an approximate 12-week period. The last person left in the "house" wins a cash prize. Like most reality programming, Big Brother has no set characters, plot, dialogue, or sequence of events. Rather, its "drama" arises from the extemporaneous interactions among contestants who are periodically required to participate in various activities and competitions with the objective of avoiding elimination. Fans of the show hold their breath as contestants are evicted, one by one, at the end of each week.

Defendant American Broadcasting Companies, Inc. ("ABC") has developed a competing show which it calls "The Glass House" that takes place in a similar setting with a like number of contestants. As with Big Brother, the idea behind the show is to put the contestants in a similar setting with a similar motivation – to win a cash prize by being the last contestant in the house at season's end. As with Big Brother, cameras will record the interaction among contestants in the hope that, once thrown together in close quarters with no escape, drama will ensue.

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CBS now claims that Glass House infringes its copyright in Big Brother and brings suit against ABC, and a number of other institutional and individual defendants involved in the production of Glass House[1], and further contends that they have misappropriated CBS's trade secrets in the Big Brother production. CBS has applied to the Court for: (1) a temporary restraining order to enjoin the production and broadcast of Glass House; (2) an order that Defendants return all confidential, proprietary materials related to Big Brother; and (3) an order to show cause why a preliminary injunction should not issue pending the litigation of this lawsuit. CBS contends that, what it characterizes as the myriad similarities between Glass House and Big Brother, coupled with the Individual Defendants' prior access to Big Brother source material demonstrates a likelihood of copyright infringement. Moreover, CBS alleges that ABC's "poaching" of numerous Big Brother employees and its purported use of proprietary production techniques employed on Big Brother give rise to claims for misappropriation of trade secrets. Defendants oppose the application on the principal grounds that CBS has failed to demonstrate either the requisite "similarity" between the two shows, or that any of the purported trade secrets qualify for protection under California law.

After reviewing the parties' arguments, the evidentiary record, and all relevant authorities, the Court concludes that the application should be **DENIED**. As the Court discusses in more detail below, it has concluded that, while it cannot say that CBS will not prevail at trial, it has concluded that success on the merits is unlikely. The evidence before the Court indicates that, under the substantial similarity test, CBS is not likely to prove that Glass House has misappropriated protectable elements of Big Brother. Moreover, the evidence indicates to the Court that Big Brother's alleged trade secrets were either already known in the business (e.t., banks of monitors in multi-camera productions), were readily capable of "reverse engineering" based on information disclosed in the public domain (e.g., camera angles), or were not adequately protected as trade secrets (e.g., tours of the Master Control Room). Furthermore, as the Court noted at the hearing, CBS has failed to persuade the Court that it will suffer immediate and irreparable injury if Glass House airs, and ABC and its co-defendants have persuaded the Court that the balance of equities tips significantly in their favor. Finally, given the Court's view of the strength of CBS's claims, the Court declines to issue an order to show cause.

II. BACKGROUND

[1] The other defendants are: Walt Disney Company; Disney Enterprises, Inc.; ABC, Inc. dba Disney ABC Television Group; Keep Calm and Carry On Productions, Inc. ("Keep Calm"); and Kenneth Rosen; Corie Henson; and Michael O'Sullivan ("Individual Defendants").

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Big Brother is a successful "special living environment" reality television show broadcast by CBS since 2000. (Declaration of Jennifer Bresnan ("Bresnan Decl.") ¶ 7.) The show revolves around "14 contestants [who] liv[e] together in a large house, isolated from the outside world, where they are filmed continuously by approximately 50 cameras . . . [as they] engage in tasks and competitions, and are periodically 'evicted' from the house through voting by their co-contestants or, in the first season, by viewers." (Declaration of Scott A. Edelman ("Edelman Decl."), Ex. B [Expert Declaration of Jeff Rovin] ("Rovin Decl.") at 7.) The premise behind Big Brother, according to CBS, is "unlike anything else on television." (App. at 3.) In short, the show "allows outside viewers to watch the unscripted interaction of its cast members, to witness how contestants interact, strategize, and ally with one another in pressure-filled competitions and evictions, all while these contestants are physically sealed off from the outside world and unhindered in how they act towards each other . . . ." (Id.)

Glass House is a reality television show developed by ABC, set to air on June 18, 2012, which shares a number of these elements with Big Brother. (Edelman Decl., Ex A [Deposition of Kenneth Rosen] ("Rosen Deposition") at 153, 15–16.) Like Big Brother, Glass House will feature twelve (12) to fourteen (14) contestants living together in a house, where they will be filmed around the clock engaging in various activities and competitions from which it is hoped that plots and sub-plots will develop. (Id. at 178–81.) Viewers will have input as to a number of the show's elements, most importantly in the process of determining which contestants are eliminated from the competition.

These similarities, according to CBS, are unsurprising in light of the fact that ABC has hired numerous former Big Brother staff to work on Glass House. Approximately 26 of Glass House's ongoing staff members formerly worked on Big Brother, including Kenneth Rosen, Glass House's "show runner," who is responsible for the day-to-day operation of the series. (Id. at 257–260.)[2] CBS makes much of the fact that, in his June 1, 2012 deposition, Rosen admits that he showed the Big Brother "Houseguest Manual," a compilation of rules for Big Brother contestants, to a production coordinator on Glass House, and asked that its contents be re-typed and sent to in-house counsel at ABC. (Id. at 94–104.) Further, Rosen concedes that he

[2] It appears that Rosen's understanding of the size of the crew was mistaken. His testimony suggested that about half of the staff had previously worked on Big Brother. More recent information suggests that the production involves more than 100 staff members, 26 of whom once worked on Big Brother. However, as Rosen notes in his deposition, most of those former Big Brother employees have not worked on that show for several years, and in the interim have been employed on other reality television programs. (Declaration of Timothy Bock ("Bock Decl.") ¶ 5; Rosen Deposition at 257–262.)

consulted an old "Master Control Room" schedule for Big Brother when determining how many "story positions" he would need to hire for Glass House. (Id. at 90–92.)

According to CBS, much of Big Brother's "unique success" lies in its "broadcast schedule, which involves recording, editing, and broadcasting episodes during the competition, within 48 hours of the events actually happening." (App. at 7.)[3] That quick turnaround is made possible by a number of filming, editing and production techniques, such as the use of multiple production teams separately assigned to monitoring major story lines; streamlined methods of coordination between editors and story producers; and the cataloging of all house activities in searchable databases. (Bresnan Decl. ¶ 16; Declaration of Don Wollman ("Wollman Decl.") ¶¶ 10–12.) CBS argues that these techniques, developed over the course of Big Brother's thirteen (13) seasons, constitute protectable trade secrets, and that Defendants have misappropriated these trade secrets by employing the same or similar techniques in the production of Glass House.

CBS filed its complaint on May 10, 2012, bringing claims for [1] copyright infringement; [2] trade secret misappropriation; [3] unfair competition; [4] breach of contract; [5] breach of fiduciary duty; [6] inducing breach of contract; [7] inducing breach of fiduciary duty; [8] conversion; [9] conspiracy; and [10] aiding and abetting. (Compl.) After securing expedited discovery in anticipation of this motion, CBS filed its application on Thursday, June 7. (App.) The Court gave Defendants until Monday, June 11 to oppose, and held a hearing on the matter on June 15.

III. DISCUSSION

A. LEGAL STANDARDS GOVERNING PRELIMINARY RELIEF

The standard for a temporary restraining order is identical to the standard for a preliminary injunction. Frontline Med. Assocs., Inc. v. Coventry Healthcare Workers Comp., Inc., 620 F. Supp. 2d 1109, 1110 (C.D. Cal. 2009) (citing Lockheed Missile & Space Co. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995)). A plaintiff seeking preliminary relief must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Doe v. Reed, 586 F.3d 671, 676 (9th Cir. 2009) (quoting Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008)). The elements of this test are "balanced, so that a stronger showing of one element

[3] As discussed below, these elements are irrelevant to the copyright analysis.

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may offset a weaker showing of another." Alliance for Wild Rockies v. Cottrell, 622 F.3d 1045, 1049–50 (9th Cir. 2010). Accordingly, a court may grant temporary relief where a plaintiff demonstrates "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." Id. at 1052 (internal quotations omitted).

B. COPYRIGHT INFRINGEMENT

1. COPYRIGHT ELEMENTS

"To establish copyright infringement, a plaintiff must prove two elements: '(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.'" L.A. Printex Industries, Inc. v. Aeropostale, Inc., 676 F.3d 841, 846 (9th Cir. 2012) (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)). Because the parties do not dispute that CBS owns copyright interests in Big Brother, and there is really no dispute that Glass House is similar in certain respects to Big Brother, the claim turns on CBS's ability to demonstrate that ABC's Glass House copies protectable elements of Big Brother.

"'Because direct evidence of copying is not available in most cases,' a plaintiff can establish copying by showing (1) that the defendant had access to the plaintiff's work and (2) that the two works are substantially similar." L.A. Printex, 676 F.3d at 846 (quoting Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996)). Although the parties disagree as to the legal effect of establishing the first element of the claim, the broadcast of the program and the employment of several members of the Glass House team on earlier seasons of Big Brother eliminate any dispute that Defendants had "access" to the copyrighted work.[4] Moreover, given the similarity of the concepts for the two programs, the Court does not doubt that some copying has occurred in this case. But the question for determination is whether there is substantial similarity between Big Brother's protected elements and elements of Glass House.

[4] Relying on Swirsky v. Carey, CBS contends that because the Individual Defendants enjoyed a "high degree of access" to Big Brother, the Court should "require a lower standard of proof of substantial similarity." 376 F.3d 841, 844 (9th Cir. 2004). This argument invokes the "inverse ratio rule" which has been questioned, if not discredited, in more recent decisions. See Funky Films, Inc. v. Time Warner Entertainment, Co., 462 F.3d 1072, 1081–82 (9th Cir. 2006) ("No amount of proof of access will suffice to show copying if there are no similarities.") (quoting Krofft Tele. Prods. v. McDonald's Corp., 562 F.2d 1157, 1172 (9th Cir. 1977)). See also Zella v. E.W. Scripps Co., 529 F.Supp.2d 1124, 1133 (C.D. Cal. 2007) ("[E]ven if access is present, Plaintiffs cannot state a claim if substantial similarity is lacking.") The "inverse ratio rule" actually stands logic on its head: a high degree of similarity would constitute strong circumstantial evidence of access; access says nothing about whether two works bear any similarity to each other which must be determined solely by a comparison of the elements of the two works.

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2. THE SUBSTANTIAL SIMILARITY TEST

In the Ninth Circuit, the "substantial similarity" inquiry entails both an "extrinsic" and an "intrinsic" test, both of which must be satisfied. Rice v. Fox Broadcasting Co., 330 F.3d 1170, 1174 (9th Cir. 2003). Whereas the intrinsic test "focuses on 'whether the ordinary, reasonable audience' would find the works substantially similar in the[ir] total concept and feel", Benay v. Warner Bros. Entm't, Inc., 607 F.3d 620, 624 (9th Cir. 2010), and is typically the province of the jury, "the extrinsic test is an objective measure of the 'articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events,'" Rice, 330 F.3d at 1174 (quoting Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994)).

As the test suggests, copyright law does not protect abstract ideas but rather the concrete expression of those ideas. 17 U.S.C. § 102(b); Metcalf v. Bochco, 294 F.3d 1069, 1074 (9th Cir. (2002); Berkic v. Crichton, 761 F.2d 1289, 1292 (9th Cir. 1985); Warner Bros. Inc. v. American Broadcasting Co., Inc., 654 F.2d 204, 208 (2d. Cir. 1981). Unprotectable elements also include general plot ideas and "scenes à faire," which are scenes that flow naturally from unprotectable basic plot premises and "remain forever the common property of artistic mankind." Metcalf, 294 F. 3d at 1074. On the other hand, "protectable expression includes the specific details of an author's rendering of ideas, or 'the actual concrete elements that make up the total sequence of events and the relationships between the major characters.'" Id. Accordingly, the Court must closely review any claim of infringement to determine whether the alleged infringing work has appropriated only an abstraction such as generalized themes, ideas and concepts, or something more concrete that reflects the creator's particularized expression of the underlying ideas. As the Second Circuit has noted, this is a perplexing issue on which the Judge Learned Hand opined more than 80 years ago:

> 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, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d. Cir. 1930).

There are additional limitations on the scope of copyright protection. First, copyright does ***not*** protect hard work, industriousness, persistence, perseverance, tenacity or

resourcefulness. Feist Publications, Inc., v. Rural Tele. Serv. Co., 499 U.S. 340, 350 (1991). It is not a doctrine based on fairness; it does not reward a creator for his or her labor, even though the creator's labor, particularly in works of non-fiction, may be the principal value added by the author because, like hard work, the facts on which the work is based are not protectable. Id. Why? The Supreme Court explains:

> [T]his is not some unforeseen byproduct of a statutory scheme. It is, rather, the essence of copyright, ***and a constitutional requirement***. The primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts. To this end, copyright assures authors the right to their original expression, ***but encourages others to build freely upon the ideas and information conveyed by a work***. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship.

Id. at 349-350 (emphasis added). See also Narell v. Freeman, 872 F. 2d 907, 910 (9th Cir. 1989) ("[T]he scope of copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain.") Similarly, copyright protection does not extend to any "procedure, process, system, [or] method of operation." 17 U.S.C. § 102(b); Barris/Fraser Enterprises, v. Goodson-Todman Enterprises, Ltd., 1988 WL 3013 * 3 (S.D.N.Y. Jan. 4, 1988).

3. BIG BROTHER'S UNPROTECTABLE PROCESSES AND PROCEDURES

At the hearing on this application, the Court noted that the moving papers conflated the copyright and trade secret analysis, in part, it appeared, to make the copyright argument appear more substantial than an argument focusing only on the properly considered elements. Further review and reflection confirms the Court's impression. The Court therefore starts with a delineation of several of the supposed copyright elements that must be disregarded.

CBS touts a number of procedures, processes and techniques that purportedly constitute protectable elements of Big Brother and included them in charts used at the hearing to support its copyright claims. These include: (1) the number and placement of cameras used to record the activities of the "cast" of the show; (2) the fact that the video streams live to the internet; (3) the fact that contestants are housebound for some or all of the period during which the show is shot; (4) the timing and scope of the post-production work; (5) the fact that the post-production does or does not involve editing of content; (6) the fact that shows commence airing before the final episode has been shot; (7) the size of the production crew and the array of positions that are held by crew members. While these various procedures and processes may ultimately have an impact

on the expressive elements of the show, 17 U.S.C. § 102(b) establishes that they are not within the ambit of copyright protection. The Court will therefore disregard those procedures, processes and techniques in its copyright analysis.

4. THE EXPRESSIVE ELEMENTS OF BIG BROTHER

It is apparent from a review of the authorities submitted by both parties that the nature of the work at issue is critical to the analysis of the substantial similarity test. In that regard, it appears that CBS has attempted to fit the reality show square peg into the fictional round hole described in cases like Metcalf and Berkic in an effort to enhance the copyright claim. Using the substantial similarity test as articulated in such cases, CBS contends that the key "articulable similarities" between the two shows are the "plot, themes, dialogue, mood, setting, pace, characters, and sequences of events." (App. at 14.) Because Big Brother does not, as a concept, readily exhibit any of these elements, ABC is more than happy to hew to this line of analysis because it suits its objective. Programming like Big Brother resists this traditional analysis because the "drama" that occurs in the voyeuristic variant of reality television develops, by design, in an unpredictable way. Until the cameras begin to record, there is no plot, there is no dialog, there is no pace or sequence of events, and there are no fixed characters because there is no author. There is a setting, which is hardly novel, and some general ideas regarding the structure of the show, but little else.

When scrutinized closely, and when the non-protectable elements are eliminated from consideration, CBS's argument amounts to a claim of copyright in the format or template that underlies Big Brother. CBS essentially seeks copyright protection in a voyeuristic reality show involving a group of 12 to 14 participants who compete for a grand prize while being subjected to round-the-clock observation while locked in a sound stage designed to give the appearance of a house. To avoid the risk that the interactions among the participants becomes boring and uninteresting, the participants are given periodic challenges that earn privileges or cost them sanctions and, hopefully, create plot elements. As the season wears on, the drama intensifies as participants are voted off ("evicted") by the other contestants until only one is left and declared the winner. The question is whether this format contains a sufficient number of concrete, expressive elements to merit copyright protection – that is, whether CBS seeks to protect an idea or abstract concept or the concrete expression of that concept.

Clearly, CBS could not obtain copyright protection for the concept of reality programming, or the concept of voyeuristic reality programming. While the concept CBS attempts to protect is more concrete than these broad abstractions, it is still quite general and in

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any event consists of unprotectable elements. CBS's repeated emphasis on the two shows' "voyeuristic" feel and "unscripted" character falls short of establishing any concrete expressive elements, let alone any protectable elements. See, e.g., Berkla v. Corel Corp., 66 F.Supp.2d 1129, 1140 (E.D. Cal. 1999) ("Just as undisputed is the proposition that ideas, techniques, or processes are not protectable under copyright law – only the original expression of the idea.") (citing Sega Enterprises v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1992)). Likewise, the components of the format are not new or unique to Big Brother. For example, according to some sources, the idea of a voyeuristic television program depicting strangers thrown together in the same environment for an extended period of time while their interactions were recorded was pioneered in the 1991 Dutch television series "Nummer 28." The concept was extended in the MTV series "The Real World," which CBS's expert describes in his report as an outgrowth of "American Family" without mentioning "Nummer 28." Thus, the idea of putting a group of people into an environment where their every move was observed is not unique or original with Big Brother. To be sure, there is no evidence that any prior show insisted that the contestants be housebound, but that is more a procedure employed to induce interesting behavior than an element of expression in and of itself. Nor is the idea of a contest among participants an element that is unique to Big Brother. In most reality shows, the contestants are vying for some grand prize. Likewise, the idea of lesser events and competitions is also a staple of reality programming for obvious reasons – competition creates conflict; conflict creates drama; and drama (hopefully) creates interest, viewers and revenue.

The Court's conclusion that CBS will struggle to prove that it can establish protectable, concrete expressive elements in Big Brother finds support in Jeffrey Rovin's report. Rovin's comparisons between the two shows' actual "expression" reflects a high level of abstraction such as when he asserts that the plots of both shows involve "house guests compet[ing] for privileges and a grand prize while risking expulsion." (Rovin Decl. at 24.) But there is nothing about being a house guest, competing, and risking expulsion that Big Brother can claim to be unique or original to the show. Indeed, competition and expulsions are the life blood of reality programming. Likewise, he notes that both Big Brother's and Glass House's "characters," who are really nothing more than contestants in a game show, are of "varied gender, age, and ethnicity." Does Rovin really contend that a diverse set of contestants constitutes an array of "characters" that are drawn with sufficient particularity that they warrant copyright protection? The Court has found no support in any case law for that proposition. Rovin also opines that, from among the contestants, some are "natural leaders and others . . . are natural whiners." (Id.) Well, maybe it will work out that way, but no one can say for sure until the door closes, the cameras are turned on, and the producers watch to see what develops. Moreover, the presence of leaders, followers and whiners is hardly an idea that would warrant copyright protection. And with regard to purported thematic elements, Rovin can do no more than surmise that episodes

will be "about trust, betrayal, ambition, disappointment, bonding, competitiveness, and affection." (Id.) But saying that is to say that anything can happen, and themes that are common to all literature for all time may arise during recording. Finally, Rovin concedes that there really is no established dialogue because "there are no scripts, just improvisation." (Id.)

The very language used by Rovin routinely de-emphasizes similarity: the shows' characters are "varied"; the dialogue is "improvised"; and, most tellingly, the shows are aimed at eliciting nearly every human emotion that one might expect to find in anything resembling the dramatic arts. In short, Rovin has identified nothing but particular tropes of the reality television genre, each of which is too generic to merit copyright protection.[5] Courts addressing the issue, including this one, have unanimously found such arguments wanting. See, e.g., CBS Broadcasting, Inc. v. ABC, 2003 U.S. Dist. LEXIS 20258, at *22 (S.D.N.Y. Jan. 13, 2003) (finding that, with respect to "Survivor" and "I'm a Celebrity, Get Me out of Here!" reality television shows, "[e]ven if . . . the[ir] elements were congruent, that congruence, without more, would not establish substantial similarity in the copyright meaning because it would violate the cardinal rule of copyright that copyright does not protect an idea but only the expression of an idea."); Bethea v. Burnett, 2005 WL 1720631, at *11 (C.D. Cal. Jun. 28, 2005) ("At the most abstract level, or at the level of 'ideas,' there is some similarity between [the reality shows] C.E.O. and The Apprentice. For example, Plaintiffs claim that the 'plot' of both reality television programs is similar because both programs depict a group of dynamic contestants from varied backgrounds competing in business challenges in a dynamic corporate environment for promotions and benefits and, ultimately, a real job as a top-level executive of a corporation . . . . However, Plaintiffs' alleged similarity is nothing more than a string of generic 'ideas' which is not protected by copyright law."); Zella, 529 F.Supp.2d at 1138 ("Each factor relevant to the extrinsic test militates so strongly in the CBS Defendants' favor that no reasonable jury could conclude that Rachael Ray and Showbiz Chefs are substantially similar."); Milano v. NBC Universal, Inc., 584 F.Supp.2d 1288, 1296 (C.D. Cal. 2008) (finding reality television show "The Bigger Loser"'s incorporation of generic elements of prior treatment insufficient to give rise to "substantial similarity").

Nor is the Court persuaded by CBS's argument that these elements, taken together and in combination, give rise to a finding of "substantial similarity." CBS contends that Glass House's

[5] At hearing, CBS emphasized that these structural features are already giving rise to substantive similarities between the two shows. For instance, CBS's counsel remarked that "[the Glass House contestants] are already bowling in the kitchen, and they haven't even gotten to the first episode." That various "real" people find kitchen bowling to be a worthwhile way to spend their time on reality television, however, does not make the two works "substantially similar."

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wholesale borrowing of Big Brother's constituent features "emulates the key expressive features of Big Brother – namely, an unscripted house reality competition show whose voyeuristic feel depends on minimal interaction between cast and production, and viewer and production." (Reply at 7.) That characterization, however, still fails to identify the sort of concrete discernible and protectable "plot," "themes," or "dialogue" that might give rise to a finding of similarity. Although the Ninth Circuit's decision in Metcalf recognized the possibility of a "selection and arrangement" claim, a close reading of that case dispels any notion that CBS can make out such a claim on these facts. 294 F.3d at 1074. In Metcalf, the Court of Appeals addressed two works with extensive and concrete similarities with respect to their plot structure, themes, and character traits. Id.[6] Nothing in Metcalf furthers CBS's position.

Instead, Metcalf reaffirmed the basic contours of this Circuit's extrinsic test, noting that "[g]eneral plot ideas are not protected by copyright law" and "remain forever the common property of artistic mankind", and that "protectable expression includes the specific details of an author's rendering of ideas, or the actual concrete elements that make up the total sequence of events and the relationships between the major characters." Id. (quoting Berkic, 761 F.2d at 1293 (9th Cir. 1985)) (internal quotation marks omitted) (emphasis added). CBS cannot merely cobble together a series of structural and conceptual reality television "elements" having little, if anything to do with "specific details" or "concrete elements" of the artwork, and then point to Metcalf. See, e.g., Bethea, 2005 WL 1720631, at *11 ("Plaintiffs' alleged similarity is nothing more than a string of generic 'ideas' which is not protected by copyright law."); CBS Broadcasting, 2003 U.S. Dist. LEXIS 20258, at *22—23 (finding "elements defining a [reality television] genre . . . too abstract to be protected.") That case does not, as CBS appears to urge, protect any combination of unprotectable elements, irrespective of their bearing on this Circuit's

[6] Indeed, the Ninth Circuit noted that "[t]he similarities between the relevant works [was] striking":

> Both the Metcalf and Bochco works are set in overburdened county hospitals in inner-city Los Angeles with mostly black staffs. Both deal with issues of poverty, race relations and urban blight. The works' main characters are both young, good-looking, muscular black surgeons who grew up in the neighborhood where the hospital is located. Both surgeons struggle to choose between the financial benefits of private practice and the emotional rewards of working in the inner city. Both are romantically involved with young professional women when they arrive at the hospital, but develop strong attractions to hospital administrators. Both new relationships flourish and culminate in a kiss, but are later strained when the administrator observes a display of physical intimacy between the main character and his original love interest. Both administrators are in their thirties, were once married but are now single, without children and devoted to their careers and to the hospital. In both works, the hospital's bid for reaccreditation is vehemently opposed by a Hispanic politician.

Metcalf, 294 F.3d at 1074.

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extrinsic test. See Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003) ("[I]t is not true that any combination of unprotectable elements automatically qualifies for copyright protection."); Zella, 529 F.Supp.2d at 1138 ("Many courts have been reluctant to expand this [selection and arrangement] concept beyond the clear-cut case presented in Metcalf.")[7]

It is, therefore, this very aspiration towards the "real" which has plagued other attempts to protect reality television concepts from infringement, and which dooms CBS's attempt to enforce copyright interests in Big Brother. Although the parties speak of the shows as highly contrived in everything from the selection of contestants to the manner in which characters are forced to sleep, the fundamental premise is to let "reality" play its course. As this Court has previously noted, reality television programs do not, as a general matter, entail a "plot as that term is normally used" in the context of copyright law. Milano, 584 F.Supp.2d at 1296. Rather, these programs contain a "contest structure," from which "a 'plot' emerges as the participants, through the dynamic of the [show], reveal their character and begin to assume specific roles." Id. For purposes of copyright, then – for purposes of the "expression" to which these programs give rise, and on which basis they are compared in assessing legal "similarity" – the network's advertising is more instructive than its legal argument. "Reality," it turns out, is hard to copy.

C. MISAPPROPRIATION OF TRADE SECRETS

In an appendix attached to its memorandum, CBS lists fourteen (14) purported trade secrets allegedly misappropriated by Defendants, ranging from the "Big Brother manuals," which provide instructions to show contestants, to various filming, editing and production techniques that CBS contends are unique to Big Brother, and which enable its singular feel and success. (App., Appendix A [CBS's Trade Secrets].)

To establish a prima facie claim for trade secret misappropriation under California's Uniform Trade Secret Act ("CUTSA"), a plaintiff must demonstrate [1] ownership of a trade secret; [2] that the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means; and [3] that the defendant's actions damaged the plaintiff. Sargent Fletcher, Inc. v. Able Corp., 3 Cal.Rptr.3d 279, 283 (Ct. App. 2003). Under California Civil Code section 3426.1(d), "trade secret" is defined as any "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) [d]erives independent

[7] The cases relied upon by CBS do not call that conclusion into question. CBS repeatedly seeks to extract from the case law and superimpose onto the present facts standard recitations concerning "similarity." But the gloss given to those words by the numerous courts that have interpreted them do not lend support to their basic argument. No court has upheld a copyright claim seeking to protect the skeletal features of a "reality television" show, and the Court finds nothing in the current record that would justify breaking new ground in that regard.

economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Cal. Civ. Code § 3426.1(d).

On the basis of the record currently before it, the Court entertains serious doubts as to CBS's ability to demonstrate either [1] that the purported trade secrets listed qualify for protection; or [2] that Defendants are actively misappropriating any such trade secrets. As an initial matter, the only evidence of even potential misappropriation offered by CBS is Rosen's admission that he consulted one of Big Brother's "Master Control Room" schedules in determining how many "story producers" to hire, and that he had an assistant type up portions of a Big Brother "House Guest" manual, which provides contestants with rather generic instructions concerning how to conduct themselves in relation to their appearance on television. As described by CBS, however, neither of these documents appears to contain the sort of "formulas," "methods" or "processes" that can be said to "derive independent economic value . . . from not being generally known to the public . . . ." Cal. Civ. Code § 3426.1(d)(1). See, e.g., Agency Solutions.Com, LLC v. TriZetto Group, Inc., 819 F.Supp.2d 1001, 1018—1019 (E.D. Cal. 2011) (finding that purported trade secret in "process flows" and "interfaces" did not "come close to providing a basis for understanding the boundaries or nature of the alleged trade secret, nor . . . provide any basis for a determination that the alleged secret is not a matter of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade.") (internal quotation marks omitted).[8] At least at this stage of the litigation, CBS has not offered anything resembling an adequate explanation as to how the material contained in either of these documents constitute trade secrets.

Moreover, as Defendants note, even if such generic material could constitute trade secrets, various portions of similar versions of the House Guest manual are available on the Internet, revealing much of the same safety and logistical instructions given to contestants in other "Big Brother" competitions. (Declaration of Carolyn H. Luedtke ("Luetdke Decl."), Ex. B [Big Brother Rules].) Further, in his deposition testimony, Rosen clarifies that he ultimately did not make use of the Master Control Room schedule, at least in the sense relevant to that

[8] The Court finds CBS's reliance on such cases as Vermont Microsystems, Inc. v. Autodesk, Inc. and O2 Micro Intern. Ltd. v. Monolithic Power Systems, Inc. unavailing. 88 F.3d 142 (2d. Cir. 1996); 420 F.Supp.2d 1070 (N.D. Cal. 2006). Although these authorities recognize that "a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage", Vermont Microsystems, 88 F.3d at 147, each relied upon extensive descriptions specifying the precise nature of the trade secret at issue and the unique economic value derived from it.

document's unique economic value, as his hiring practices revolved almost exclusively around budgetary considerations. (Rosen Deposition at 90–93.) Absent a stronger showing as to either element of a misappropriation claim, the Court will not enjoin the production and broadcast of ABC's show based solely on the haphazard use of two generic documents.

As to the remaining filming, editing and production techniques which CBS claims as trade secrets, the Court has no basis on which to find either ownership or misappropriation. As Defendants point out, similar techniques are commonplace in the production of reality television programming, and CBS bears the burden of delineating precisely what makes these particular techniques unique and valuable. (Declaration of Corie Henson ("Henson Decl.") ¶ 8.) Further, CBS provides no evidence that Defendants actually used these procedures, citing only a "wealth of indirect evidence" of misappropriation, namely "the numerous media accounts describing Glass House as a knockoff of Big Brother" and "the hiring of 30 strategically selected Big Brother staffers," which it claims "raise an inference of improper use." (App. at 22.) Such circumstantial evidence, without more, is plainly insufficient to support the issuance of an injunction, particularly in the face of California public policy favoring the mobility of employees and the experience they have gained in prior employment. See, e.g., Whyte v. Schlage Lock, Co., 125 Cal.Rptr.2d 277, 294 (Ct. App. 2002) ("[T]he inevitable disclosure doctrine cannot be used as a substitute for proving actual or threatened misappropriation of trade secrets."); FLIR Systems, Inc. v. Parrish, 95 Cal.Rptr.3d 307, 316 (Ct. App. 2009) ("Mere possession of trade secrets by a departing employee is not enough for an injunction.")

D. OTHER PRELIMINARY RELIEF FACTORS

Even if the Court were persuaded that CBS had some likelihood of success on the merits, it finds that CBS has failed to establish the remaining factors for preliminary relief.

1. IRREPARABLE HARM

First, CBS has failed to demonstrate that it would be irreparably harmed by denial of the application. As the Ninth Circuit has recently made clear, irreparable harm is no longer presumed in a copyright infringement case. See Flexible Lifeline Systems, Inc. v. Precision Lift, Inc., 654 F.3d 989, 998 (9th Cir. 2011) ("We conclude that presuming irreparable harm in a copyright infringement case is inconsistent with, and disapproved by the Supreme Court's [recent] opinions . . . . [E]ven in a copyright infringement case, the plaintiff must demonstrate a likelihood of irreparable harm as a prerequisite for injunctive relief, whether preliminary or permanent.")

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-04073 GAF (JEMx)	Date	June 21, 2012
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As the Court noted at the hearing, there is no indication that the broadcast of Glass House would in any way dull viewers' appetites for Big Brother or similar reality television programs. Moreover, even if the broadcast of Glass House did result in a loss of viewership for Big Brother, there is no indication that this harm would be "irreparable"; CBS has not demonstrated that any potential loss in viewership could not later be compensated through money damages. See, e.g., Metromedia Broadcasting Corp. v. MGM/UA Entertainment Co., Inc., 611 F.Supp. 415, 426–427 (C.D. Cal. 1985) (finding potential loss of viewers and advertising revenue insufficient to establish likelihood of irreparable harm, and compensable by money damages). In the absence of any evidence that the broadcast of Glass House will cause it to suffer any harm that cannot be compensated by money damages, the Court concludes that the failure to make such a showing is an independent ground for denying the requested restraining order.

2. BALANCE OF HARDSHIPS

Moreover, the Court finds that, at least on the basis of the current record, the balance of hardships tips sharply in favor of Defendants. That inquiry requires the Court to "consider the harm that the nonmoving party will suffer if the injunction is granted, balancing it against the irreparable harm to the moving party from the denial of relief." Reid L. v. Ill. State Bd. of Educ., 289 F.3d 1009, 1021 (7th Cir. 2002) (emphasis added).

The issuance of an injunction will disrupt, if not terminate the employment of the more than one hundred employees working on Glass House, as well as the Glass House contestants, who gave up their own employment opportunities to take part in the show. (Bock Decl. ¶ 5; Declaration of Deborah Anderson ¶¶ 3–4.) Defendants' investment in Glass House, including the show's development and promotion, estimated to be above $20 million, will be rendered almost worthless. (Declaration of Jill Gershman ¶¶ 3–4.) By contrast, and as explained above, CBS has not shown that the potential harm to Big Brother would be irreparable. Even if the broadcast of Glass House in some way diverted viewers from Big Brother to Glass House, that reduction in viewership would be compensable through an award of money damages. Measured against the immediate and substantial harm that Defendants would suffer due to an injunction, the Court finds that the balance of hardships tips sharply in favor of Defendants.

E. SPOLIATION OF EVIDENCE

Finally, CBS contends that Rosen has admitted to destroying potentially relevant e-mails, and asks the Court to enjoin any such further spoliation.

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In his deposition, Rosen states that his general practice is not to maintain copies of all e-mails he sends and receives, but rather to "keep e-mails that [he] think[s] [he] may need to reference in the future, and . . . delete e-mails that [he] [does not] think [he will] need to reference in the future." (Rosen Deposition at 33–34.) Although he admits that in so doing, he "delete[d] e-mails relating to Glass House after this lawsuit was filed", Rosen's counsel states that all e-mails were preserved, and that his e-mail accounts have since been forensically imaged. (Id. at 48–49.)

In light of any continuing uncertainty as to the preservation of evidence relating to this action, the Court orders as follows:

All parties to this action shall preserve all relevant documents, as defined under the Federal Rules of Civil Procedure, including but not limited to all electronic evidence or evidence stored on computers regardless of the medium on which it is stored. "Relevant documents" includes all documents that contain any information regarding the creation, development and production of Glass House.

For purposes of this Order, "preserve" is to be interpreted broadly to accomplish the goal of maintaining the integrity of all documents, data, and tangible things including all documents as defined above and those that are reasonably anticipated to be subject to discovery under Federal Rules of Civil Procedure 26 or 34 in this action. To preserve includes taking steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, erasing, wiping, relocation, migration, theft or mutation of such material, as well as negligent or intentional handling that would make material incomplete or inaccessible.

IV. CONCLUSION

For the foregoing reasons, the Court finds that CBS has failed to demonstrate an entitlement to the preliminary relief sought. The application is **DENIED**, except with respect to the preservation order discussed above. The request for an order to show cause re: preliminary injunction is also **DENIED.**

IT IS SO ORDERED.