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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

DEBORAH NOVAK, ET AL,)	Case No. CV 07-4000 GAF (PLAx)
Plaintiffs,)	
vs.)	ORDER GRANTING MOTION FOR SUMMARY JUDGMENT
WARNER BROS. PICTURES LLC, ET)	
AL.,)	
Defendants.)	

I. INTRODUCTION AND BACKGROUND

This is a copyright case in which Plaintiffs, two documentary film makers who produced a film about the Marshall University football program, contend that Defendants produced and released a motion picture, "We Are Marshall," that infringed on Plaintiffs' copyright in the documentary. If the Court does not agree that infringement has occurred, Plaintiffs argue in the alternative that Defendants contractually agreed to acquire rights in the documentary and have breached that agreement. Defendants now move for summary judgment on all claims, arguing that the parties never entered into any contract and that "We Are Marshall" does not infringe on the documentary. Having reviewed the undisputed facts and those without substantial controversy, the Court agrees and concludes that Defendants are entitled to summary judgment on all claims.

1 The lawsuit involves two films that deal with the tragic true story of a disaster
2 that befell the Marshall University football team on November 14, 1970. On that rainy
3 Saturday evening, a Southern Airways flight carrying the team, most of its coaches,
4 and a number of its fans crashed into a hillside short of the Tri-State Airport outside of
5 Huntington, West Virginia, on a return trip from a game against East Carolina
6 University. Thirty years after the crash, Plaintiffs produced "Ashes to Glory, The
7 Tragedy and Triumph of Marshall Football," a documentary commemorating the
8 event, its aftermath, and the rebuilding of the Marshall football program. The story is
9 told through newspaper accounts, historical film footage, news broadcasts from 1970,
10 home movies taken of local fans who flew with the team, and interviews of surviving
11 team members, sports reporters, and members of the community (including orphaned
12 children) whose husbands, fathers, mothers, and friends died in the crash.

13 Defendants in this case knew of the documentary and had access to it. One
14 of those defendants, Thunder Road Productions, Inc., an independent production
15 company, even tried, unsuccessfully, to negotiate a contract with Plaintiffs to obtain
16 their participation in the production of a dramatization of the event and to acquire
17 certain rights in their documentary. When the negotiations failed, production of a
18 movie based on the Marshall tragedy moved ahead, and, in 2006, Warner Brothers
19 released "We Are Marshall," a two hour dramatization of the aftermath of the 1970 air
20 crash. Though the movie is based on the actual events of 1970 and 1971, and draws
21 on the historical record for information about the events, considerable artistic license
22 is taken with the facts to condense, focus and sharpen the narrative -- fictional
23 characters are created, events are modified or fabricated for effect, and the timing and
24 sequence of some events has been rearranged.

25 Though the works are significantly different in their presentation, Plaintiffs
26 contend that the feature film infringes on their copyright in "Ashes to Glory." However,
27 to prove infringement, Plaintiffs must prove that the two works are "substantially
28 similar" as that phrase is used in copyright jurisprudence. Defendants argue that

1 Plaintiffs cannot meet that burden and that the Court can compare the two works,
2 apply the substantial similarity test, and enter judgment in Defendants' favor as a
3 matter of law. Defendants contend that the works are similar only in that both deal
4 with the events surrounding the November 14, 1970 airplane crash, and that those
5 events are historical facts in which no one can claim a copyright interest. The Court
6 agrees.

7 Though the two works tell the story of the November 14, 1970 air plane crash,
8 that event, and the events that preceded and followed, are all matters of public record
9 which cannot be copyrighted. Copyright protects only an author's original expression
10 and not historical facts or events which means, as noted by the Supreme Court that
11 "the fact/expression dichotomy limits severely the scope of protection in fact-based
12 works." Feist Publications, Inc., v. Rural Tele. Serv. Co., 499 U.S. 340, 350 (1991).
13 Here, Plaintiffs have created and produced a fact-based narrative that recounts, in an
14 historically accurate way, what happened before and after the 1970 air plane crash.
15 Defendants, on the other hand, have produced a dramatic recreation of the events
16 that, though based on the historical record including the documentary, does not
17 appropriate Plaintiffs' expressive elements and makes no pretense of being
18 historically accurate. Thus, even though the two works have the same story as their
19 subject, they are not "substantially similar" as that phrase is used in copyright
20 jurisprudence.

21 The contract claim fares no better. Plaintiffs retained Jonathan Westover to
22 act as their agent in negotiations with Thunder Road and instructed him on the terms
23 and conditions that they wanted included in any deal struck with that company. No
24 agreement was reached on many material terms, and Westover acknowledged in
25 deposition that no agreement was ever reached to option or purchase the rights to
26 "Ashes to Glory." When the negotiations failed, Plaintiffs attempted, without success,
27 to sell the documentary to other production companies, indicating that they clearly
28 understood that they had no agreement with any defendant. Plaintiffs cannot now,

1 with the success of “We Are Marshall” itself an historical fact, revive a claim that they
2 never believed they had in the first place. For these reasons, which are discussed in
3 greater detail below, the Defendants’ motion for summary judgment is **GRANTED**.

4 **II. FACTS**

5 On November 13, 1970, a Friday, the Marshall University football team
6 traveled to East Carolina University to play its next to last game on that season’s
7 schedule. Instead of traveling by bus, the team’s normal mode of transportation, it
8 flew to the East Carolina game on a Southern Airways DC-9 aircraft. Because the
9 team did not occupy all seats on the plane, seats were made available for purchase
10 by alumni and boosters. Injured players, freshman football players, and the
11 cheerleading squad did not travel.

12 The following day, the team boarded the plane for the trip back to Huntington,
13 West Virginia. The weather was bad, visibility was limited, and the captain of the
14 aircraft had never landed at Tri-State Airport near Huntington. On final approach, for
15 reasons never fully determined, the aircraft crashed into the side of a wooded hill
16 short of the runway. All passengers and crew were killed.

17 **A. COVERAGE OF THE MARSHALL STORY**

18 As a result of the catastrophic loss suffered by the Marshall football program,
19 the airplane crash received nationwide attention. The crash was reported through all
20 national news outlets, including the three television networks. In the years since the
21 crash, the tragic event has become the subject of a number of articles and stories that
22 have chronicled the football program’s rebirth.

23 **1. *The Salvatore Article***

24 In 1993, local journalist Ernie Salvatore wrote an article for the Huntington
25 Quarterly titled “After the Crash [/] Rising from the Ashes.” (WB MSJ Ex.13.) The
26 article discussed the tragedy and the Marshall football team’s “rise from the ashes”

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28 ¹Cites to “WB MSJ” exhibits and deposition transcripts are to the exhibits and transcripts
attached to the Declaration of Andrew Esbenshade. (Docket No. 30.)

1 which was “given an incredibly dramatic boost” with the “last-second victory in the first
2 post-crash home game by the heirs to Marshall’s decimated program.” (WB MSJ Ex.
3 3; WB MSJ Novak Depo. Tr. at 71:2-10.) William “Red” Dawson, an assistant football
4 coach at Marshall from 1968 through the 1971 season, agreed. He observed that the
5 “victory over Xavier was an extremely emotional victory and was recognized by the
6 team, the coaches, Marshall University and the community of Huntington, West
7 Virginia as an important and extraordinary step in Marshall’s rebuilding.” (Dawson
8 Decl. (Docket No. 30-12) ¶¶ 2, 7.)

9 **2. *The ESPN Documentary***

10 In 2000, before “Ashes to Glory” first aired, ESPN aired its own one-hour
11 documentary on the 1970 air crash entitled “Remembering Marshall: Tragedy to
12 Triumph.” (Novak Depo. Tr. at 121:11-17, 184:12-22.) The documentary focused on
13 the crash, its effect on the football team, and the effort to rebuild the program,
14 culminating with the inspirational and improbable 1971 upset victory over Xavier.
15 (Novak Depo. Tr. at 184:12-22; see also Rose Decl. at 5-6.) Like each of the other
16 works dealing with this event, the documentary describes and celebrates the team’s
17 triumph over adversity.

18 **3. “*Ashes to Glory*”**

19 As the thirtieth anniversary of the disaster approached, Plaintiffs Deborah
20 Novak and John Witek became interested in the story and determined to produce a
21 documentary which they endeavored to make as historically accurate as possible.
22 (WB MSJ Novak Depo. Tr. at 205:9-14.) The documentary, which was produced in
23 cooperation with West Virginia Public Television and registered with the United States
24 Copyright Officer, aired as “Ashes to Glory” and presents the history of Marshall
25 football from 1895 to 2000 through a variety of materials from the historical record and
26 on camera interviews of those who were not on the flight. (Esbenshade Decl., Ex. 1.)
27 The documentary covers the periods before and after the crash in roughly equal parts,
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1 and places the events of 1970 and 1971 in the broader historical context of Marshall
2 University football.

3 In the first half of its presentation, the documentary places considerable
4 emphasis on the events leading to the tragedy and re-tells, in detail, the story of the
5 entire 1970 football season.² By including comprehensive information about the 1970
6 Marshall football team and its members, the expectations for the season, the
7 disappointments it suffered, and the importance of the game against East Carolina,
8 the documentary provides context for the disaster and the events that followed. That
9 context includes detailed biographical information regarding the coaches, team
10 members and those who flew with the team, through a variety of means including
11 footage of contemporaneous interviews of Coach Tolley and team members, and on
12 camera interviews of surviving teammates and family members. In some instances,
13 the lives of those who perished are vividly remembered through home movie footage
14 that complements an accompanying on camera interview. Interesting facts about
15 team members are related which include:

- 16 – the story of four African-American players recruited from the state of
- 17 Alabama, all of whom were the first in their families to attend college;
- 18 – anecdotes from the team quarterback's brother who recounts his
- 19 brother's exploits as both a football and baseball player and how he
- 20 came to choose to attend Marshall; and
- 21 – the perhaps apocryphal story of the team's leading linebacker whose
- 22 goal was to play a game without wearing a helmet.

23 Coach Tolley's widow recounts his attitude and approach to the game and how he felt
24 about his players. Similar vignettes are presented about most of the team members
25 and those who traveled with them on the ill-fated flight. By providing a sketch of each
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28 ²The discussion that follows in the text is taken entirely from the Court's review of the
documentary, which is attached as Exhibit 1 to the Esbenshade Declaration.

1 of those who were killed in the crash, the documentary not only tells a story but also
2 serves as a memorial to each of the victims of the tragedy.

3 **B. DEFENDANTS CONTEMPLATE A MARSHALL PROJECT AND CONTACT PLAINTIFFS**

4 In 2002 defendant Mary Viola, who in 2003 became a creative executive with
5 Defendant Thunder Road Film Productions, began to think about making a feature
6 film based on the Marshall plane crash. (WB MSJ Viola Depo. Tr. at 30:18-20; WB
7 MSJ Pltfs. Ex.³ 21 [Viola Depo. Tr. at 20:3-8]). She read a number of articles about
8 the crash and its aftermath, and learned of two documentaries on the subject,
9 including “Ashes to Glory.” (Defs. Sep. Statement, ¶ 16.) Viola purchased a copy of
10 the documentary and first watched it sometime after August or September of 2002.
11 (WB MSJ Viola Depo. Tr. at 30:21-31:19.) In September 2002, she registered a
12 treatment for a feature film on the subject with the Writer’s Guild of America. (Defs.
13 Sep. Statement, ¶ 17.) She had the project in mind when she joined Thunder Road
14 the following year.

15 During the same period, screenwriter Jamie Linden, who was also interested
16 in the story, wrote an outline for a Marshall based story. (WB MSJ Linden Depo. Tr.
17 at 37:18-38:5.) In December of 2003, as part of his research for the project, Linden
18 ordered a copy of “Ashes to Glory.” (WB MSJ Linden Depo. Tr. at 66:15-67:9.) The
19 record before the Court indicates that, at this point in time, Linden was working
20 completely independent of Thunder Road and was not involved with Thunder Road’s
21 Marshall project. (WB MSJ Pltfs. Ex. 16 [Aug. 17, 2005 memo from Linden].)

22 **C. THE PARTIES ENTER NEGOTIATIONS**

23 In November 2003, after she had watched the documentary, Viola and Kristi
24 Felton contacted Deborah Novak about the possibility of optioning the rights to “Ashes
25 to Glory” in connection with Viola’s effort to develop a film based on the Marshall
26 story. (Defs. Sep. Statement, ¶¶ 19-20.) Shortly after that discussion, Felton emailed
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28 ³Cites to “WB MSJ Pltfs.” exhibits and deposition transcripts are to exhibits and transcripts
attached to the Plaintiffs’ appendix of declarations (Docket No. 40-2).

1 Novak a pro forma “Documentary Rights Option and Exclusive Consulting Agreement”
2 (“Option and Consulting Agreement”). (WB MSJ Pltfs. Exs. 2-3.) The email
3 transmitting the Option and Consulting Agreement noted that “[w]e’re sending this as
4 a sample for you [sic] review -- its [sic] not a binding agreement by any means, so no
5 need to fill out or sign. It’s simply for you to get a sense of the verbiage and the basic
6 elements of an option agreement.” (WB MSJ Pltfs. Ex. 2.) The document did not
7 contain either Novak or Witek’s name and did not even make specific reference to
8 “Ashes to Glory.” (WB MSJ Pltfs. Ex. 3.) Novak received the document and
9 discussed its contents with Witek. (WB MSJ Pltfs., Novak Decl. ¶¶ 27-28.)
10 Thereafter, Viola, Novak and Witek spoke by telephone on a number of occasions
11 regarding the terms of the proposal. (WB MSJ Novak Depo. Tr. at 26:17-27:17.)

12 On February 2, 2004 Viola sent Novak a draft “Option Agreement - Short
13 Form” (“Option Short Form”). (WB MSJ Ex. 4.) The Option Short Form is addressed
14 to Novak and Witek and states, among other things, that the “purchase price . . . shall
15 be negotiated in good faith . . . and will be no less than fifteen thousand dollars.” (WB
16 MSJ Ex. 4.) In the cover email attaching the Option Short Form, Viola noted that a
17 number of material terms were still under discussion, including who would retain
18 ownership of the rights to “Ashes to Glory.” (WB MSJ Ex. 4.) Viola invited Novak to
19 send the current “version to [Novak’s] lawyer to see what he/she says about it.” (WB
20 MSJ Ex. 4.)

21 Novak and Witek never signed the Option Short Form. (WB MSJ Ex. 14
22 [Plaintiffs’ Responses to Requests for Admissions].) Instead, by February 18, 2004,
23 Novak and Witek secured the services of an agent, Jonathan Westover at The Gage
24 Group, and he took over the negotiations on behalf of Novak and Witek. (WB MSJ
25 Ex. 6; WB MSJ Novak Depo. Tr. at 46:3-6.) In connection with his retention,
26 Westover was specifically advised by Novak and Witek what they wanted in the
27 contract including, among other things, the retention of all rights in “Ashes to Glory”
28 save for a feature film, story and co-producer credits, a total minimum compensation

1 of \$500,000, and a bonus based on the film's gross. (WB MSJ Ex. 7.) Novak
2 personally informed Viola that further negotiations should be directed to Westover,
3 and Westover acknowledged that he was not told then, or at any other time, that
4 Novak and Witek had reached agreement with Thunder Road. (Defs. Sep. Statement,
5 ¶¶ 32-33.)

6 At about the same time, Basil Iwanyk, a colleague of Viola's at Thunder Road,
7 was attempting to develop interest in a project based on the Marshall tragedy. In his
8 effort to generate interest in the project, he sent multiple copies of "Ashes to Glory" to
9 various agents and potential writers in an attempt find a screenwriter interested in the
10 project. (WB MSJ Pltfs. Exs. 17-18; *id.* Ex. 22 [Iwanyk Depo. Tr. at 218:8-11].) It was
11 during this period that he and Viola first met with Linden and another writer about
12 working with Thunder Road on the Marshall football project. (WB MSJ Pltfs. Ex. 22
13 [Iwanyk Depo. Tr. at 299:12-300:7].) The meetings went well and Linden became the
14 likely screen writer on the project. (WB MSJ Pltfs. Ex. 22 [Iwanyk Depo. Tr. at 299:12-
15 300:7, 327:10-20].)

16 On February 25, 2004 Novak wrote to Viola with a list of dates when Viola
17 could meet the potential writer, presumably Linden, for the project, but noted: "we will
18 need to have you and Jonathan Westover work out an agreement before we can meet
19 with your writer." (WB MSJ Pltfs. Ex. 10.) Viola responded that they "are working on
20 an agreement with our lawyer who will then pass on to Jonathan. I spoke to him
21 briefly the other day about the basics. It sounds like we're all on the same page."
22 (WB MSJ Pltfs. Ex. 10.) After March 2, 2004, Novak did not talk or correspond with
23 Viola or Iwanyk during the remainder of the negotiations. (WB MSJ Novak Depo. Tr.
24 at 247:24-248:21.)

25 On March 8, 2004 Viola and Iwanyk wrote to Westover that their "attorney is
26 drawing up some simple boiler plate to adjoin Witek & Novak Inc. with Thunder Road
27 Pictures on the Marshall Football feature proposal." (WB MSJ Ex. 9.) The March 8,
28 2004 letter indicated that certain points were "currently being discussed" as to the cost

1 and length of the option and the purchase price for underlying rights, co-producer
2 credits and Witek and Novak's retention of rights. (WB MSJ Ex. 9.) Viola and Iwanyk
3 wrote that the "above points are currently being drawn into a binding contract. Should
4 more points need to be covered at this stage, please let us know." (WB MSJ Ex. 9.)

5 **D. THE NEGOTIATIONS END**

6 Despite a hopeful start, the negotiations failed in large part because the
7 parties could not reach agreement on the financial terms and conditions. Novak and
8 Witek told Westover that they were hoping to get \$500,000 out of the deal with
9 Thunder Road. (WB MSJ Pltfs. Ex. 24 [Westover Depo. Tr. at 52:4-12]; WB MSJ Ex.
10 7.) In mid-March 2004 Westover offered a dollar figure⁴ that was untenable to
11 Defendants. (WB MSJ Viola Depo. Tr. at 288:15-289:13.) Viola called Westover to
12 work something out but "they were sticking to their exorbitant counter, they were
13 passing on [Defendants'] offer, and they were going to take it out without
14 [Defendants]." (WB MSJ Viola Depo. Tr. at 288:15-289:13.)

15 Viola understood that "negotiations were done." (WB MSJ Viola Depo. Tr. at
16 289:6-13; see also WB MSJ Novak Depo. Tr. at 21:16-18.) Westover agreed that the
17 parties had reached an impasse and informed Novak and Witek that he was unable to
18 conclude a deal with Thunder Road. (WB MSJ Westover Depo. Tr. at 84:15-23; see
19 also WB MSJ Westover Depo. Tr. at 120:6-8; see also WB MSJ Westover Depo. Tr.
20 at 123:22-124:8.) Issues that were unresolved when negotiations ended included the
21 nature of the interest that Defendants would receive in "Ashes to Glory." (WB MSJ
22 Novak Depo. Tr. at 24:3-13.) Likewise, although Novak "felt that the basic agreement
23 was in place," she concedes that the parties "were very far apart on the financial
24 considerations." (WB MSJ Novak Depo. Tr. at 46:7-16.)

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28 ⁴Westover does not recall, one way or another, whether he conveyed the \$500,000 figure to Iwanyk or Viola, but does not believe he did. (WB MSJ Westover Depo. Tr. at 79:10-20.)

1 **E. POST NEGOTIATION ACTIVITY**

2 Around March 22, 2004 Novak authorized Westover to send “Ashes to Glory”
3 to other production companies and studios for consideration. (WB MSJ Novak Depo.
4 Tr. at 56:20-57:2.) Novak “felt that, if other people were interested, then perhaps
5 [Iwanyk and Viola] would negotiate more vigorously with [Plaintiffs].” (WB MSJ Novak
6 Depo. Tr. at 57:5-10.) Plaintiffs continued to look for other production companies or
7 studios that might be interested in “Ashes to Glory” as a feature (WB MSJ Novak
8 Depo. Tr. at 72:1-21) and submitted “Ashes to Glory” to ESPN at the end of June
9 2004 for consideration as a film project. (WB MSJ Novak Depo. Tr. at 73:13-24).
10 Westover acknowledges that he was trying to sell “Ashes to Glory” because “no
11 agreement had been reached with Thunder Road.” (WB MSJ Westover Depo. Tr. at
12 83:9-14.)

13 Thunder Road went ahead with the Marshall project without Novak and Witek,
14 and Linden drafted a screenplay. As of August 2005, one of Linden’s sources for the
15 information on Marshall was “Ashes to Glory.” (WB MSJ Pltfs. Ex. 16 [Aug. 17 2005
16 memo from Linden].) Linden notes that he ordered a copy of “Ashes to Glory” in 2003
17 and watched it once; during the period that he was drafting he watched the
18 documentary a second time. (WB MSJ Pltfs. Ex. 16.) “After the negotiations fell
19 through, [he] intentionally didn’t watch it again . . . [b]ut [he] would have to say that it
20 did influence [his] initial outline.” (WB MSJ Pltfs. Ex. 16.)⁵

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23 ⁵There is slightly conflicting testimony as to whether Linden watched “Ashes to Glory” after the
24 negotiations fell through. In his deposition, Linden states that he “watched parts of [“Ashes to
25 Glory”] again at some point in the summer of ‘04” which would be after negotiations ended. (WB
26 MSJ Pltfs. Ex. 23 [Linden Depo. Tr. at 94:11-14].) Linden states that when he re-watched it he
27 did not know that negotiations had ended and further states that he fast-forwarded through a
28 significant portion. (WB MSJ Pltfs. Ex. 23 [Linden Depo. Tr. at 98:6-16].) This apparent
discrepancy does not affect the outcome of the motions. The Court also notes that Defendants
object to the use of a memorandum prepared by Linden as being unauthenticated (Defendants’
Evidentiary Objections (Docket No. 49-5) at 6) even though they do not provide any evidence
disputing its authenticity. The objection strikes the Court as odd because the memorandum
provides substantial support for Defendants’ position.

1 **F. WE ARE MARSHALL IS RELEASED**

2 In December 2006, “We Are Marshall” was released and remained in theaters
3 for approximately three months. The film reportedly grossed over \$43 million.

4 Later, in 2007, the present lawsuit was filed in this Court. Defendants now
5 move for summary judgment on Plaintiffs’ claims.

6 **III. SUMMARY JUDGMENT STANDARD**

7 Summary judgment is proper where “the pleadings, depositions, answers to
8 interrogatories, and admissions on file, together with the affidavits, if any, show that
9 there is no genuine issue as to any material fact and that the moving party is entitled
10 to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Thus, when addressing a
11 motion for summary judgment, this Court must decide whether there exist “any
12 genuine factual issues that properly can be resolved only by a finder of fact because
13 they may reasonably be resolved in favor of either party.” Anderson v. Liberty Lobby,
14 Inc., 477 U.S. 242, 250 (1986). The moving party has the burden of demonstrating
15 the absence of a genuine issue of fact for trial. See id. at 256. Where there is no
16 evidence demonstrating the existence of a genuine issue of material fact, the moving
17 party may prevail simply by “pointing out to the district court that there is an absence
18 of evidence to support the nonmoving party’s case.” Celotex Corp. v. Catrett, 477
19 U.S. 317, 325 (1986).

20 **IV. DISCUSSION**

21 **A. THE COPYRIGHT CLAIM**

22 **1. SCOPE OF COPYRIGHT PROTECTION**

23 An understanding of what copyright protects, and what it does not protect, is
24 critical to the resolution of this motion. Copyright does **not** protect hard work,
25 industriousness, persistence, perseverance, tenacity or resourcefulness. It is not a
26 doctrine based on fairness; it does not reward an author for his labor, even though in
27 historical works the labor involved in researching, discovering, compiling and relating
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1 the historical record may be the principal value added by the author. As the Supreme
2 Court noted in Feist:

3 It may seem unfair that much of the fruit of the compiler's labor may be used
4 by others without compensation. As Justice Brennan has correctly observed,
5 however, this is not some unforeseen byproduct of a statutory scheme. It is,
6 rather, the essence of copyright, **and a constitutional requirement**. The
7 primary objective of copyright is not to reward the labor of authors, but to
8 promote the Progress of Science and useful Arts. To this end, copyright
9 assures authors the right to their original expression, but encourages others to
10 build freely upon the ideas and information conveyed by a work. This
11 principle, known as the idea/expression or fact/expression dichotomy, applies
12 to all works of authorship. As applied to a factual compilation, assuming the
13 absence of original written expression, only the compiler's selection and
14 arrangement may be protected; the raw facts may be copied at will. This
15 result is neither unfair nor unfortunate. It is the means by which copyright
16 advances the progress of science and art.

17 499 U.S. at 349-50 (emphasis added) (citations, alteration, and internal quotation
18 marks omitted). Thus, copyright law provides no support for Novak's notion that, by
19 producing their documentary, Plaintiffs somehow came to own the Marshall story and
20 that anyone using "Ashes to Glory" in conducting research for a screenplay would be
21 engaged in an act of piracy.⁶

22 What copyright does protect is the original expression of ideas, which can be
23 something as simple as the particular arrangement of facts in a data compilation. Id.
24 at 345. The originality requirement gives an author a property interest in his
25 **expression** of the facts, ideas and concepts that constitute the body of his work, but
26 precludes copyright protection for the facts and ideas themselves because "facts,
27 whether alone or as part of a compilation, are not original." Id. at 350-51 (compilation
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⁶ Plaintiffs give lip service to this principle and proclaim that they do not seek the exclusive right to tell the story of the plane crash and its aftermath. They acknowledge that, "**Anyone was and is free to tell that story.**" (Pltfs. MSJ Reply (Docket No. 48) at 7-8 (discussing affirmative defenses to contract claims) (emphasis added).) Even so, they assert that they have told the story in a unique way, and that they have "at least some proprietary rights to the singular method of telling this story." (Id.) The Court agrees with both points, but, as discussed below, the problem with the argument is that "We Are Marshall" does not appropriate that which is unique in the documentary. It is similar only in that it deals with the Marshall plane crash and presents, in that context, a tale of the phoenix rising from the ashes. Neither the Marshall story nor the "phoenix" plot line is protectable. Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985).

1 of unprotectable facts may gain protection through selection and arrangement);
2 Metcalf v. Bochco, 294 F.3d 1069, 1074 (9th Cir. 2002) (citing Kouf v. Walt Disney
3 Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994)). Unprotectable elements
4 also include general plot ideas and “scenes a faire,” which are scenes that flow
5 naturally from unprotectable basic plot premises and “remain forever the common
6 property of artistic man kind.” Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985).
7 On the other hand, “protectable expression includes the specific details of an author’s
8 rendering of ideas, or ‘the actual concrete elements that make up the total sequence
9 of events and the relationships between the major characters.’” Metcalf, 294 F.3d at
10 1074 (quoting Berkic, 761 F.2d at 1293).

11 Because copyright jurisprudence holds that ideas themselves are not
12 protectable, the Supreme Court “has long recognized that the fact/expression
13 dichotomy limits severely the scope of protection in fact-based works.” Feist, 499
14 U.S. at 350. Thus, “[a] factual compilation is eligible for copyright if it features an
15 original selection or arrangement of facts, but the copyright is limited to the particular
16 selection or arrangement. In no event may copyright extend to the facts themselves.”
17 Id. at 350-51. It follows that, where a work constitutes a presentation of historical
18 facts and ideas, those facts and ideas are not protectable. Narell v. Freeman, 872 F.
19 2d 907, 910 (9th Cir. 1989). As the Narell court stated:

20 Historical facts and theories may be copied, as long as the defendant does not
21 “bodily appropriate” the **expression** of the plaintiff. [Citations.] “[T]he scope of
22 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.” [Citation.]

23 Id. at 910-11 (emphasis added). In short, copyright protection “is limited to those
24 aspects of the work -- termed 'expression' -- that display the stamp of the author's
25 originality.” Feist, 499 U.S. at 350.

26 Since Plaintiffs in this case seek protection of a documentary, which consists
27 almost entirely of the arrangement of facts found in the historical record, the principles
28 laid down in Feist and Narrell will necessarily control the analysis of the copyright

1 claim. With that background in mind, the Court turns to the elements of Plaintiffs'
2 claim.

3 **2. THE ELEMENTS OF A COPYRIGHT CLAIM**

4 The elements of a copyright claim derive from the basic principles of copyright
5 law discussed above. To establish copyright infringement, a plaintiff must show that:
6 (1) she owns the copyright; and (2) defendant copied protected elements of the work.
7 Rice v. Fox Broad. Co., 330 F.3d 1170, 1174 (9th Cir. 2003); Shaw v. Lindheim, 919
8 F.2d 1353, 1356 (9th Cir. 1990); 4-13 Melville B. Nimmer et al., Nimmer on Copyright
9 § 13.01 (2005) ("Nimmer").

10 In this case, no one questions Plaintiffs' ownership of the copyright in the
11 documentary. The resolution of the case turns entirely on whether Defendants copied
12 protected elements of that work.

13 **a. Proof of Copying**

14 Plaintiff raises a threshold question regarding the second element -- the
15 copying of protected elements. Plaintiff contends that, since Defendants had access
16 to their work, copying is proved, or, at the very least, their burden of proving copying
17 has been reduced.⁷ The first part of the argument is simply incorrect; the second

19 ⁷Plaintiffs argued at the hearing that Linden's testimony, and his memorandum from 2005, prove
20 "direct copying." Linden watched "Ashes to Glory," just as he reviewed information from the
21 Marshall Media Guide and ESPN, and read articles from the Huntington Herald-Dispatch and
22 the Richmond, Virginia Times Dispatch as source material for his screenplay. In other words,
23 he did his research. Watching "Ashes to Glory" and using it as a research source is not
24 "copying" as Plaintiffs suggest. Nowhere does Linden state that he "copied" "Ashes to Glory"
25 and one can scour "We Are Marshall" from one end to the other without finding any original
26 element that has been bodily appropriated from the documentary into the movie. Moreover,
27 even if protectable elements had been copied into the outline, Plaintiffs' case would fail because
28 the relevant inquiry is not whether an early outline copied "Ashes to Glory" but whether the
finished project, "We Are Marshall," copied "Ashes to Glory." See v. Durang, 711 F.2d 141, 142
(9th Cir. 1983) ("The only discovery plaintiff suggests is the production of early drafts of
defendant's play on the theory they might reflect copying from plaintiff's play that was disguised
or deleted in later drafts. Copying deleted or so disguised as to be unrecognizable is not
copying."); Chase-Riboud, 987 F. Supp. at 1231 ("A defendant that actually uses a plaintiff's
work may legitimately avoid infringement by intentionally making sufficient changes in a work
which would otherwise be regarded as substantially similar to that of the plaintiff's.") (citation and
internal quotation marks omitted).

1 aspect relies on the discredited "inverse ratio rule."

2 That Defendants, including the screenwriter, had access to and consulted
3 Plaintiffs work (especially in view of the case law regarding fact-based and historical
4 works) does not prove "copying." As Feist stated, since the very object of publishing a
5 fact-based work is to communicate useful knowledge, the object of publishing it
6 "would be frustrated if the knowledge could not be used without incurring the guilt of
7 piracy of the book." Baker v. Selden, 101 U.S. 99, 103 (1880), quoted in Feist, 499
8 U.S. at 350. Thus, "copying," in a copyright action, is proven by evidence that (1) the
9 defendant had access to the plaintiffs' work; and that (2) the allegedly infringing work
10 is "substantially similar" to the plaintiffs' work. E.g., Funky Films, Inc. v. Time Warner
11 Entm't Co., 462 F.3d 1072, 1076 (9th Cir. 2006) (citing Three Boys Music Corp. v.
12 Bolton, 212 F.3d 477, 481 (9th Cir. 2000)); Narell, 872 F.2d at 910.

13 As to the suggestion that Defendants' acknowledged access to the work
14 lowers the standard of proof of substantial similarity -- the so-called "inverse ratio
15 rule" -- several decisions in this circuit quite properly question the viability and the
16 imagined logic of the rule. The court in Aliotti v. R. Dakin & Co., 831 F. 2d 898, 902
17 (9th Cir. 1987), quoting from the Nimmer copyright treatise, noted, "no amount of
18 proof of access will suffice to show copying if there are not similarities." More to the
19 point, the court observed that, since no amount of access relieves the plaintiff of
20 proving substantial similarity, the "inverse ratio rule" confuses and even conceals the
21 substantial similarity requirement. Id. In Shaw v. Lindheim, 919 F.2d 1353, 1361 (9th
22 Cir. 1990), the circuit reiterated this point in observing that "clear and convincing
23 evidence of access will not avoid the necessity of also proving substantial similarity
24 since access without similarity cannot create an inference of copying." And most
25 recently, in Funky Films, a case where the trial court assumed access in ruling on a
26 motion for summary judgment and granted a defendant's motion on a finding of no
27 substantial similarity, the plaintiff on appeal claimed that a continuance should have
28 been granted to permit it to develop evidence of a high degree of access so that it

1 could invoke the inverse ratio rule. The Ninth Circuit rejected the argument and
2 affirmed the trial court, noting:

3 We do not agree that appellants' invocation of the inverse-ratio rule requires
4 reversal of the district court's decision. No amount of proof of access will
5 suffice to show copying if there are no similarities, and, in this case, additional
6 discovery would not change the fact that the two works lack any concrete or
7 articulable similarities.

8 Funky Films, 462 F. 3d at 1081 (citation and internal quotation marks omitted). In
9 short, regardless of the degree of access, Plaintiffs still bear the burden of proving the
10 full measure of substantial similarity or their claim fails. Here, as in Funky Films, the
11 Court assumes access, which is not contested in any event, and turns to the
12 substantial similarity test.

13 **b. Substantial Similarity**

14 In determining whether two works are substantially similar on summary
15 judgment, the court employs the "extrinsic test," which objectively measures the
16 "articulable similarities between the plot, themes, dialogue, mood, setting, pace,
17 characters, and sequence of events." Rice, 330 F.3d at 1174 (quoting Kouf, 16 F.3d
18 at 1045). In applying the extrinsic test, the court "compares, not the basic plot ideas
19 for stories, but the actual concrete elements that make up the total sequence of
20 events and the relationships between the major characters." Funky Films, 462 F.3d at
21 1077 (quoting Berkic, 761 F.2d at 1293). Courts "must take care to inquire only
22 whether the **protect[a]ble elements, standing alone**, are substantially similar."
23 Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002) (citations and
24 internal quotation marks omitted) (emphasis in original); see also Nimmer §
25 13.03[B][2] ("[A]n essential element of an infringement case is that 'plaintiff must show
26 that defendants' works are substantially similar to elements of plaintiff's work that are
27 **copyrightable or protected** by the copyright.' When similar works resemble each
28 other only in those unprotected elements, then defendant prevails.") (emphasis in
original) (citation omitted).

1 Berkic provides helpful guidance on this point. In Berkic, a case that
2 compared two works involving the murder of healthy young people for the purpose of
3 removing and selling their organs to wealthy older people in need of transplants, the
4 Ninth Circuit plainly stated:

5 No one can own the basic idea for a story. General plot ideas are not
6 protected by copyright law; they remain forever the common property of
artistic mankind.

7 Id. Thus, in Berkic, even though the plot lines at an abstract level revealed “a certain
8 gruesome similarity,” that similarity in expression did not give rise to a viable
9 infringement claim because the abstract plot line -- murder for purpose of harvesting
10 healthy organs -- itself was not protectable. Id. Later decisions have emphasized this
11 point, admonishing trial courts to distinguish between the protectable and
12 unprotectable material because only similarity in protected material will give rise to a
13 claim for infringement. Funky Films, 462 F.3d at 1077 (citing Cavalier, 297 F.3d at
14 822).

15 Narell provides even more specific guidance where the alleged infringer has
16 used material taken from an historical work. The plaintiff in Narell had written “Our
17 City: The Jews of San Francisco,” an historical account of “the movement of Jewish
18 immigrants from Europe to California.” 872 F.2d at 909. The book described itself as
19 a “social history and mass biography of the Jewish families who since gold-rush days
20 have left their mark on virtually every facet of Bay Area life.” Id. The allegedly
21 infringing work, “Illusions of Love,” can be characterized as a romance novel as it
22 presented “the unforgettable story of a romantic triangle that spans a quarter of a
23 century.” Id. Portions of “Illusions of Love” were based on historical events described
24 in “Our City.” The evidence demonstrated that the defendant had access to “Our
25 City,” and that he even lifted entire phrases from the work and included them in the
26 novel. Even so, the Ninth Circuit affirmed the district court's grant of summary
27 judgment because the historical facts taken from “Our City” were not protectable and
28 the phrases allegedly copied were commonly-used expressions that lacked originality

1 and therefore were not protectable. Furthermore, the Court held that the
2 appropriation of the historical research, as opposed to the expression of that research
3 would not give rise to a copyright claim, and that in this case the use of plaintiff's
4 expressive elements, as opposed to historical facts, was minimal. The Ninth Circuit
5 concluded:

6 [Defendant] has not copied the equivalent of a unique line or stanza, but has
7 duplicated a few ordinary phrases and paraphrased largely factual statements
in creating an entirely different kind of story.

8 Id. at 912.

9 The Court therefore turns to the two works for the purpose of applying the
10 substantial similarity test to determine whether any evidence suggests that
11 Defendants "bodily appropriated," Narell, 872 F. 2d at 910, any protected element of
12 Plaintiffs' documentary.

13 **3. THE TWO WORKS ARE NOT SUBSTANTIALLY SIMILAR**

14 "Ashes to Glory" is a documentary that records and describes real world
15 events and the experiences of those individuals who lived through those events. It is
16 historical and informational, not fictional, and places a premium on historical accuracy.
17 Accordingly, the only protection available to Plaintiffs lies in their presentation of
18 historical events by which the Court refers to the sequencing, pace, narration, and
19 selection of footage, photographs, events and individuals portrayed -- but not the
20 events themselves. A comparison of the two works reveals that, while both deal with
21 the same event, their respective presentations vary so fundamentally that they cannot
22 be described, in whole or in part, as "substantially similar."⁸

23 **A.1. Style of Presentation: "Ashes to Glory"**

24 "Ashes to Glory" is presented in what can best be described as a classical
25 documentary format with the objective of telling a story that, to the extent possible, is
26 accurate in every detail. The documentary draws on and presents evidence from the

27 ⁸The discussion of the two works is taken entirely from the Court's review of the documentary
28 and the feature film, which are attached as Exhibits 1 and 2 to the Ebenshade Declaration.

1 historical record and seeks, above all else, to be informative. Where footage is
2 available from interviews of the victims of the tragedy, that footage is incorporated into
3 the narrative. Likewise, the documentary includes biographical data regarding many
4 of the community victims through home movie footage that accompanies interviews of
5 surviving family members. Regarding the post-crash period, those who were
6 involved with the team but not on the airplane, including former team members
7 Reggie Oliver, Nate Ruffin, Ed Clark, Mickey Jackson, and Rick Meckstroth appear in
8 excerpts of on camera interviews in which they tell their stories in much the same way
9 that a witness would testify in court. In short, the documentary presents the story in
10 an objective, chronological sequence with an emphasis on the place of the crash in
11 the historical context of Marshall football.

12 **A.2. Style of Presentation: “We Are Marshall”**

13 In its style of presentation, “We Are Marshall” has nothing in common with the
14 documentary. The movie dramatically recreates the events from November 1970 to
15 the fall of 1971, and, though it remains true to the spirit of those events, it does not
16 pretend to present an entirely accurate rendition of the events of the post-crash
17 period. The principal objective of the movie is to entertain, which requires a different
18 approach than a documentary, which has as its principal objective to inform. As
19 discussed throughout this memorandum, numerous events are altered or invented
20 entirely for dramatic effect, and the story is carried forward through dialogue most of
21 which was imagined and independently created by the screenwriter.⁹ Moreover, while
22 the documentary proceeds in the form of a chronological presentation of evidence, the
23 movie is character driven and focuses principally on its star’s portrayal of Coach
24 Lengyel, who is made the inspirational center of the movie’s narrative, and secondarily
25 on the lives of Paul Griffin, Annie Cantrell, Marshall President Don Dedmon, Assistant
26

27 ⁹Some of the fictionalized events are listed in the Wikipedia entry for the movie. Among other
28 things not revealed by the present record, the entry indicates that the cheer that forms the basis
for the movie’s title was created **after** the period covered by the movie.

1 Coach Red Dawson, and team captain Nate Ruffin. Though there are important sub-
2 plots, the movie centers primarily on the fictionalized daily interactions of Lengyel with
3 his coaches, with the university president, and with members of the team and portrays
4 him as willing them to overcome their loss and to triumph over adversity.

5 The movie also makes use of many of the common devices used in the
6 production of feature films -- unusual camera angles, fades, dissolves, intercut
7 scenes, montages, and the like. For example, in the post-game, pre-flight period, a
8 number of short scenes from various locations -- Coach Lengyel's home in Wooster,
9 Ohio, the home of the team's announcer, the locker room, the movie theater, the local
10 diner, the airport tarmac, and a dorm room on campus -- are shown briefly in quick
11 succession to expose the viewer to the simultaneous activities of characters going
12 about their lives which, in the very immediate future, will be turned upside down. This
13 rapid pacing is in sharp contrast to the slow, measured pace of the documentary,
14 which places the air plane crash in historical context, which is not a part of the movie.
15 Another example: the movie contains an early scene where Annie and the other
16 cheerleaders are driving home from the game in an open convertible; a camera from
17 above the car focuses on her face while she looks to the sky as if looking for Chris's
18 flight. The camera slowly pulls back and as she fades into the darkness, the darkness
19 becomes the window next to Chris's seat on the plane as he looks out the window as
20 if looking down to find her. Through the camera work, without a word of dialogue, the
21 scene creates an emotional moment because the viewer knows what is about to
22 happen and knows that the characters don't. "We Are Marshall" contains dozens of
23 such moments, but does not contain a single scene that can be described as a
24 wholesale appropriation of any protectable element in the documentary.¹⁰

25
26 ¹⁰Apparently unaware of the irony in the argument, Plaintiffs claim that Defendants infringed their
27 work by using the same clip from the Newlywed Game TV show that was used in "Ashes to
28 Glory," which Plaintiffs contend is significant because the clip they used in "Ashes to Glory" was
from an episode that was not actually televised at the time of the crash. The argument proves
(continued...)

1 **B.1. Content: “Ashes to Glory”**

2 The documentary covers a much broader time period than “We Are Marshall”
3 and attempts to be as historically accurate as possible. It devotes roughly equal
4 amounts of time to the periods before and after the 1970 crash.

5 “Ashes to Glory” commences its narrative in 1895 with information regarding
6 the first recorded Marshall football game and traces the history of the program through
7 its “glory days” to its steep decline through the late 1960s. It recounts the reasons for
8 the decline, references the team’s 27 game losing streak as it entered the 1969
9 season, and explains that, because of the lack of funding at the state level, the
10 program turned to the local community for support. It reports on the hiring of Rick
11 Tolley to take over and rebuild the program and how he and his staff coached the
12 team to three wins in 1969. Through interviews conducted in 1970, photographs and
13 newspaper articles, and contemporary interviews of those who were not on the
14 November 14, 1970 flight, the documentary presents detailed information about Tolley
15 and the members of the team.

16 The documentary then turns to a description of the team’s 1970 season, which
17 started on a high note but soon headed south leading to much disappointment. The
18 viewer learns that late season successes gave the team a chance at finishing .500 if it
19 could win its last two games, the first of which was to be played at East Carolina. As
20 the East Carolina game approached, and it was announced that the team would fly
21 rather than take a bus to that game, the documentary explains that not all seats on the
22 flight were filled and that community members could purchase tickets and fly with the

23

24 ¹⁰(...continued)

25 nothing of consequence. First, Plaintiffs own no copyright in the Newlywed Game clip, so it is
26 not a protectable element of the documentary. Second, since they did not disclose that they
27 fudged on the historical accuracy of this minor point until after the commencement of this
28 litigation, one might reasonably conclude that Defendants believed the documentary to be
historically accurate regarding the episode depicted in “Ashes to Glory” and therefore used the
same clip. Finally, the Court notes that the clip appears so briefly in “We Are Marshall” that its
use would not, in any event, support a finding of substantial similarity as to that aspect of the two
works.

1 team. The documentary then turns to a presentation of biographical information of the
2 community members who died on the flight, drawn from photo albums, newspaper
3 accounts, home movie footage, and interviews of family and friends who were not on
4 the flight. Notably, none of this information -- neither fact nor expression -- appears in
5 "We Are Marshall," which simply does not address in any meaningful way the status of
6 the football program, its players or its coaches before the crash, and only tangentially
7 refers to community members who were on the flight. The documentary then
8 addresses the crash itself and retells the story through the experiences of former team
9 members, orphaned children of those who flew with the team, sports reporter Ernie
10 Salvatore, newspaper accounts, footage from the national television networks, and
11 film and videotape of funerals and memorial services. The documentary concludes
12 with the post-crash efforts to rebuild the program through the retention of those
13 coaches not on the aircraft and the hiring of Jack Lengyel to head up the program.
14 Team members, coaches Dawson and Lengyel, and others recall those days and the
15 struggles they encountered in putting the team back together again. The
16 documentary reports on the stunning upset win over Xavier in the team's first home
17 game in 1971, and reports on the team's rise to glory in the 1990's when the team
18 won a number of championships and several Marshall players went on to become
19 stars in the National Football League.

20 **B.2. Content: "We Are Marshall"**

21 "We Are Marshall" is not a history but a dramatic re-enactment of an historical
22 event with substantial liberties taken with the facts. The movie is devoted almost
23 entirely to the time period from November 14, 1970, to the team's win over Xavier
24 early in the 1971 season.

25 Because it commences in November 1970, "We Are Marshall" contains
26 almost no information about any aspect of the Marshall football program, its team
27 members or its coaches prior to the 1970 plane crash. The movie's narrative begins
28 in the last few seconds of the East Carolina football game as Marshall fails to connect

1 on a last second pass to the end zone that would have given it a win. Coach Tolley is
2 only briefly portrayed on the sideline of the East Carolina game, in a post-game locker
3 room speech, at the airport, and in the airplane just prior to the crash. The viewer
4 learns nothing of his background, experience, or family, and nothing about the history
5 of Marshall football, recent or otherwise. The plane crash occurs shortly into the
6 movie, and the focus thereafter is on President Dedmon, Paul Griffin and Coach Jack
7 Lengyel, who is at the center of the movie and is portrayed by Matthew McConaughey
8 as the inspirational savior of the program.

9 To understand the radical differences in the two presentations, the Court notes
10 just some of the specific scenes, events and characters that appear in the movie and
11 that are wholly, or in substantial part, fictionalized:

12 (1) The narrative commences in the final seconds of the East Carolina game
13 with the Marshall cheerleaders (who in reality did **not** make the trip) urging the
14 team on. As Coach Tolley tells Coach Red Dawson to send in the final play,
15 the movie cuts back and forth between the field and other locations including
16 the home of Wooster College coach Jack Lengyel, who is depicted with his
17 wife and children.¹¹ With the clock ticking down to zero, a last minute pass
18 sails just past the outstretched fingertips of the Marshall receiver as time goes
19 to 0:00. It did not happen that way: the documentary says nothing about
20 Dawson sending in a play, and the game ended ignominiously on an
21 intentional grounding penalty, not with a pass into the end zone. It is apparent
22 that the scene is filmed so that it mirrors the later scene involving the last few
23 seconds of the 1971 Xavier game at the end of the movie.

24 (2) A scene from the local diner depicts fictional character Paul Griffin being
25 congratulated by the owner and other local residents for his son Chris's
26 successful game as a running back (19 carries, 108 yards) as Paul meets

27
28 ¹¹The movie does not explain how a college football coach managed to be at home on a
Saturday afternoon during the fall football season.

1 Marshall president Dedmon for dinner to discuss improvements to the school.
2 The scene springs entirely from the mind of the screenwriter.

3 NOTE: Because Paul Griffin is a fictional character who symbolizes the
4 community and personifies the despair felt throughout Huntington and
5 Marshall University after the crash, the scenes in which he appears
6 have necessarily been imagined and certainly do not appear in any
7 form in the documentary. Likewise, since Griffin is a fictional character,
8 his son Chris is also a creation of the screenwriter.

9 (3) Multiple post-game scenes have been fictionalized including: (a) a locker
10 room speech in which Coach Tolley admonishes the team that the only thing
11 that matters is winning; (b) the boarding of the aircraft where Chris Griffin says
12 goodbye to his fiancée, fictional cheerleader Annie Cantrell; (c) a telephone
13 call from a phone booth at the airport in which one of the team members calls
14 Reggie Oliver and asks him to buy a case of beer for later that evening.
15 These events do not appear in the documentary because they have been
16 made up.

17 (4) The movie includes a scene on the aircraft as coach Tolley walks the aisle
18 talking to players and supporters. Obviously the scene has been imagined
19 because no one knows what happened inside the airplane that night.

20 (5) The movie depicts President Dedmon as he confronts the scene of the
21 crash as the plane, in pieces scattered across a wooded hillside, burns.
22 Likewise, Paul Griffin and others are depicted at the scene as they come to
23 realize that the aircraft is the Southern Airways flight that carried the Marshall
24 football team. These events do not appear in the documentary although Nate
25 Ruffin and others speak of the event.

26 (6) Coach Dawson, whose marital status in 1970 is not described in the
27 documentary, is depicted as being married at the time and is shown in a
28

1 fictionalized scene arriving home to greet his wife who believed he had been
2 killed in the accident.

3 (7) The movie suggests that only four members of the varsity team were left
4 after the crash when, in fact, the documentary suggests that there were
5 several upperclassmen who did not travel for a variety of reasons. Likewise,
6 the entire freshman class escaped death because they were not eligible to
7 play with the varsity team and did not travel with the team. The movie makes
8 only the briefest reference to the freshmen. On the other hand, while the
9 movie depicts Paul Griffin as almost immediately suggesting to Dedmon that
10 the football program be suspended without mentioning that a final game
11 remains on the schedule, the documentary indicates that there were enough
12 remaining players that they asked to suit up and play the final game of the
13 season in memory of their dead teammates.

14 (8) Griffin's proposal to suspend the football program provides the impetus for
15 a number of fictionalized dramatic scenes, including: Dedmon's confrontation
16 with the four remaining upperclassmen and the emergence of Nate Ruffin as
17 the leader of the what might be called the "save the program" movement;
18 Ruffin's organization of a student demonstration to save the program; Ruffin's
19 conflict with a fellow teammate who questions the wisdom of Ruffin's efforts;
20 Ruffin's appearance at a board meeting to lobby to retain the program; the
21 appearance of students outside the building where the meeting took place
22 chanting, "We are Marshall." This last scene is central to the movie's theme,
23 but never actually happened; it is another example of how the author created
24 an event that captures a spirit, amalgamates several events, and
25 communicates a complex set of ideas in a single dramatic scene that, though
26 dramatically effective, was historically inaccurate.

1 (9) In a scene at the diner where she works as a waitress, Annie approaches
2 Chris's father and offers to return Chris's engagement ring which had once
3 belonged to his deceased mother.

4 (10) Dedmon is depicted as offering Red Dawson the head coaching position,
5 but Dawson declines because he no longer wants to be associated with
6 Marshall football.¹² The historical record indicates only that Dawson was
7 named interim head coach for a period and continued as an assistant when
8 Lengyel was hired. Thus, the scene at Dawson's home (on the roof of a shed)
9 where coach Lengyel attempts to talk Dawson into returning to the team is
10 fictional.

11 (11) Lengyel is fictionally portrayed as seeking the job; in fact he was
12 recommended by a friend of Dedmon. There is no evidence that Dedmon
13 traveled to Wooster, Ohio to meet Lengyel or any explanation in the
14 documentary as to why Lengyel took the job. Whether or not the movie's
15 depiction is accurate, the idea for these scenes cannot be found in anything
16 produced by Novak and Witek.

17 (12) Lengyel's relationships with Dedmon, with Dawson and other coaches,
18 and with Ruffin and other team members, are largely fictionalized and include
19 the following events that do not appear in the documentary:

- 20 – Coach Lengyel's first meeting with the three returning upperclassmen;
- 21 – Coach Lengyel's pressure on Dedmon to petition the NCAA to permit
22 freshmen to play and Dedmon's efforts in that regard;

23
24
25 ¹²With respect to Dedmon's role in the various activities involving the athletic department
26 in general, and the football program in particular, screenwriter Linden notes that he
27 "combined Dedmon's character and responsibilities . . . with Ed Starling, the Assistant
28 Athletic Director In all likelihood, most of the legwork would have been done by
Starling." (WB MSJ Pltfs. Ex. 16 [Linden Memo at 3].) This would have included the
hiring of a new head coach, a task taken on entirely by Dedmon in the movie. (See id.
at 2.)

- 1 – Coach Lengyel’s hiring of his staff (presented in a montage with rock
- 2 music in the background);
- 3 – Coach Lengyel and staff recruiting high school players is depicted in
- 4 the movie but barely mentioned in the documentary; and
- 5 – Coach Lengyel’s visit to legendary coach Bobby Bowden at West
- 6 Virginia University to seek advice and information on a new offense to
- 7 be used at Marshall, if true, is based on sources other than “Ashes to
- 8 Glory.”

9 (13) The movie depicts internal conflicts within the team, including a locker
10 room fight after the opening game of the 1971 season, which is an event that
11 may or may not have occurred, but is never even hinted at in the
12 documentary.

13 (14) The personal stories of Coach Dawson, Nate Ruffin, Annie Cantrell and
14 Paul Griffin as they struggle to make sense of their lives in the wake of the
15 tragedy, including Griffin’s fictionalized spearheading of Dedmon’s termination
16 and the subsequent confrontation between the two of them are critical parts of
17 the movie but, because they are fictionalized, do not appear in any detail in the
18 documentary.

19 (15) The documentary teaches that six players were so badly injured in the
20 crash that they could not be identified and so were buried in a single ceremony
21 at a single site. “We Are Marshall” presents this fact as follows: after the
22 opening loss of the 1971 season, Marshall prepared to play its home opener
23 against Xavier. On the day of the game, Coach Lengyel puts his players on a
24 bus that takes them to the cemetery and addresses the team at the site of
25 their memorial where he says, “For those of you who do not know, this is the
26 final resting place for six members of the 1970 Thundering Herd. The plane
27 crash that took their lives was so severe, so absolute, that their bodies were
28 unable to be identified. So they were buried here, together.” If this pre-game

1 event occurred, the screenwriter learned of it from some source other than the
2 documentary. Nevertheless, the comparison of the two works vividly
3 demonstrates how an historical fact can be expressed in widely differing ways,
4 and helps to demonstrate why copyright protects expression, but not facts.
5 (16) Except for a brief denouement, the movie ends with the victory over
6 Xavier in a final scene that mirrors the failed last play from the East Carolina
7 game. Here Coach Lengyel instead of Coach Tolley turns to Red Dawson and
8 tells him to send in the play, which he does with just a few seconds on the
9 clock. As the clock ticks down to zero, the ball is snapped just in time to get
10 the play off. Using similar camera angles as those used in the filming of the
11 opening scene, the movie depicts the final pass of the game being thrown into
12 the end zone where the receiver makes a leaping catch for a touchdown as
13 the game ends with Marshall defeating Xavier 15-13 in one of the most
14 stunning upsets in college football history. This scene, along with the opening
15 scene, become the “bookends” of the story. The Court further notes that,
16 though the Xavier game ended with a last second victory, the winning play
17 was not a pass into the end zone but a screen pass requiring a 13 yard run for
18 the score.

19 What appears above is just a small sampling of movie content that expresses
20 the Marshall story in ways not found in the documentary. One could literally proceed
21 scene by scene through “We Are Marshall” and find hundreds of similar examples
22 precisely because the works, in terms of expression as opposed to facts, have little in
23 common.

24 **C. 1. Characters: “Ashes to Glory”**

25 The discussion of characters in this context is somewhat unusual because the
26 documentary speaks only of real people whose identities and connection to the crash
27 are matters of fact and cannot be copyrighted. Nevertheless, the Court notes that the
28 documentary includes: (1) on camera interviews of former teammates Reggie Oliver,

1 Nate Ruffin, Ed Carter, Mickey Jackson and Rick Meckstroth; (2) an on camera
2 interview of Coach Tolley's widow; (3) on camera interviews of numerous family
3 members of local boosters who traveled with the team; (4) on camera interviews of
4 local newsmen who covered the team and the post-crash funerals; (5) an on camera
5 interview of Coaches Lengyel and Dawson; and (6) footage of interviews from 1970 of
6 Coach Tolley and the team's quarterback, tight end, and defensive captain. Ruffin,
7 Lengyel and Dawson are featured in the movie, but the others are presented either
8 briefly or not at all. The facts related in these interviews, under Feist and Narell, are
9 not copyrightable.

10 **C.2. Characters: "We Are Marshall"**

11 The movie's portrayal of Lengyel, Ruffin and Dawson, though based on
12 information from a number of sources including interview segments included in "Ashes
13 to Glory," does not lift and incorporate these interviews into its narrative. Rather, "We
14 Are Marshall" uses only some of the events discussed in these interviews and
15 recreates them through fictionalized dialogue that, by definition, does not appear in
16 the documentary. Moreover, as noted above, "We Are Marshall" adds a number of
17 fictional characters, who are central to the movie's narrative, to symbolize aspects of
18 the historical events and to sharpen the movie's focus. Three notable additions are:
19 (1) Paul Griffin, a widower and prominent member of the Huntington community who
20 is portrayed as a member of the Marshall University Board of Trustees, the father of a
21 star player killed in the crash, and a proponent of suspending the Marshall football
22 program; (2) Annie Cantrell, a cheerleader and fiancée of Paul Griffin's son, Chris,
23 whose open grieving helps Paul to deal with his own sense of loss; (3) Don Dedmon,
24 President of Marshall University who is an amalgam of the actual president and the
25 assistant athletic director.

26 In short, we learn of the characters and what happened to them through the
27 documentary; we learn more about their thoughts and feelings through the movie.

28 **C. 3. Characters: The Nate Ruffin Issue**

1 Despite the clear differences in how the two works deal with the people
2 involved in the tragedy, Plaintiffs argue in substance that a screenwriter who learns
3 facts about the life of a person from a copyrighted documentary cannot dramatize that
4 person's story without infringing on the copyright. An example of Plaintiffs' argument
5 illuminates their fundamental theory.

6 The documentary includes extensive interview footage of Nate Ruffin, the
7 1970 and 1971 Marshall team captain who, because he was injured, did not travel to
8 the East Carolina game. The timing of Plaintiffs' interview of Ruffin turned out to be
9 fortuitous because Ruffin died shortly after the documentary was filmed. Ruffin,
10 therefore, was not available as a source of information to writer Jamie Linden, who
11 was forced to rely on material already in the historical record, including the interview
12 segments incorporated into the documentary, for information about Ruffin's
13 connection to the Marshall tragedy. At the hearing on this motion Plaintiffs argued
14 that, but for Ruffin's interview, no one would know that he attended a movie on the
15 night of the crash, that he learned of the crash at the theater, and that he left the
16 theater to find a ride to the airport. It follows, according to Plaintiffs, that the
17 dramatization of these events, which were recorded only in the documentary, infringes
18 on their copyright. Plaintiffs warn that, if the Court holds that a script writer can use
19 documentaries as a basis for dramatizing events without compensation to the
20 documentary film producer, such a ruling would destroy the value of copyrights in all
21 documentary films.

22 The Court acknowledges that documentary film makers, like all historians,
23 perform a great service as they add to our understanding of historical events, large
24 and small. But, even assuming that Ruffin's interview is the only source of information
25 about what he did on the night of the crash, Plaintiffs' argument cannot be correct
26 because it would essentially give them a copyright in the historical facts of Ruffin's life
27 (and all of the other historical events discussed in the documentary) -- something that
28 the law does not allow. What Ruffin did upon learning of the crash is a fact -- it does

1 not “display the stamp of the author’s originality.” Feist, 499 U.S. at 350. While one
2 can appreciate that Plaintiffs’ interview of Ruffin has preserved this information in the
3 historical record for all time, case law teaches that copyright does not reward effort
4 and that historical works, because they are fact intensive, receive narrower copyright
5 protection than works of fiction. A comparison of Ruffin’s appearance in the two
6 works helps to illustrate why the Supreme Court has established such a rule.

7 In the documentary, a number of segments of Ruffin’s interview are
8 incorporated into the narrative. Regarding the evening of November 14, 1970, Ruffin
9 tells the interviewer that he was at a local movie theater when he learned of an
10 airplane crash and, worried that it might be the team’s aircraft, left the theater to find a
11 ride to the airport. He does not say whether he attended the movie alone or with a
12 friend, and does not provide any information about what happened before he received
13 word of the crash. Essentially the documentary presents the testimony of a witness,
14 Nate Ruffin, who describes what he recalled of his actions at a particular time and
15 place that is central to the subject of the documentary. “We Are Marshall” does not
16 use the words Ruffin spoke in the interviews or otherwise lift footage of the interview
17 and incorporate it into its narrative. Rather, in “We Are Marshall,” the events are
18 dramatically recreated with modification and embellishment. First, Ruffin and a
19 teammate are depicted entering the theater and bantering with the young woman in
20 the ticket booth about the East Carolina loss; the scene is juxtaposed with Coach
21 Tolley’s post-game locker room speech. A few scenes later, the lights are turned on
22 in the theater, the movie is stopped, and a theater employee walks onto the stage and
23 announces that an airplane has crashed near the airport. At that point, Ruffin and his
24 friend sprint from the theater, run into the street and flag down a pick up truck that is
25 speeding toward the airport. Thus, unlike the documentary, which presents a
26 witness’s recollection of an event, the movie presents a re-enactment of the event
27 with a substantial dose of artistic license taken to add further drama to the story line.
28

1 There can be little dispute that, in respect to this particular event, “We Are
2 Marshall” deals with the same general historical information contained in Ruffin’s
3 interview, but it is equally apparent that it expresses the information in an entirely
4 different way with an entirely different effect. The movie depicts Ruffin as he lives
5 through and experiences the horror of the event; the documentary presents his
6 recollection of the event. One work tells us what happened; the other shows us what
7 happened.

8 **D.1. Plot: “Ashes to Glory”**

9 “Ashes to Glory” is what its authors say it is -- an historically accurate
10 documentary of the history of Marshall University football told in chronological order
11 from the beginning in 1895 to the present with the 1970 air plane crash tragedy at the
12 mid-point of the narrative. To the extent it can be said to have a sub-plot, it would be
13 the personal stories of spouses, friends and family members of the boosters who flew
14 with the team to the East Carolina game. But these “plot lines” are not protectable
15 because they are not original to the authors.

16 **D.2. Plot: “We Are Marshall”**

17 “We Are Marshall” focuses principally on the “phoenix rising from the ashes”
18 aspect of the Marshall football program, which is also central to the documentary, but
19 which, as noted, is not protectable because it describes an historical event. The
20 movie, however, adds plot lines that are not found in the historical record presented
21 by “Ashes to Glory,” and, based on information from Linden, appear to be entirely, or
22 largely, fictional. These include: Paul Griffin’s personal struggle as he grieves over
23 the loss of his son; Annie Cantrell’s uncertainty over what to do with her life now that
24 her fiancée has been killed; Nate Ruffin’s personal struggle first to save the football
25 program and then to lead the team while coping not only with his grief but with the
26 pain of physical injury; Coach Dawson’s effort to come to grips with his loss and make
27 a contribution to the rebuilding of the program; President Dedmon’s battle with the
28 awesome responsibility of dealing with the community, the university’s board, the

1 student body, the football team, the NCAA, and his own termination. Other, narrower
2 plot lines that appear in "We Are Marshall" but not in the documentary include: (1)
3 Dedmon's pursuit of the NCAA waiver; (2) the coaching staff's recruiting efforts; and
4 (3) internal strife among the football players leading up to the Xavier game.

5 **4. CONCLUSION**

6 If the unprotectable elements of the two works -- the historical facts, scenes a
7 faire, the biographical data -- are removed from the analysis, the two works are not
8 substantially similar. The Court has carefully and thoroughly considered the two
9 works, and has viewed the content of each several times. Those reviews, for reasons
10 discussed above, persuade the Court that, on the basis of the undisputed facts, the
11 works are not substantially similar as a matter of law. The copyright claim therefore
12 fails and the Court **GRANTS** Defendants' motion for summary judgment on Plaintiffs'
13 copyright claim.

14 **B. BREACH OF CONTRACT CLAIMS**

15 Plaintiffs bring claims for breach of express and implied-in-fact contracts, all of
16 which fail. The undisputed facts show that the parties never reached an agreement
17 and never manifested any conduct that would lead one to believe an agreement had
18 been reached.

19 **1. THERE WAS NO EXPRESS CONTRACT**

20 An express contract is one in which the parties intent is stated in words. Cal.
21 Civ. Code § 1620. In this case, the parties entered into negotiations for the purpose
22 of forming a contract, but never achieved that objective. While the parties expressed
23 varying degrees of hopefulness during the negotiation process, and the evidence
24 indicates that some progress was made during the course of negotiations,
25 disagreements on material terms prevented a final meeting of the minds. In these
26 circumstances, as even Plaintiffs' agent understood, the parties never reached
27 agreement on a contract.
28

1 Even if the parties had reached a stage where they expected to reach an
2 agreement (which does not appear to be the case here), “[t]here is no contract where
3 the objective manifestations of intent demonstrate that the parties chose not to bind
4 themselves until a subsequent agreement [was] made.” Bustamante v. Intuit, Inc.,
5 141 Cal. App. 4th 199, 213 (2006) (second alteration in original) (internal quotation
6 marks omitted) (quoting Rennick v. O.P.T.I.O.N. Care, Inc., 77 F. 3d 309, 316 (9th Cir.
7 1996)). Bustamante explains that where “essential terms were only sketched out, with
8 their final form to be agreed upon in the future (and contingent upon third-party
9 approval), the parties had at best an ‘agreement to agree,’ which is unenforceable
10 under California law.” Id. Thus, for example, even if the parties had signed a
11 document indicating their intent to enter into a final agreement, such a letter has no
12 binding effect because it reflects only that the parties were in the process of
13 negotiating a binding agreement. Rennick, 77 F. 3d at 315-16. In circumstances like
14 those presented in this case, “[t]he failure to reach a meeting of the minds on all
15 material points prevents the formation of a contract **even though the parties have**
16 **orally agreed upon some of the terms, or have taken some action related to the**
17 **contract.”** Bustamante, 141 Cal. App. 4th at 215 (emphasis in original) (internal
18 quotation marks omitted) (quoting Banner Entm’t, Inc. V. Superior Court, 62 Cal. App.
19 4th 348, 359 (1998)).

20 Here, neither the Option and Consulting Agreement nor the Option Short Form
21 were signed by the parties and they were transmitted with correspondence that clearly
22 showed they were not binding on the parties. (WB MSJ Pltfs. Ex. 2; WB MSJ Ex. 4.)
23 On the contrary, the parties continued to negotiate, and when those negotiations
24 became serious Plaintiffs hired an agent to represent them and gave him specific
25 directions as to what they wanted included in any agreement with Thunder Road,
26 including, among other things, substantially more money than Thunder Road had
27 offered and a retention of rights in “Ashes to Glory.” (WB MSJ Ex. 7.) When
28 negotiations broke off in March of 2004, the parties had not reached agreement on

1 various terms including, most importantly, either the purchase price or an identification
2 of the rights Defendants would receive in “Ashes to Glory.” (WB MSJ Novak Depo.
3 Tr. at 20:25-24:19.) In essence, neither side was in agreement on either the sale
4 price or what was being sold.¹³ Westover unambiguously advised Novak and Witek
5 that he was not able to reach an agreement with Thunder Road. (WB MSJ Westover
6 Depo. Tr. at 84:15-23.)

7 After negotiations ended, Plaintiffs attempted to sell the rights to “Ashes to
8 Glory” to other studios. (WB MSJ Novak Depo. Tr. at 72:1-21; WB MSJ Novak Depo.
9 Tr. at 73:13-24.) Westover admits that he was attempting to make a deal with others,
10 including ESPN, because “no agreement had been reached with Thunder Road.”
11 (WB MSJ Westover Depo. Tr. at 83:9-14.) Clearly, all parties involved knew that no
12 agreement had been reached and their conduct conveyed as much.

13 **2. THERE WAS NO IMPLIED CONTRACT**

14 “An implied contract . . . in no less degree than an express contract, must be
15 founded upon an ascertained agreement of the parties to perform it, the substantial
16 difference between the two being the mere mode of proof by which they are to be
17 respectively established Zenith Ins. Co. v. Cozen O’Connor, 148 Cal. App. 4th
18 998, 1010 (2007) (citations and internal quotation marks omitted); Goodrich &
19 Pennington Mortgage Fund, Inc. v. Chase Home Finance, LLC, 05 CV 636 (JLS),
20 2008 WL 698464, at *7 (S.D. Cal. Mar. 14, 2008) (slip copy) (“The essential elements
21 of an implied-in-fact contract and an express contract are the same -- mutual assent
22 and consideration.”) (citing Chandler v. Roach, 156 Cal. App. 2d 435, 440 (1957)).
23 “[A]n implied-in-fact contract entails an actual contract, but one manifested in conduct
24

25 ¹³Considering the materiality of these terms, i.e., what was being sold and the price, the Court
26 is not in the least persuaded by Plaintiffs’ arguments that California law or “custom in the
27 industry” will “fill in the gaps” and supply the necessary terms. See Weddington Prods., Inc. v.
28 Flick, 60 Cal. App. 4th 793, 811 (1998) (“If, by contrast, a supposed ‘contract’ does not provide
a basis for determining what obligations the parties have agreed to, and hence does not make
possible a determination of whether those agreed obligations have been breached, there is no
contract.”) (citations omitted).

1 rather than expressed in words.” Maglica v. Maglica, 66 Cal. App. 4th 442, 455
2 (1998).

3 A common example of an implied contract can be found in employment
4 litigation. Typically, a long term employee who has been terminated by his employer
5 will claim that he had an implied contract not to be terminated without good cause.
6 The Court then looks to such things as the length of the employee’s tenure, the
7 content of company policies, the elements of company practices, the content of
8 annual performance reviews, and statements by management level employees to
9 ascertain whether the employee has established the existence of the alleged
10 agreement. E.g., Guz v. Bechtel Nat. Inc., 24 Cal. 4th 317, 336 (2000); Foley v.
11 Interactive Data Corp., 47 Cal. 3d 654, 680 (1988). In short, courts look to conduct
12 involving the two parties to find an agreement to be bound on the material terms of
13 their relationship. In this case, the parties had no involvement with each other except
14 for their negotiations. When those failed, their relationship ceased to exist. In these
15 circumstances, there is no basis for finding that the parties entered into any implied in
16 fact contract to do anything with respect to “Ashes to Glory.”

17 **3. THE FACTS DO NOT ESTABLISH A *DESNY* CLAIM**

18 Plaintiffs also appear to make a claim under Desny v. Wilder, 46 Cal. 2d 715
19 (1956) which supports an implied-in-fact contract when a party discloses an idea and
20 “(a) before or after disclosure he has obtained an express promise to pay, or (b) the
21 circumstances preceding and attending disclosure, together with the conduct of the
22 offeree acting with knowledge of the circumstances, show a promise of the type
23 usually referred to as ‘implied’ or ‘implied-in-fact.’” Desny, 46 Cal. 2d at 738-39.
24 (citations omitted). However, Desny requires that Plaintiffs disclose their idea to
25 Defendants. Grosso v. Miramax Film Corp., 383 F.3d 965, 967 (9th Cir. 2004) (“The
26 Desny rule is justified on the theory that the bargain is not for the idea itself, but for the
27 services of conveying that idea.”) (citation omitted). Desny addresses the situation
28 where the recipient of a script, treatment, screenplay or other work has expressly or

1 impliedly sought disclosure of the author’s work and obtained access to that work
2 through disclosure by the author. That case plainly has no application here because
3 Defendants already possessed “Ashes to Glory” when they contacted Plaintiffs. Thus,
4 Plaintiffs have no basis for a Desny implied-in-fact contract claim.

5 **2. CONCLUSION**

6 For the foregoing reasons, the Court **GRANTS** Defendants’ motion for
7 summary judgment on Plaintiffs’ breach of contract claims.

8 **C. UNFAIR COMPETITION**

9 Defendants argue there is no evidence of any unfair business practice and
10 that, even if there were, Plaintiffs could only obtain restitution or injunctive relief,
11 neither of which are warranted. (WB MSJ Mem. at 18.) Defendants are correct.
12 “[T]he Unfair Business Practices Act does not authorize an award of damages.” Bank
13 of the West v. Superior Court, 2 Cal. 4th 1254, 1272 (1992). Furthermore, because
14 Plaintiffs never conveyed any money or property to Defendants, there is no basis for
15 restitution. Nor is there any evidence of any ongoing wrong to warrant injunctive
16 relief. Plaintiffs even seem to concede that their unfair business practice claim is
17 completely dependent on their breach of contract and copyright claims, without which
18 the unfair business claim fails. (WB MSJ Opp. at 27 (“If plaintiffs withstand summary
19 judgment as to any of their claims, they suffice to form the basis for a claim under
20 section 17200.”).) Accordingly the Court **GRANTS** Defendants’ motion for summary
21 judgment on the unfair competition claim.

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V. CONCLUSION

For the reasons set forth above, the Court **GRANTS** Defendants' motion for summary judgment.¹⁴ As such, Defendants prevail on all of Plaintiffs' claims and the Court **GRANTS** judgment in Defendants' favor. Defendants shall provide the Court with a proposed judgment consistent with this memorandum and order.

IT IS SO ORDERED.

DATED: October 20, 2008



Judge Gary Allen Feess
United States District Court

¹⁴Plaintiffs moved for summary judgment on Defendants' affirmative defenses. (Docket No. 31.) Because Defendants have prevailed on their motion for summary judgment, Plaintiffs' motion is **DENIED AS MOOT**.