

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEBORAH THOMAS,

Plaintiff,

v.

THE WALT DISNEY COMPANY, WALT DISNEY
STUDIOS, DISNEY PRESS, PIXAR
ANIMATION STUDIOS, WALT DISNEY
FEATURE ANIMATION, WALT DISNEY
PICTURES and DISNEY ENTERPRISES,
INC.,

Defendants.

No. C-07-4392 CW

ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS THE FIRST
AMENDED COMPLAINT

Defendants The Walt Disney Company, Walt Disney Pictures (also
sued as Walt Disney Studios and Walt Disney Feature Animation),
Disney Book Group, LLC (sued as Disney Press), Pixar (sued as Pixar
Animation Studios), and Disney Enterprises, Inc. move to dismiss
the first amended complaint (FAC). Plaintiff Deborah Thomas
opposes the motion. The motion was heard on January 31, 2008.
Having considered all of the parties' papers and oral argument on
the motion, the Court grants Defendants' motion.

BACKGROUND

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2 According to the FAC, during the summer of 2000, Plaintiff
3 created an original literary work titled "Squisher the Fish." FAC
4 ¶ 14. On April 6, 2001, Plaintiff submitted the story to
5 Defendants "for the purpose of selling her work for use as a movie,
6 published book, television show, game or other commercial
7 application." FAC ¶ 18. On June 21, 2001, Defendants returned
8 Plaintiff's story and informed her that it was their business
9 practice not to consider unsolicited outside story submissions.
10 FAC ¶ 23. Plaintiff alleges that during the time Defendants had
11 the story, they copied it and "incorporated it into a movie
12 created, produced, distributed and sold by Defendants entitled
13 'Finding Nemo.'" FAC ¶ 24.

14 "Finding Nemo" was first released and shown to the public on
15 May 30, 2003, and Plaintiff first saw the movie on June 6, 2003.
16 FAC ¶¶ 26, 27. Plaintiff alleges that Defendants continued to show
17 "Finding Nemo" domestically and internationally after May 29, 2004
18 and that sales and rentals of the DVD and videocassette of the
19 movie continued after May 29, 2004. FAC ¶ 28, 30. Further,
20 Plaintiff alleges that "sometime after May 30, 2003, Defendants
21 prepared a video game based on the movie" and sales of that video
22 game continued after May 29, 2004. FAC ¶ 31. Similarly,
23 Defendants "prepared children's books based on the movie" and "made
24 toys and other merchandise based on the story and characters in the
25 movie." FAC ¶¶ 33, 34. Plaintiff alleges that the sales of the
26 books, toys and merchandise continued after May 29, 2004. FAC
27 ¶¶ 33, 34. Finally, Plaintiff alleges that "Defendants have
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1 prepared live performances based on the movie" which "continued
2 after May 29, 2004." FAC ¶ 34.

3 Plaintiff now seeks relief on two grounds, copyright
4 infringement under the Copyright Act and unfair competition under
5 California Business & Professions Code § 17200.

6 DISCUSSION

7 Under the Federal Rules of Civil Procedure, a complaint must
8 contain a "short and plain statement of the claim showing that the
9 pleader is entitled to relief." Fed. R. Civ. P. 8(a). A plaintiff
10 need not set out in detail the facts upon which it bases its claim;
11 however, the plaintiff must "give the defendant fair notice of what
12 the plaintiff's claim is and the grounds on which it rests."

13 Conley v. Gibson, 355 U.S. 41, 47 (1957); see Bell Atlantic Corp.
14 v. Twombly, 127 S. Ct. 1955, 1964 (2007). All material allegations
15 in the complaint, "even if doubtful in fact," are assumed to be
16 true, id., and are construed in the light most favorable to the
17 plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir.
18 1986).

19 When granting a motion to dismiss, the court is generally
20 required to grant the plaintiff leave to amend, even if no request
21 to amend the pleading was made, unless amendment would be futile.
22 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
23 F.2d 242, 246-47 (9th Cir. 1990).

24 I. Copyright Claim

25 A. Substantially Similar

26 Defendants argue that Plaintiff fails to state a claim because
27 "Squisher the Fish" and "Finding Nemo" are not substantially

1 similar. As discussed below, the Court grants Defendants' request
2 for judicial notice of the text of "Squisher the Fish" and the film
3 "Finding Nemo." "There is ample authority for holding that when
4 the copyrighted work and the alleged infringement are both before
5 the court, capable of examination and comparison, non-infringement
6 can be determined on a motion to dismiss." Christianson v. West
7 Pub. Co., 149 F.2d 202, 203 (9th Cir. 1945).¹

8 To determine whether two works are substantially similar, the
9 Court applies a two part test, examining both "extrinsic" and
10 "intrinsic" components of the works. See Apple Computer, Inc. v.
11 Microsoft Corp., 35 F.3d 1435, 1442-43 (9th Cir. 1994). Although
12 to establish infringement the works must be substantially similar
13 under both tests, the Court may only consider the extrinsic test

14 _____
15 ¹Both parties have filed requests for judicial notice.
16 Generally, in ruling on a motion to dismiss, a court cannot
17 consider material outside of the complaint. Branch v. Tunnell, 14
18 F.3d 449, 453 (9th Cir. 1994), overruled on other grounds in
19 Galbraith v. County of Santa Clara, 307 F.3d 1119, 1127 (9th Cir.
20 2002). However, a court may consider exhibits submitted with the
21 complaint and those documents "whose contents are alleged in a
22 complaint and whose authenticity no party questions, but which are
23 not physically attached to the pleading." Id. at 453-54.

24 Defendants request that the Court take judicial notice of the
25 copyright deposit for "Squisher the Fish" on file with the United
26 States Copyright Office, the motion picture "Finding Nemo," various
27 newspaper and magazine articles, and a number of press releases
28 published on Pixar's website. While Plaintiff refers to the
contents of the movie "Finding Nemo" and the text of "Squisher the
Fish" in the complaint, she does not refer to any of the articles
or press releases. Therefore, the Court grants Defendants' request
for judicial notice of the text of "Squisher the Fish" and the
motion picture "Finding Nemo" and denies Defendants' request for
judicial notice of the newspaper and magazine articles and of the
press releases from the Pixar website. (Docket No. 27).

Plaintiff seeks judicial notice of four facts. However, none
of these facts is alleged in the complaint. Moreover, even if
true, the facts do not provide a basis upon which the Court would
deny Defendants' motion. Therefore, the Court denies Plaintiff's
request. (Docket No. 38).

1 because "the intrinsic test, which examines an ordinary person's
2 subjective impressions of the similarities between two works, is
3 exclusively the province of the jury. Funky Films, Inc. v. Time
4 Warner Entertainment Co., L.P., 462 F.3d 1072, 1077 (9th Cir.
5 2006). The extrinsic test measures objectively, as a matter of
6 law, whether protectable elements of two works are substantially
7 similar in ideas and expression. See Apple Computer, 35 F.3d at
8 1442. If all of the similarities between the works arise from the
9 use of unprotectable ideas, the plaintiff fails to satisfy the
10 extrinsic test. Kouf v. Walt Disney Pictures & Television, 16 F.3d
11 1042, 1045 (9th Cir. 1994); Aliotti v. R. Dakin & Co., 831 F.2d
12 898, 901 (9th Cir. 1987).

13 The extrinsic test turns on specific, external criteria,
14 "which can be listed and analyzed." North Coast Indus. v. Jason
15 Maxwell, Inc., 972 F.2d 1031, 1034 (9th Cir. 1992). Ultimately,
16 only protectable aspects of a work may be considered when
17 determining whether infringement has occurred. See Pasillas v.
18 McDonald's Corp., 927 F.2d 440, 443 (9th Cir. 1991) (copyright
19 holder cannot show substantial similarity of expression between
20 standard elements); Harper House, Inc. v. Thomas Nelson, Inc., 889
21 F.2d 197, 207-08 (9th Cir. 1989) (infringement decision cannot be
22 based on unprotectable aspects of plaintiff's work). Under the
23 extrinsic test, the Court defines the scope of copyright protection
24 by "analytically dissecting" the alleged similarities between the
25 works and separating protected elements of expression from
26 unprotected ideas. See Apple Computer, 35 F.3d at 1443.

27 "Protectable expression includes the specific details of an
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1 author's rendering of ideas" while "scenes a faire, which flow
2 naturally from generic plotlines, are not protectable." Funky
3 Films, 462 F.3d at 1077. In Funky Films, the court examined the
4 "plot, characters, themes, mood, pace, dialogue [and] sequence of
5 events" in evaluating whether the defendant's television series was
6 substantially similar to the plaintiff's screenplay. Id. at 1078;
7 see also Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir.
8 1984) ("The extrinsic test requires a comparison of plot, theme,
9 dialogue, mood, setting, pace, and sequence.").

10 1. Plot

11 Both "Squisher the Fish" and "Finding Nemo" begin with an egg
12 hatching into a young fish.² However, that is one of the few ways
13 in which the plots of the two stories are the same. In "Squisher
14 the Fish," Squisher is hatched and then finds "a hole to call his
15 very own." Pallios Decl., Ex. T at 1. "Finding Nemo" begins with
16 Nemo's mother and father in a new home, excited that they are about
17 to become parents. Roberts Decl., Ex. U.

18 After Squisher spends the night in his hole, he wakes up
19 curious and hungry. Pallios Decl., Ex. T at 1. He is amazed by
20 the many kinds of fish in the ocean. Id. Squisher introduces
21 himself to a fish named Glen who tells him, "I'd love to help you
22 out, just follow me along the way and we'll eat and sing and play,
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24 ²Plaintiff alleges that she submitted a different version of
25 her story to Defendants than the version that she registered with
26 the copyright office. Thomas Decl. ¶ 2. Plaintiff contends that
27 the version she sent to Defendants includes a sentence about
28 Squisher's parents guarding the egg from which he hatches. Thomas
Decl., Ex. B. at 2. However, the version she registered did not
include this sentence. Pallios Decl., Ex. T.

1 play, play." Id. Glen then sings Squisher a song that teaches him
2 about many of the different creatures living in the sea. Id. at 2-
3 3. Glen also teaches Squisher about love. Id. at 3. After Glen
4 teaches Squisher about the danger of humans, a diver swims above
5 them. Id. Glen and Squisher hide in a moray eel's cave. Id. The
6 eel tries to eat the two fish and chases them until they are able
7 to hide in a tiny hole. Id.

8 Glen then brings Squisher to the reef cleaning station, "a
9 place where you can work and be safe, there's plenty to eat and
10 many friends you can make." Id. at 4. At the cleaning station,
11 Glen meets a fish named Mr. Grubbs who has a hole in his fin where
12 a diver speared him. Id. Squisher also meets and falls in love
13 with a fish named Dot. Id. at 4-5.

14 Squisher and Dot live together and are "a perfect match." Id.
15 at 5. One day Squisher and Dot meet Glenn and Emily to search for
16 a new place to play. Id. While the fish are playing hide and
17 seek, a diver scoops Dot into a net. Id. at 7. She calls out for
18 help and Squisher also gets caught in the net trying to save her.
19 Id. The two fish are put in a boat and then put in a tank "[t]o be
20 cared for by humans and protected from harm." Id. The story
21 closes with Squisher "home at last" and "safe and happy to be
22 protected from harm." Id. at 10. He is described as "the king of
23 his world, in this public aquarium." Id.

24 While "Squisher the Fish" focuses on Squisher's discovery of
25 the ocean and his eventual capture by divers, "Finding Nemo," as
26 the title implies, focuses on Nemo's father Marlin's attempts to
27 find Nemo after he is captured by divers. While Squisher's capture
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1 and placement in the aquarium is the culmination of his story,
2 Nemo's capture is the catalyst for his father's adventures, which,
3 together with Nemo's attempts to escape from the fish tank in a
4 dentist's office, are the central plot of the story.

5 On the most general level, both stories deal with young fish
6 in the ocean that are captured by divers and put in a fish tank.
7 However, courts have consistently held that such basic plot ideas
8 are not protected by copyright law. See, e.g., Cavalier v. Random
9 House, Inc., 297 F.3d 815, 824 (9th Cir. 2002); Berkic v. Crichton,
10 761 F.2d 1289, 1293 (9th Cir. 1985).

11 In Cavalier, the Ninth Circuit noted that the parties' works
12 shared "the general premise of a child, invited by a moon-type
13 character, who takes a journey through the night sky and returns
14 safely to bed to fall asleep." 297 F.3d at 824. However, the
15 court held that "basic plot ideas, such as this one, are not
16 protected by copyright law." Id. Similarly, in Berkic, the court
17 noted,

18 At a very high level of generality, the works do show a
19 certain gruesome similarity. Both deal with criminal
20 organizations that murder healthy young people, then
21 remove and sell their vital organs to wealthy people in
22 need of organ transplants. To some extent, both works
23 take their general story from the adventures of a young
24 professional who courageously investigates, and finally
25 exposes, the criminal organization.

26 761 F.2d at 1293. However, the court held, "this degree of
27 similarity between the basic plots of two works cannot sustain a
28 plaintiff's claim that the works are 'substantially similar.'" Id.
In fact, the court held, "No one can own the basic idea for a
story" because "[g]eneral plot ideas are not protected by copyright

1 law." Id. Rather, such ideas "remain forever the common property
2 of artistic mankind." Id.

3 2. Sequence

4 As described above, Nemo is captured early in "Finding Nemo"
5 and the story revolves around his father's efforts to find him and
6 Nemo's attempts to escape from the fish tank in a dentist's office.
7 The climax of the story occurs when Nemo and his father are
8 reunited. In contrast, Squisher spends the majority of the story
9 exploring the sea, first with his friend Glen, then with his friend
10 Mr. Grubbs and finally with Dot. The climax of Squisher's story is
11 when he is captured and put in the fish tank only to discover that
12 he is happy and safe there.

13 Plaintiff argues that, despite these differences in the
14 overall storylines, Defendants have copied "the entirety of the
15 fundamental essence and structure of" her work and "Nemo's story
16 cannot begin or end without the Squisher story." Opposition at 8.
17 Plaintiff cites Universal Pictures Co. v. Harold Lloyd Corp., 162
18 F.2d 354 (9th Cir. 1947), in support of her argument that she can
19 sustain a claim even if the copied portion only constitutes a small
20 portion of Defendants' work. The Universal Pictures court held,
21 "The whole picture need not be copied to constitute infringement;"
22 and, "The mere copying of a major sequence is sufficient." Id. at
23 361. However, in that case, the court found "57 consecutive scenes
24 lifted almost bodily from the Lloyd product, not just the
25 reproduction of an isolated single incident or event." Id. at 360.
26 Such similarities do not exist here. Further, although it is
27 shorter, Plaintiff's work covers much more of the protagonist's

1 life, hatching, falling in love and discovering that his blue dot
2 is fading as he ages. In contrast, throughout the movie Nemo is a
3 young fish whose father is searching for him.

4 Plaintiff also argues that specific events in "Finding Nemo"
5 are copied from her story. However, as Defendants point out,
6 Plaintiff's arguments are based on factual misrepresentations of
7 the stories. A comparison of the sequence of events in the two
8 works does not support a finding of substantial similarity.

9 3. Characters

10 Plaintiff argues that the title characters are both "curious
11 inquisitive" and "cautioned . . . to be wary of dangers."
12 Opposition at 8. However, a young character who is inquisitive and
13 whose curiosity leads him or her into danger "can be considered a
14 stock character." Cavalier, 297 F.3d at 825 (holding that a
15 talking moon is a stock character in children's literature).
16 Further, the fact that both Nemo and Squisher are talking fish
17 "directly flows" from the idea of a young fish discovering the
18 ocean. See id. (talking moon "directly flows from the idea of a
19 journey through the night sky"). Moreover, Plaintiff's description
20 of Squisher is not reflected in any of the physical characteristics
21 of Nemo. Nemo is an orange clownfish with wide eyes and white
22 stripes around his body. Squisher is initially described as a
23 "tiny yellow fish." Roberts Decl., Ex. T. at 1. Later, it is
24 disclosed that he has a "blue circle" marking. Id. at 5.

25 Plaintiff also notes that Nemo has an injured fin, a
26 characteristic that she argues Defendants copied from her character
27 Mr. Grubbs. Plaintiff further argues that "Defendants like this
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1 characteristic so much they used it twice, having Gill, one of the
2 aquarium fish in Nemo, suffer from the same injured fin."
3 Opposition at 8. However, Plaintiff provides nothing to support
4 her argument that an injury is a protectable characteristic and, as
5 Defendants argue, there is no similarity among the injuries.
6 Nemo's fin was deformed from a barracuda attack while he was still
7 an egg; Gill's fin is also deformed but the film does not explain
8 why; Mr. Grubbs' fin was injured when it was pierced by a diver's
9 spear the day before he met Squisher.

10 Plaintiff's argument that other minor characters in "Finding
11 Nemo" were copied from her story similarly fails. Although
12 Squisher and Nemo's father both meet turtles, the presence of a sea
13 turtle, as in "Finding Nemo," or a loggerhead turtle, as in
14 "Squisher the Fish," can be said to "directly flow" from storylines
15 taking place in the ocean. See Cavalier, 297 F. 3d at 825.
16 Similarly, that Nemo and Squisher would each encounter another
17 character that teaches him about things can reasonably be expected
18 of a story in which a young fish is discovering the ocean. A
19 comparison of the characters does not support a finding of
20 substantial similarity.

21 4. Mood

22 Defendants also argue that the mood of the two works differs
23 sufficiently to undermine a finding of substantial similarity.³

24
25 ³Defendants further argue that the pace of the works
26 undermines a finding of similarity, noting that over the course of
27 eleven pages, Squisher grows up and falls in love, while over the
28 course of a feature-length film, "Nemo remains a boy." Reply at 8.
However, it is virtually impossible to compare the pace of an
eleven page story with that of a feature length film. See Idema v.

1 Defendants argue that "Plaintiff's work does not have a mood" while
2 "'Nemo's' mood is exciting and suspenseful." Reply at 8.
3 Plaintiff characterizes the works differently, arguing that both
4 works have a mood of a "happy, light children's tale" and of
5 "wonderment for the ocean and its inhabitants." Opposition at 10.
6 However, as Defendants argue, Nemo is in danger for much of the
7 film, lending a suspenseful and potentially scary mood. A
8 comparison of the moods of the two works does not support a finding
9 of substantial similarity.

10 5. Setting

11 Both stories take place on a reef in the ocean and in a fish
12 tank. However, this "naturally and necessarily flows from the
13 basic plot premise," common to the two stories, of a fish captured
14 from the ocean and put into a fish tank. Cavalier, 297 F.3d at
15 924. In Williams v. Crichton, the Ninth Circuit found that much
16 more specific "common elements of electrified fences, automated
17 tours, dinosaur nurseries, and uniformed workers were scenes-a-
18 faire that flowed from the concept of a dinosaur zoo." 84 F.3d
19 581, 589 (9th Cir. 1996). The setting of these works does not
20 support a finding of substantial similarity.

21 Thus, none of the factors weigh in favor of a finding of
22 substantial similarity between "Squisher the Fish" and "Finding
23 Nemo." Therefore, the Court finds that Plaintiff's copyright claim
24 fails as a matter of law. Because this finding is based on the

25 _____
26 Dreamworks, Inc., 162 F. Supp. 2d 1129, 1185 (C.D. Cal. 2001)
27 (noting the difficulty of such a comparison "between works which
28 are captured in different media (written word versus film)").

1 works themselves and not on Plaintiff's pleadings, leave to amend
2 would be futile.

3 B. Time-Bar

4 Defendants also argue that, even if the works are
5 substantially similar, Plaintiff's copyright infringement claim is
6 time-barred. The parties agree that the statute of limitations for
7 such claims is three years. 17 U.S.C. § 507. Plaintiff does not
8 dispute that she first saw the film on June 6, 2003, almost four
9 years before May 29, 2007, when she filed the original complaint in
10 this case in California state court. However, Plaintiff contends
11 that Defendants continued to show the film in public theaters after
12 May 29, 2004, and that each "theatrical showing constitutes a new
13 act of infringement." Opposition at 2. Further, Plaintiff
14 contends that each sale of a DVD of the film or video game based on
15 the film constitutes a separate act of infringement. Id.

16 In Roley v. New World Pictures, LTD., the Ninth Circuit held,
17 "A cause of action for copyright infringement accrues when one has
18 knowledge of a violation or is chargeable with such knowledge." 19
19 F.3d 479, 481 (9th Cir. 1994) (citing Wood v. Santa Barbara Chamber
20 of Commerce, Inc., 507 F. Supp. 1128, 1135 (D. Nev. 1980)). In
21 Roley, the plaintiff relied on a "rolling statute of limitations
22 theory" to argue that "so long as any allegedly infringing conduct
23 occurs within the three years preceding the filing of the action,
24 the plaintiff may reach back and sue for damages or other relief
25 for all allegedly infringing acts." Id. The Ninth Circuit
26 rejected that theory but held, "In a case of continuing copyright
27 infringement, an action may be brought for all acts that accrued
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1 within the three years preceding the filing of the suit." Id.

2 Citing Roley, the Ninth Circuit later held, in Kourtis v.
3 Cameron, that a copyright infringement claim based on the release
4 of the film "Terminator II" was time-barred because the plaintiffs
5 alleged that they had learned of the infringement at the time of
6 the release, which was more than three years prior to the date
7 their complaint was filed. 419 F.3d 989, 999 (9th Cir. 2005).
8 However, the Kourtis court noted that "the complaint also alleges
9 several acts of continuing infringement, including the release of
10 "Terminator II" on DVD and the use of the "Minotaur" materials to
11 develop "Terminator III." Id. at 999-1000. Because the plaintiffs
12 had not alleged the dates on which they discovered those acts of
13 continuing infringement, the court held that "it cannot be
14 concluded that the Kourtises' claim is time-barred in its
15 entirety." Id. at 1000. However, the court noted that the
16 defendant could renew its statute of limitations arguments on
17 summary judgment.

18 Similarly, Plaintiff concedes that she was aware of the
19 alleged infringement based on Defendants' production of "Finding
20 Nemo" as early as June 6, 2003, but has not alleged when she
21 learned of the other acts of continuing infringement. Therefore,
22 Plaintiff's infringement claim based on the initial production of
23 the film is time-barred, but the Court cannot find that her claims
24 based on the other acts of continuing infringement are barred.

25 Defendants cite Polar Bear Productions, Inc. v. Timex Corp.,
26 384 F.3d 700 (9th Cir. 2004), in support of their argument that
27 even if Plaintiff did not know about the continuing acts, such as

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1 the release of the film on DVD and the related video games,
2 merchandise and live performances until May, 2004, she should have.
3 However, in Polar Bear Productions, the Ninth Circuit clearly held
4 that "the date of discovery is an issue of fact." Id. at 707.
5 Therefore, the Court finds only that Plaintiff's claims based on
6 the original production and release of the film must be dismissed
7 as time-barred.

8 III. California Business and Professions Code § 17200 Claim

9 Defendants argue that Plaintiff's § 17200 claim is preempted
10 by the Copyright Act because the work involved falls within the
11 "subject matter" of the Copyright Act and the rights Plaintiff
12 asserts under California law are "equivalent" to those protected by
13 the Copyright Act. Kodadek v. MTV Networks, Inc., 152 F.3d 1102,
14 1212 (9th Cir. 1998).

15 Plaintiff does not dispute that her story falls within the
16 "subject matter" of the Copyright Act. However, she argues that
17 her unfair competition claim is not equivalent to her copyright
18 infringement claim because she has alleged a breach of confidence.
19 Defendants counter that Plaintiff's breach of confidence
20 allegations fail as a matter of law.

21 A breach of confidence claim requires a confidential
22 relationship that arises when an idea is offered to another in
23 confidence and is voluntarily accepted by the offeree in
24 confidence. Faris v. Enberg, 97 Cal. App. 3d 309, 322-23 (1979).
25 A plaintiff may raise an inference of a confidential relationship
26 in a number of ways including through "proof that the material
27 submitted was protected by reason of sufficient novelty and

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1 elaboration," or proof that she "offered the idea upon condition of
2 confidence and a clear understanding that payment would be made
3 upon use." Id. at 323 (internal citations and quotations omitted).

4 Plaintiff alleges that "Defendants knew or should have known
5 that Plaintiff's story submission was in confidence." FAC ¶ 21.
6 However, the cover letter Plaintiff sent to Defendants along with
7 her story does not state that the manuscript is being offered in
8 confidence.⁴ See Thomas Decl., Ex. A. The cover letter also fails
9 to provide a clear basis from which to infer that Plaintiff
10 expected payment if her story was used. The letter simply states,
11 "I feel there is potential for this to be sold along with a
12 cassette tape for young readers as it sounds good when read aloud"
13 and "I certainly hope that we can work together as I believe that
14 this is a book with great potential." Id. Neither of these
15 statements supports an inference of a confidential relationship
16 between Plaintiff and Defendants. Plaintiff also argues that her
17 cover letter "communicat[ed] to Defendants that her story was
18 original and novel." Opposition at 12. However, nothing in the
19 letter supports such a finding.

20 Moreover, the cases Plaintiff cites in support of her argument
21 do not support a finding of a confidential relationship. In Faris,
22 the defendant Enberg agreed to meet with the plaintiff Faris to
23 discuss Faris's idea for a sports show. 97 Cal. App. 3d at 314.

24
25 ⁴Because Plaintiff refers to this cover letter in her
26 complaint, supplies a copy of the letter and does not allege any
27 other communication between the parties, the Court may rely on the
28 letter to dismiss her claim. Indeed, at the hearing Plaintiff's
counsel confirmed that there was no other communication between the
parties.

1 At that meeting, Enberg requested and Faris gave him a copy of his
2 registered format of the idea. Id. at 315. Faris told Enberg that
3 "it was his 'creation' and 'literary property.'" Id. Further,
4 Faris "discussed [his] show and Mr. Enberg's participation as a
5 business proposal or offer." Id. Nevertheless, the California
6 court held that "no rational receiver of the communications from
7 Faris could be bound to an understanding that a secret was being
8 imparted." Id. The Faris court clearly stated, "We do not believe
9 that the unsolicited submission of an idea to a potential employee
10 or potential business partner, even if that person then passes the
11 disclosed information to a competitor, presents a triable issue of
12 fact for confidentiality." Id. This case does not support a
13 finding of a confidential relationship where, as here, Plaintiff
14 alleges that she submitted an unsolicited work to Defendants, which
15 was then returned with a cover letter stating that Defendants do
16 not accept such submissions.

17 While the California Court of Appeal found a confidential
18 relationship in Thompson v. California Brewing Company, that case
19 is clearly distinguishable from Plaintiff's. There, the plaintiff
20 alleged that he submitted his "new and novel" idea "at defendants'
21 special instance and request." 150 Cal. App. 2d 469, 472 (1957).
22 Further, the plaintiff alleged that the defendants had "expressly
23 and orally agreed to pay to plaintiff the reasonable value of such
24 new and novel idea if and when the defendants, or any of them, used
25 the same." Id. Although the letter by which the plaintiff
26 disclosed his idea to the defendants did "not of itself indicate
27 any element of confidence in the relationship," the court

1 nonetheless found the allegations of a confidential relationship
2 sufficient because the plaintiff "alleged the voluntary assumption
3 of such a relationship by the defendants." Id. at 474. Further,
4 the Thompson court relied on the fact that the defendants there
5 were "looking for 'ideas.'" Id. at 475. Unlike the plaintiff in
6 Thompson, Plaintiff here has no basis other than her letter to
7 establish any such voluntary assumption.

8 Similarly, Plaintiff quotes dicta in Davies v. Krasna, where
9 the California Court of Appeal quoted a law review article that
10 stated that even when a traditional relationship giving rise to a
11 confidential relationship does not exist, "courts will tend to find
12 a confidential relationship when the parties deal on unequal terms
13 resulting in one party reposing trust and confidence in the other's
14 good faith." 245 Cal. App. 2d 535, 548 (1966) (quoting Nimmer, The
15 Law of Ideas, 27 So. Cal. L. Rev. 119, 138-40 (1954)). However,
16 there, as in Thompson, the court only found a confidential
17 relationship where the plaintiff alleged the "voluntary assumption
18 of such a relationship by the defendants." Id. (quoting Thompson,
19 150 Cal. App. 2d at 475).

20 California law clearly requires "understanding or voluntary
21 acceptance of the confidential disclosure" on Defendants' part.
22 Tele-Count Eng'rs v. Pac. Tel. & Tel. Co., 168 Cal. App. 3d 455,
23 465 (1985). The content of Plaintiff's cover letter, together with
24 Defendants' return of her submission without review belies any such
25 understanding or acceptance.

26 Plaintiff has not adequately plead a confidential
27 relationship. Therefore, her § 17200 claim is equivalent to her
28

1 infringement claim and preempted by the Copyright Act. Further,
2 Defendants' "knowledge of the confidential nature of information
3 must precede its disclosure." Id. Unless Plaintiff could plead
4 any other communication between herself and Defendants that
5 occurred prior to her submission of her story with the cover
6 letter, there is no basis upon which such knowledge could be found.
7 Plaintiff indicates that she cannot do so. Therefore, the Court
8 dismisses with prejudice Plaintiff's § 17200 claim.

9 CONCLUSION

10 For the foregoing reasons, the Court GRANTS Defendants' motion
11 to dismiss the FAC (Docket No. 32). Because amendment would be
12 futile, the dismissal is with prejudice. The Clerk shall enter
13 judgment in favor of Defendants and close the file. Each party
14 shall bear its own costs.

15 IT IS SO ORDERED.

16 2/14/08

17 Dated: _____



18 _____
19 CLAUDIA WILKEN
20 United States District Judge
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