

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

_____ :
TIMMY PINO, :
 :
Plaintiff, :
 :
v. :
VIACOM, INC., et al., :
Defendants. :
_____ :

Civil No. 07-3313 (AET)

MEMORANDUM & ORDER

THOMPSON, U.S.D.J.

This matter is before the Court on Defendants Viacom, Inc., MTV Networks, and Spike TV’s (collectively, “Defendants”) Motion to Dismiss, or in the Alternative, for Summary Judgment. The Court has decided this Motion based upon the submissions of the parties and without oral argument pursuant to Fed. R. Civ. P. 78. For the reasons set forth below, Defendants’ Motion is granted.

BACKGROUND

On July 18, 2007, Plaintiff Timmy Pino filed a one-count Complaint alleging copyright infringement under 17 U.S.C. § 101 et seq. Specifically, Plaintiff alleges that Defendants’ reality television show, *Pros vs. Joes*, infringes upon his copyright in a three-page script treatment and fourteen-page screenplay entitled *Under Pressure*. *Under Pressure* is meant to be a sports reality show featuring contests between professional athletes and amateur athletes. (Compl. ¶ 29.) Plaintiff was inspired to write the script treatment and screenplay after meeting Pat Tillman, the former National Football League player who became an Army Ranger and was killed in

Afghanistan in 2004. (Compl. ¶¶ 28, 30.) On March 10, 2005, he filed for a copyright for the script treatment (Compl. ¶ 32). He received a copyright for the screenplay in April 2005.

(Compl., Ex. E.)

In May and June 2005, Plaintiff began shopping the *Under Pressure* screenplay to television networks. Plaintiff's agent sent the screenplay to contacts at the William Morris Agency and International Creative Management, including agents whom Plaintiff alleges to have been associated with Defendants MTV Networks and Spike TV. (Compl. ¶¶ 35, 36.) Plaintiff also sent the screenplay to a representative at CBS-TV in New York and the United Talent Agency in August and September 2005. (Compl. ¶¶ 37, 38.) In addition, Plaintiff paid to place the script treatment on two amateur script referral websites that are intended to expose the work of "unknown script writers [to] executive industry professionals." (Compl. ¶ 33.) Plaintiff alleges that Defendant MTV Networks subscribes to at least one, if not both, of these websites.

(Id.)

Because Plaintiff alleges *Pros vs. Joes* to be substantially similar to *Under Pressure*, the Court briefly describes Plaintiff's screenplay and Defendants' show.

A. *Under Pressure* Script Treatment and Screenplay

Under Pressure is intended to be a reality television show that depicts either three or four contestants who compete in separate sporting events in different arenas.¹ (Defs.' Statement of Material Facts, ¶ 10.) The contestants compete to earn points and win a cash prize. (Id.) Each contestant participates in three consecutive events, referred to as "Pressure Situations," and is

¹ The script treatment for *Under Pressure* contemplates three contestants, while the screenplay refers to four contestants. (Pl.'s Counterstatement of Material Facts, ¶ 10.) The Court does not find the difference to be material to its analysis.

scored on a scale of 1 to 10 by four judges. In addition, viewers are able to vote for the contestants online. (Compl., Ex. A at 2; id., Ex. B at 3.) The professional athletes who are featured in *Under Pressure* are not stars in their respective sports. (Id., Ex. B at 6.) These athletes are supposed to make regular appearances on the show, “giving their characters time to evolve as the season evolves.” (Id.)

Under Pressure opens with a cheering crowd present at Nassau Veterans Memorial Coliseum in Long Island, New York. (Id. at 1.) An American flag and honor guard are displayed across the screen as the national anthem plays. (Id.) Three contestants each in basketball, football, baseball, and hockey are announced as the anthem plays. Each set of contestants is introduced on the field, court, or rink on which they will play. (Id. at 1-2.) The American flag is once again displayed after the contestants are introduced as the national anthem ends and the crowd cheers. (Id. at 2.)

Next, the audience is introduced to two announcers located at the *Under Pressure* Sports Headquarters, which Plaintiff describes as a “cross between an announcer’s booth at a game and a news anchor desk.” (Id. at 2.) The announcers play a video montage that shows how each contestant prevailed over the other two competitors in his chosen sport, and provides the prevailing contestant’s background. (Id. at 3.) The other two contestants are designated as alternates in each sports competition. (Id.)

The screenplay describes the scoring system and the process by which the contestants advance in a prerecorded spot, followed by a female interviewer who explains how contestants are selected. (Id. at 3-4.) Other segments include contestant outtakes, and a medical team outlining the risks of competition. (Id. at 4.) Commentary on the contestants by the professional

athletes is interwoven throughout these segments. (Id.)

The screenplay next features the basketball “pressure situations.” The panel of four basketball judges are introduced, as are the professional athletes who will compete against the amateur contestant. (Id.) The basketball pressure situations require the contestant to engage in: (1) a two-minute long three-point shootout where the professional athletes defend the contestant; (2) shooting free throws under pressure; and (3) taking a charge from a professional athlete. (Id. at 4-5.) The other sports’ pressure situations follow similar formats. For example, the football competition finds the contestant having to: (1) kick a field goal while being rushed by professional athletes; (2) throwing a “Hail Mary” pass while being rushed by the professionals; and (3) running a pass pattern and attempting to score against a professional. (Id. at 5-6.)

Prior to the completion of online voting by viewers, the points leader and two alternates reenact a “classic sports moment” in order to earn a \$10,000 bonus. After this segment is shown, the winner of the show is announced. As the credits roll, the show is dedicated to Tillman’s memory. (Id. at 12, 14.)

B. *Pros vs. Joes*

Pros vs. Joes first aired on Spike TV on March 6, 2006. Approximately twenty episodes have aired in total over two seasons of the show. (McNamara Aff. ¶¶ 3-4.) The episodes have featured prominent professional athletes representing a variety of sports. (Defs.’ Statement of Material Facts, ¶ 33.) The show opens with a shot of an empty football stadium, followed by a series of highlight clips of the professional athletes appearing in that particular episode. The show’s logo appears in a frame, followed by shot of the host, Petros Papadakis, standing on the field with the amateur contestants (“Joes”). (Id., ¶ 35.) The host introduces the Joes and

professional athletes. The professional athletes and the Joes taunt one another and engage in “trash talking.” This continues in the next scene, which takes place in respective Joes and professionals’ locker rooms. (Id., ¶¶ 36-37.)

After this sequence, the players return to the field, where they participate in three “Match-Ups.” Each Joe competes individually against the same professional in each Match-Up, but the format of each Match-Up varies. For example, the first Match-Up pits the Joes against a professional athlete in a contest that is derived from the professional’s sport, the second Match-Up finds the Joes competing against a professional in an event that modifies the latter’s sport (such as shooting baskets against a basketball player while moving on a conveyor belt), and the third Match-Up features a competition between each Joe and a professional athlete in a sport that is different from the professional’s. (Id., ¶¶ 38-40.) The Joes earn scores on an objective basis, such as the number of baskets made or goals scored. (Id., ¶ 44.)

After the third Match-Up, also known as the “Elimination Round,” the two Joes with the highest scores compete against the four professionals in a final round. Each Joe competes individually against the respective professionals in four time-based events. The Joe who completes the events in the least amount of time is the winner of the episode. (Id., ¶ 41.) During the first season, episode winners earned \$20,000 and a chance to compete for a grand prize in the final episode, while winners during the second season won the professionals’ jerseys and the opportunity to compete in the final episode. (Id., ¶¶ 45, 46.)

Throughout and in between the Match-Ups, the professionals and Joes are shown commenting on each other. *Pros vs. Joes* does not depict cheering crowds or show prerecorded segments explaining the rules or risks of each contest. (Id., ¶¶ 42, 47.) The show occasionally

shows clips from the Joes' audition tapes. (Id., ¶ 47.)

APPLICABLE LAW

A. Standard of Review

Defendants first argue for dismissal of Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6). In deciding a motion to dismiss under Rule 12(b)(6), all allegations in the Complaint must be accepted as true and viewed in the light most favorable to the plaintiff. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). The Court need not, however, credit a plaintiff's "bald assertions" or "legal conclusions." Id. A court may dismiss a complaint if it appears that a plaintiff has not pled "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007).

Alternatively, Defendants ask the Court to grant them summary judgment pursuant to Fed. R. Civ. P. 56. Summary judgment is appropriate if, on the record, "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Kreschollek v. S. Stevedoring Co., 223 F.3d 202, 204 (3d Cir. 2000). In deciding whether summary judgment should be granted, the Court considers "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," and construes all facts and inferences in the light most favorable to the nonmoving party. Fed. R. Civ. P. 56(c); see also Curley v. Klem, 298 F.3d 271, 276-77 (3d Cir. 2002). To survive a motion for summary judgment, a plaintiff cannot rely merely on the unsupported allegations of the complaint, and must present more than the "mere existence of a scintilla of evidence" in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

Here, Defendants have submitted DVDs containing twenty episodes of *Pros vs. Joes*. Plaintiff's opposition includes a DVD of a four-second military montage that he argues is a part of *Pros vs. Joes*. Defendants have countered by presenting evidence that the montage is not a part of the show, and have included a spreadsheet that shows the times, dates, and various Spike TV shows that the clip has preceded. Accordingly, because not all of the evidence submitted by the parties is "integral to and explicitly relied upon" by Plaintiff's Complaint, In re Rockefeller Ctr. Props., Inc. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999) (emphasis and citations omitted), the Court converts Defendants' Motion into one for summary judgment.

B. Copyright Infringement

The Court considers the issue of copyright infringement by comparing the allegedly infringing work against the original work. Dam Things from Denmark v. Russ Berrie & Co., Inc., 290 F.3d 548, 561 (3d Cir. 2002). A plaintiff seeking to prevail on a copyright infringement claim must show that: (1) he owns the copyright; and (2) the defendant has copied the copyrighted work. Id. (quoting Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1231 (3d Cir. 1986)). Copying is established by showing that the defendant had access to the copyrighted work and that there are substantial similarities between the allegedly infringing work and the original. Dam Things, 290 F.3d at 561.

The Third Circuit has set forth two tests to determine whether substantial similarity exists between two works, each of which must be satisfied. Whelan Assocs., 797 F.2d at 1232. The first inquiry, known as the extrinsic test, considers whether the similarities between the two works are sufficient to conclude that the defendant copied the plaintiff's work, i.e., whether "actual copying" has occurred. Dam Things, 290 F.3d at 562; Kepner-Tregoe, Inc. v. Executive

Dev., Inc., 79 F. Supp. 2d 474, 484 (D.N.J. 1999). This test focuses on the “objective similarities in specific expressive elements, such as plot, themes, dialogue, mood, settings, pace and sequence of events in the two works.” Daley v. Granada US Prods., No. 02-2629, 2003 U.S. Dist. LEXIS 3133, at * 3 (E.D. Pa. Jan. 31, 2003) (citing Kouf v. Walt Disney Pictures and Television, 16 F.3d 1042, 1045 (9th Cir. 1994)). Courts may consider expert testimony or visually compare the works in question to assist in this inquiry. Kepner-Tregoe, 79 F. Supp. 2d at 484. The next inquiry is the intrinsic test, where the Court considers whether a “lay-observer would believe that the copying was of protectible aspects of the copyrighted work.” Dam Things, 290 F.3d at 562 (internal quotations omitted); Kepner-Tregoe, 79 F. Supp. 2d at 484. In this inquiry, the Court considers “the nature of the protected material and the setting in which it appears.” Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 908 (3d Cir. 1975).

Copyright protection extends to the expression of ideas, but not to the ideas themselves. Universal Athletic Sales, 511 F.2d at 908. Further, copyright protection is not available to *scenes à faire*, which are those “incidents, characters or settings which are as a practical matter indispensable . . . in the treatment of a given topic.” Whelan Assocs., Inc., 797 F.2d at 1236; see also Williams v. Crichton, 84 F.3d 581, 587 (2d Cir. 1996) (describing *scenes à faire* as “sequences of events that ‘necessarily result from the choice of a setting or situation, do not enjoy copyright protection.’”) (internal citation omitted).

DISCUSSION

For the purposes of this Motion, Defendants concede that they had access to Plaintiff’s work. However, they argue that Plaintiff’s infringement claim fails as a matter of law because Plaintiff cannot sustain his burden of showing that *Under Pressure* and *Pros vs. Joes* are

substantially similar. Specifically, Defendants assert that Plaintiff is seeking copyright protection for what amounts to nothing more than generic, stock elements typical of the reality show genre and *scenes á faire* flowing from a sports-themed show, and that comparison of the two shows reveals that the expression, structure, and essence are fundamentally dissimilar. Plaintiff contends that, even if *Under Pressure* consists of unprotectable elements, copyright protection extends to his selection, arrangement, and presentation of those elements. Plaintiff argues that “the infringement in this case consists of the defendants’ nearly identical selection, organization, and presentation of both protectable elements and unprotectable ‘stock’ elements.” (Pl.’s Opp. Br. at 8.) Further, Plaintiff argues that *Pros vs. Joes* “duplicates the ‘fundamental essence or structure’ of [*Under Pressure*]” and, therefore, his showing of substantial similarity is sufficient to submit the issue of whether the alleged copying was unlawful to a jury. (Pl.’s Opp. Br. at 13.)

A. Stock Elements Of *Under Pressure* Are Not Protectable

Defendants argue that the alleged similarities on which Plaintiff bases his claim are between stock elements common to reality shows. Moreover, Defendants contend that the alleged similarities are elements generic to the idea of a sports-themed reality television show in which amateur contestants compete for prizes against professional athletes. The Court finds that elements common to both works, including, *inter alia*, the presence of hosts who provide witty commentary on the contestants and competition, introductory sequences that feature highlights of sporting events and sounds associated with various sports, spotlights on professional athletes and amateur contestants, camera shots of athletic fields or arenas, trash-talking exchanges, and sports contests are *scenes á faire* that flow necessarily from the idea of a sports-themed reality show that pits amateurs against professional athletes.

B. The Protectable Elements Of *Under Pressure* Are Not Substantially Similar To *Pros v. Joes*

Plaintiff argues that *Under Pressure* and *Pros vs. Joes* are “substantially similar in their fundamental essence and structure” and, in particular, “in their setting and sequence of events.” (Pl.’s Opp. Br. at 15.) The Court has reviewed Episode 101 of *Pros vs. Joes* and Plaintiff’s script treatment and screenplay, and considers the factors that comprise expression under the Third Circuit’s formulation of the extrinsic test.

1. Plot

Plot is defined as the “sequence of events by which the author expresses his theme or idea.” 4 Nimmer on Copyright § 13.03[A][1][b], at 13-42 (2003). Here, *Pros vs. Joes* features an introductory sequence where the host interacts with the professional athletes and the Joes, four sports contests, interspersed with locker room scenes. During the various Match-Ups, the show tends to focus on the professionals rather than the Joes, allowing the viewer to listen to the professionals banter about the Joes and the competition. Although the Joes compete individually against each professional, they win each episode by performing better, i.e., scoring more points, or completing an event in less time, than their counterparts. The Joes are scored according to objective criteria.

In Plaintiff’s work, the introduction features three contestants each in four sports and ends with a camera shot of the American flag as the national anthem plays.² Commentary by the hosts

² In a letter submitted to the Court subsequent to filing his opposition, Plaintiff included a DVD containing a four-second video clip featuring tanks that he contends is actually a part of *Pros vs. Joes* and, therefore, copies Plaintiff’s military tributes. However, in a supplemental filing, Defendants have offered evidence that the video clip is not a part of *Pros vs. Joes*, but, rather, is a Spike TV promotional spot. (Schuurmans Aff., ¶ 4.) Accordingly, the Court declines to credit Plaintiff’s unsubstantiated allegation concerning this video clip.

in the studio and several pre-recorded segments alternate with the various pressure situations throughout the show. One contestant in each sport advances to face a professional athlete in the pressure situations, and wins by outperforming the professional. The contestants are rated by a panel of judges on a scale of 1 to 10.

Thus, the Court finds that the sequence of events in *Under Pressure* differs significantly from that in *Pros vs. Joes*.

2. Theme

At a basic level, both shows are about ordinary men competing against professional athletes. *Pros vs. Joes* allows the contestant to live, albeit temporarily, his dream of being a professional athlete, and to see how he fares against prominent professional athletes. *Under Pressure* promotes a can-do attitude where an average, ordinary man proves his abilities against professional athletes who did not attain the highest levels of achievement or notoriety in their sports. The patriotic music and homage to the armed forces reinforces the theme of ordinary individuals striving to do better. The Court finds that a reasonable fact-finder could find the themes of these shows to be substantially similar.

3. Dialogue

Although the screenplay for *Under Pressure* is light on dialogue as compared to the produced versions of *Pros vs. Joes*, both shows feature taunting and trash-talking exchanges between the contestants and the professional athletes. To the extent that this type of dialogue is a protectable element rather than *scenes à faire* of sporting events, the Court finds that the dialogue of these shows not to be substantially similar.

4. Mood

In *Pros vs. Joes*, the Joes take themselves and the events seriously, but the competition is fundamentally a mismatch in favor of the professional athletes. The overall tone of the show is comedic, and while the professionals taunt and trash-talk the Joes in the locker room and on the sidelines, the viewer does not have the impression that the professionals feel threatened in any significant manner by the Joes. Plaintiff's screenplay refers to the professional athletes as "villains," "felons," and "bad boys," connoting a battle of good versus evil where the contestant believes he can best the professional in competition. Plaintiff argues that both works showcase violence between the professionals and contestants, pointing to former football star and wrestling champion Bill Goldberg's bodyslams of the Joes in Episode 101 as an example. However, the altercations that take place in *Pros vs. Joes* are incidental to and a byproduct of the physical nature of sporting events, whereas at least some of the confrontations in *Under Pressure* appear to be motivated by drama that is generated behind the scenes, such as the fight that erupts between a hockey "goon" and a contestant, after the contestant is caught making overtures towards the player's wife. The Court does not find the mood of the works to be substantially similar.

5. Settings

The contests on both shows take place at different arenas, courts, or fields, depending on the sport, but the competitors in *Under Pressure* play before cheering crowds, while aerial shots of the stadiums featured in *Pros vs. Joes* confirm that only the competitors and the host are present during the events. Between pressure situations, the viewer of *Under Pressure* is taken to the studio or watches pre-recorded segments, whereas locker room scenes featuring the professional athletes and the Joes are shown in between the contests in *Pros vs. Joes*. Thus, the

Court finds that the settings of the two shows are not substantially similar.

6. Pace

According to the *Under Pressure* screenplay, the contestant in each sport competes against the professional athlete in a series of three pressure situations without pause. The pre-recorded segments and studio commentary are shown in between each sporting event. In *Pros vs. Joes*, the contestants take turns competing in the various events against the professionals, and the athletic activity appears to occur at a slower pace. Although Plaintiff contends that he does not have sufficient information to know whether the contestants in *Pros vs. Joes* take breaks during events, he does not offer any evidence suggesting that the Joes complete their events without pause that would raise a genuine issue of material fact with respect to this issue. Accordingly, the Court does not find the pace of the two shows to be substantially similar.

7. Sequence of Events

The Court has already discussed the sequence of events in its analysis of the plots of Plaintiff's and Defendants' work. The Court does not find the sequence of events in the two works to be substantially similar as a matter of law.

Although the Court finds that there may be a triable issue of fact with respect to the theme of the two works, consideration of the other factors comprising the extrinsic test compels the Court to find that Plaintiff has not met his burden of showing substantial similarity.

C. Defendants' Selection of Uncopyrightable Elements Is Not Substantially Similar To Plaintiff's Selection

The original selection of unprotectable elements enjoys copyright protection, but it is considered to be "thin." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349

(1991). The copyright in the sequence of unprotectable elements “is limited to the particular selection or arrangement” and a subsequent work will avoid infringement “so long as [it] does not feature the same selection and arrangement” as the original. Id. at 349, 351. However, Plaintiff’s argument that Defendants’ sequence of these elements is substantially similar to his arrangement of those elements fails. In Metcalf v. Bochco, on which Plaintiff chiefly relies, the Ninth Circuit, in reversing the district court and finding that plaintiff had satisfied the extrinsic test to survive summary judgment, held that the sequence in which an author compiles a significant number of unprotectable elements is itself entitled to copyright protection. 249 F.3d 1069, 1074 (9th Cir. 2002). The Metcalf court found the following similarities between the two works at issue:

[Both works] are set in overburdened county hospitals in inner-city Los Angeles with mostly black staffs . . . 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.

Id. at 1073-74.

Here, Plaintiff does not allege or identify any sequence of uncopyrightable elements in *Pros vs. Joes* that is similar to any in *Under Pressure* so as to approach the extent of similarity and identity in Metcalf. At best, Plaintiff lists random similarities between elements of the

shows in support of his argument that the extrinsic test for substantial similarity is satisfied. (Pl.'s Opp. Br. at 17.) However, courts routinely reject theories of substantial similarity based on random similarities across works. See, e.g., Williams, 84 F.3d at 590 (finding such lists to be “inherently subjective and unreliable”); Kouf, 16 F.3d at 1045-46 (“[W]e are equally unimpressed by Kouf’s compilation of random similarities scattered throughout the works.”). The Court does not find Defendants’ sequence of unprotectable elements in *Pros vs. Joes* to be substantially similar in expression to Plaintiff’s arrangement of those elements in *Under Pressure*. Therefore, the Court finds that Plaintiff has not satisfied the extrinsic test for substantial similarity between the sequences of otherwise unprotectable elements.

Because Plaintiff has not satisfied the extrinsic test for substantial similarity with respect to any of the protectable elements of his work or his original selection of unprotectable elements, and therefore has not raised any issue of material fact with respect to his copyright infringement claim, the Court grants Defendants’ Motion for summary judgment.

CONCLUSION

For the foregoing reasons, and for good cause shown,

IT IS on this 29th day of February, 2008,

ORDERED that Defendants Viacom, Inc., MTV Networks, and Spike TV’s Motion to Dismiss, or in the Alternative, for Summary Judgment [4] is GRANTED.

s/ Anne E. Thompson

ANNE E. THOMPSON, U.S.D.J.