UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CYNTHIA RODRIGUEZ and ELIZABETH MARIE ANN ZWIEBACH, Plaintiffs,	05 Civ. 10218 (LAP)
v.	MEMORANDUM AND ORDER
HEIDI KLUM COMPANY, LLC, MIRAMAX FILM CORP., THE WEINSTEIN COMPANY LLC, THE WALT DISNEY COMPANY, AND NBC UNIVERSAL, INC., Defendants.	

LORETTA A. PRESKA, United States District Judge:

This action arises from the broadcast of the fashion-themed reality television program *Project Runway*. Plaintiffs Cynthia Rodriguez ("Rodriguez") and Elizabeth Zwiebach ("Zwiebach") (collectively, the "Plaintiffs") contend that the program infringes on a copyrighted treatment (the "Treatment") they created for a show called *American Runway*. Plaintiffs seek damages for the alleged infringement of their copyright pursuant to 17 U.S.C. § 101, *et seq.*, and New York State common law. Defendants Heidi Klum Company ("Klum Co."), Miramax Film Corp. ("Miramax"), Weinstein Company LLC, ("Weinstein Co."), The Walt Disney Company ("Disney") and NBC Universal, Inc.,

("NBC") (collectively, the "Defendants"[1]) have moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.[2] For the reasons discussed below, Defendants' motion is GRANTED.

I. BACKGROUND

Plaintiff Cynthia Rodriguez works in the fashion industry in New York and has over twenty years of industry experience as a designer. (Compl. ¶¶ 1, 25; Pls' 56.1 Stmt. 1.) Plaintiff Elizabeth Zwiebach has over twenty years of experience as a fashion buyer and merchandiser. (Compl.

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[1] The parties have stipulated that Plaintiffs will not proceed against defendants Heidi Klum, Miramax Film Partners, Inc., Harvey Weinstein, Robert Weinstein, The Full Picture, LLC, Desiree Gruber, Jane Cha, The Magical Elves Inc., Dan Cutforth and Jane Liptsitz. (Declaration of Eric J. Lobenfeld in Support of Defendants' Motion For Summary Judgment, sworn to January 14, 2008 ("Lobenfeld Decl.") at ¶ 5.)

[2] The following submissions have been considered in resolving this motion: Plaintiffs' Complaint ("Compl."); Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Defs.' Mem."); Defendants' Rule 56.1 Statement ("Defs' 56.1 Stmt."); Defendants' Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment ("Defs.' Reply"); Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Pls.' Opp'n"); Plaintiffs' Rule 56.1 Reply Statement ("Pls' 56.1 Stmt"); (Lobenfeld Decl.); Declaration of Eli Holzman in Support of Defendants' Motion for Summary Judgment, sworn to January 2, 2008 ("Holzman Decl."); Declaration of Jonathan Fisher in Opposition to Defendants' Motion for Summary Judgment, sworn to February 13, 2008 ("Fisher Decl."); Declaration of Cynthia Rodriguez in Opposition to Defendants' Motion for Summary Judgment, sworn to February 12, 2008 ("Rodriguez Decl.").

¶ 2, 25.; Pls' 56.1 Stmt. 1.) Both Rodriguez and Zwiebach have spent significant portions of their careers working with moderately priced clothing geared toward women thirty years of age and older. (See, e.g., Rodriguez Dep.,[3] 11:23-12:5, 12:18-13:7, 16:10-12, 17:24-18:5, 18:18-25, Zweibach Dep.,[4] 36:15-37:3, 37:18-38:13, 38:16-39:8, 45:22-24.)

Project Runway, which premiered in December of 2004, is a reality television show in which aspiring fashion designers compete before a panel of judges in weekly elimination challenges to win a grand prize of $100,000, a mentorship with Banana Republic and a work display spread in ELLE Magazine. (See Lobenfeld Decl., Exs. 25-27.) The program is produced in part and hosted by international supermodel Heidi Klum, owner of Klum Co. (Id.)

Defendants Klum Co., Miramax and Weinstein Co. are executive producers of *Project Runway*, which NBC distributes through its subsidiary, Bravo Media LLC. (Defs' 56.1 Stmt. ¶¶ 8-11.)[5] Harvey Weinstein and Eli Holzman were both employees of Miramax during the relevant time period

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[3] "Rodriguez Dep." refers to the Deposition of Plaintiff Cynthia Rodriguez taken on February 28, 2007. (Lobenfeld Decl., Ex. 3.)

[4] "Zwiebach Dep." refers to the Deposition of Plaintiff Elizabeth Zweibach taken on March 30, 2007. (Lobenfeld Decl., Ex. 6.)

[5] Miramax is a subsidiary of Defendant Disney. (Defs' 56.1 Stmt. ¶ 8.)

and are executive producers of *Project Runway*.[6] (Defs' 56.1 Stmt. ¶¶ 8-10.)

Third parties Lynn Longendyke and EJ Johnson work for 7th on Sixth, an event management company that organizes and runs fashion shows. (Rodriguez Decl. ¶¶ 5-7.) 7th on Sixth is a subsidiary of IMG World ("IMG"), an international sports and entertainment talent management company. (Id.) Bob Horowitz and Hillary Mandel are employed by TWI, which is also a subsidiary of IMG. (Id.) Desiree Gruber and Jane Cha both work for Full Picture LLC, a public relations firm. (Defs' 56.1 Stmt. ¶¶ 8, 17.) Desiree Gruber is Heidi Klum's publicist and is also an executive producer of *Project Runway*. (Id. ¶ 8.)

In 2002, Plaintiffs began developing and writing a detailed Treatment[7] for a reality television show entitled *American Runway*. (See Rodriguez Decl. ¶ 3.) Plaintiffs registered their Treatment with the Writer's Guild of America, East, on or about March 3, 2003, and with the United States Copyright Office on June 6, 2003. (Id.) As described in the Complaint, the Plaintiffs' Treatment "was

[6] Eli Holzman left Miramax in 2004. (Defs' 56.1 Stmt. ¶ 9.) Harvey Weinstein was the president of Miramax until he left the company in 2005 to begin his own production company, Weinstein Co. (Id. at ¶ 10.)

[7] For a true copy of the Plaintiffs' Treatment, see Fisher Decl., Ex. A ("American Runway").

the product of months of research and development work [for a] reality television show based upon a fashion competition wherein fashion designers are pitted against one another for the opportunity to earn fame, money, and notoriety as winners of the design competition." (Compl. ¶ 27; Fisher Decl., Ex. A.) Plaintiffs began shopping their Treatment around to talent agencies on or about May 16, 2003, and, to that end, forwarded copies of it to the 7th on Sixth employees Longendyke and Johnson. (Rodriguez Decl. ¶ 5.) Copies of the Treatment were then circulated to the Bob Horowitz and Hillary Mandel of TWI. (Id. ¶ 7.) While these Treatment recipients did express some initial interest in developing *American Runway*, Plaintiffs had not obtained a meeting with the TWI Employees by late July of 2003, and progress on *American Runway* came to a standstill. (Id. ¶¶ 6, 9.)

In December of 2004, Plaintiff Rodriguez viewed the premier of *Project Runway* on Bravo and soon became convinced that Defendants had impermissibly copied the Treatment. (Id. ¶ 11.) On December 6, 2005, Plaintiffs filed the instant action, which includes a federal copyright infringement claim and New York State common law claims for misappropriation, unfair competition and unjust enrichment. (Compl. ¶¶ 45-69.) The complaint alleges that

Defendants gained access to their Treatment and that *Project Runway* is a strikingly similar and slavish copy. (Id. ¶¶ 40-41.)

Plaintiffs allege that their Treatment entered into Defendants' ambit after they sent it to Longedyke and Johnson of 7th on Sixth and it was circulated to Mandel and Horowitz of TWI. (See Pls.' Opp'n 3-4; Rodriguez Decl. ¶¶ 5-7.) Plaintiffs argue that Defendants gained access to it by communicating with the 7th on Sixth and TWI Employees who had previously received the Treatment from Plaintiffs. (Pls.' Opp'n, 14-15.) Specifically, Plaintiffs point to a series of emails from November of 2003 that evidence phone conversations and conference calls between and among Desiree Gruber, Eli Holzman and IMG subsidiary employees Longedyke, Johnson, Mandel and Horowitz (among others) regarding *Project Runway*. (Lobenfeld Decl., Ex. 21, at 18-21.) Additionally, Plaintiffs assert that Klum gained access to the Treatment through unidentified model assignment booking agents who also work at IMG. (Rodriguez

Dep., 185:14-188:8)[8]; (Zwiebach Dep., 152:3-159:10.)[9]

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[8] Q. We talked about Jake Smith.
Who were Ms. Klum's agents at IMG with whom you discussed the production of "American Runway" or showed them the treatment?
A. Lynn Longendyke, E.J. Johnston, and Jake Smith are employees of IMG.
Q. And Ms. Klum -
A. Is also employed by IMG, represented by IMG.
Q. She is represented by IMG?
A. Correct.
Q. Is Ms. Longendyke her agent?
A. No.
Q. Is Mr. Johnston her agent or was he at the time?
A. No.
Q. Was Mr. Smith her agent at the time?
A. Not that I know of.
Q. So I guess the question is, what is the basis for your saying that Heidi Klum was shown the treatment?
A. Since IMG owns 7th on Sixth, TWI, they are all under one roof, that's the connection. (Rodriguez Dep., 185:13-186:13.)

[9] Q. How do you believe the Defendants got access to American Runway?
A. This is my theory.
Q. Sure.
A. I believe that it was pitched to IMG. I think they were excited about the idea. I think that it got held there. And I think the timing was right they pulled it out and said, we have a great show here, and ran with it. (Zweibach Dep., 152:3-12.)

Q. I want to go back to something you said, I may not be quoting you correctly. In words or substance, you said they all talk to each other, they all work together and all share things.
What's your basis for saying Heidi Klum, for example, talks to Jake Smith?
A. She's represented by IMG.
Q. Mr. Smith doesn't work for IMG, does he?
A. I'm not sure. (cont'd on next page)

II. DISCUSSION

A. Summary Judgment

Summary judgment is appropriate when there is no genuine issue as to any material fact that has the potential to affect the outcome of the case. Fed. R. Civ. P. 56(c). The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether [the evidence] is so one-sided that one party must prevail as a matter of law." Williams v. Crichton, 84 F.3d 581, 587 (2d Cir. 1996) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512 (1986)); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

(cont'd)
Q. So is it your suggestion that because Ms. Klum may or may not be represented by one or two people at IMG she, therefore, had access to everything that everybody and every company affiliated with IMG has?
A. No. I think it was probably brought to her attention.
Q. What's your basis for saying that?
A. The fact that she's represented by IMG, who is tied to Seventh on Sixth. That would be my only basis.
Q. So your only basis for the fact that somebody must have told Ms. Klum about this is the fact that the agency of whom a couple of members represent her is somehow related to Seventh on Sixth, that's your testimony.

* * *

A. THE WITNESS: Yeah. I agree. I have no idea who she's in contact with. (Zweibach Dep., 156:5-157:18.)

When considering allegations of copyright infringement, whether two works are substantially similar to one another is ordinarily a question of fact to be resolved by a jury. See Yurman Design, Inc. v. PAJ, Inc., 262 F .3d 101, 111 (2d Cir. 2001) (citing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998)). However, courts may find noninfringement as a matter of law "when the similarity concerns only noncopyrightable elements of plaintiff's work, or when no reasonable trier of fact could find the [two] works substantially similar." Walker v. Time Life Films, Inc., 784 F.2d 44, 48 (2d Cir.1986); see also Williams, 84 F.3d at 587. Courts may also grant summary judgment in cases where the plaintiff fails to prove that his or her work was actually copied or where the defendant is able to prove that his or her work was independently created. See Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498, 500-01 (2d. Cir. 1982); Silberstein v. Fox Entm't Group, Inc., 424 F. Supp. 2d 616, 624, 628 (S.D.N.Y. 2004).

To prevail on a claim of copyright infringement, a plaintiff must demonstrate: (1) ownership of a valid copyright, and (2) infringement of the copyright by the defendant. Hamil Am., Inc. v. GFI Inc., 193 F.3d 92, 98 (2d Cir. 1999); see also Feist Publ'ns, Inc. v. Rural Tel.

Serv. Co., Inc., 499 U.S. 340, 361, 111 S. Ct. 1282, 1295-96 (1991). In the instant case, Defendants do not contest the validity of Plaintiffs' copyright. Accordingly, Plaintiffs need only prove Defendants' actual infringement of the copyright by demonstrating that: "(1) [Defendants have] actually copied [Plaintiffs'] work, and (2) the copying is illegal because a substantial similarity exists between [Defendants'] work and the protectible elements of [Plaintiffs' work]." Knitwaves, Inc. v. Lollytogs Ltd. (Inc.), 71 F.3d 996, 1002 (2d Cir. 1995) (quoting Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp., 25 F.3d 119, 122-23 (2d Cir. 1994).

B. Actual Copying

i. Access

Although actual copying may be established by direct evidence, a plaintiff can rarely provide such evidence. See Hamil, 193 F.3d at 99. Accordingly, actual copying may be inferred where a plaintiff establishes that the defendant (1) had access to the copyrighted work and (2) there are similarities between the two works probative of copying. See Boisson v. Banian, Ltd., 273 F.3d 262, 267 (2d Cir. 2001); accord Walker, 784 F.2d at 48. Proof of access requires a showing that "an alleged infringer had a 'reasonable possibility' -- not simply a 'bare possibility'

-- of [seeing] the prior work; access cannot be based on mere 'speculation or conjecture.'" Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51 (2d Cir. 2003) (quoting Gaste v. Kaiserman, 863 F.2d 1061, 1066 (2d Cir. 1988). The plaintiff has the burden of presenting significant, affirmative and probative evidence to support a claim of access. See Tisi v. Patrick, 97 F. Supp. 2d 539, 547 (S.D.N.Y. 2000).

In the case at bar, Plaintiffs have shown that Treatment recipients Longendyke, Johnson, Mandel and Horowitz discussed "working together" and "collaborating" on the production of *Project Runway* with Gruber and Holzman. (Lobenfeld Decl., Ex. 21, 16-21.) Those discussions, however, were focused on marketing the show, "bundling" sponsors and renting tents in Bryant Park during Fashion Week; there is no reference to Plaintiffs' Treatment or to the substance of the show (other than to "'subtle' product placement"). (Id.) Plaintiffs point to no evidence from which a fact finder could find that Longendyke, Johnson, Mandel or Horowitz provided any creative input regarding the production of *Project Runway* to Holzman, Gruber or any of the Defendants. (Id.) To the contrary, Klum, Holzman and Gruber testified, without contradiction, that they had never heard of *American Runway*

until after the instant action was filed. (Id., Ex. 8 at 226, Ex. 7, at 158, Ex. 18 at 147-48.) While it is hypothetically possible that Defendants could have received the Treatment from employees at IMG, the test requires more than the bare possibility of access. Jorgensen, 351 F.3d at 51; see also Silberstein, 424 F. Supp. 2d at 624 ("'Access' means that the alleged infringer had a *reasonable* opportunity to observe or copy plaintiff's work")(emphasis added); Dimmie v. Carey, 88 F. Supp. 2d 142, 148-149 (S.D.N.Y. 2000)(finding conclusory allegations of access insufficient to refute defendants' sworn testimony that they never saw the allegedly infringed work).[10]

ii. Substantial Similarity

Even if Plaintiffs could show Defendants had access to their Treatment, they cannot establish actual copying because there is no substantial similarity between *American Runway* and *Project Runway*. To show actual

[10] Additionally, Plaintiffs have alleged that Heidi Klum received the Treatment through her photo-shoot booking agents at IMG (Rodriguez Dep., 185:21-188:8); (Zwiebach Dep., 152:3-154:13) and through IMG executives Chuck Bennett and Steve Kerepesi, who allegedly had access to Mrs. Klum. (Pls.' Opp'n., 4-5.) These averments are not probative of Defendants' access because they constitute mere speculation that the Ms. Klum's photo-shoot booking agents, Mr. Kerepesi and Bennett 1) received Plaintiffs' Treatment and 2) discussed the Treatment with Klum. See Silberstein, 424 F. Supp. 2d at 627 (Conjecture cannot create a genuine issue of material fact as to access) citing Jorgensen, 351 F. 3d at 51.

copying a plaintiff must "show a substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation." Key Publn's, Inc. v. Chinatown Today Publ'g Enters., Inc., 945 F.2d 509, 514 (2d Cir. 1991). However, not all copying constitutes copyright infringement, even if the plaintiff has a valid copyright. See Boisson, 273 F.3d at 267 (citing Feist Publ'ns, 499 U.S. at 361). Elements of a copyrighted work that are lacking in originality or taken from the public domain are not eligible for copyright protection. See Boisson, 273 F.3d at 268.

Thus, the Court of Appeals applies the "More Discerning Observer" test where, as here, a plaintiff's work is not "wholly original" but incorporates elements from the public domain.[11] Id. at 272 (citing Key Publn's, 945 F.2d at 514. The Court's opinion in Boisson outlines how to apply the test to literary works:

> [W]hen evaluating claims of infringement involving literary works, we have noted that

[11] Plaintiffs' Treatment is not "wholly original" because the idea of a reality television show where people compete for a prize is a basic staple of modern television programming. See Bethea v. Burnett, No. CV 04-7690, 2005 WL 1720631, at *11 (C.D. Cal. June 28, 2005). Indeed, as Plaintiffs admit, *American Runway* was inspired by other reality television shows, particularly *American Idol* and *Project Greenlight*. (Lobenfeld Decl., Ex. 3, 24-34.)

> while liability would result only if the protectible elements were substantially similar, our examination would encompass "the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting of the [plaintiff's] books and the [defendants'] works."

273 F.3d at 273 (quoting Williams, 48 F.3d at 588). Additionally, *scenes a faire,* sequences of events or features that necessarily result from the choice of a setting or situation do not enjoy copyright protection and are excluded from consideration when deciding whether or not two works are substantially similar. See Walker, 784 F.2d at 50; Arden v. Columbia Pictures Industries, Inc., 908 F.Supp. 1248, 1258 (S.D.N.Y. 1995).

Applying these principles here, I conclude that no reasonable jury could find that the Plaintiffs' Treatment and *Project Runway* are substantially similar. (See Lobenfeld Decl., Ex. 25-27; Fisher Decl.., Ex. A.) Plaintiffs' Treatment envisions a show where aspiring fashion designers compete to create the best moderately priced clothing line for a "Real American Man or Woman." (Fisher Decl., Ex. A.) As the show progresses into later episodes, each contestant presents additional completed outfits of his or her clothing line. (Id.) Competitors are eliminated on a weekly basis by panel of judges, who receive a 50% vote on which designers should stay and which

should go, and the American public, which also receives a 50% vote. (Id.) The majority of episodes take place in front of a live studio audience, with whom an attractive and comedic semi-celebrity host interacts throughout the episodes. (Id.)

By contrast, *Project Runway* is focused on the search for the next great high-class fashion designer, not the creation of a marketable clothing line. (Lobenfeld Decl., Ex. 25-27.) In *Project Runway*, the contestants compete in unrelated elimination challenges each week without regard for whether or not their clothing would ever be marketable to consumers. (Id.); see Bethea v. Burnett, No. CV 04-7690, 2005 WL 1720631, at *11 (C.D. Cal. June 28, 2005)(finding weekly elimination challenges distinguishable where defendants' allegedly infringing work featured separate and distinct challenges and plaintiffs' challenges were all cumulatively related). The American public has no say in elimination decisions, which are made exclusively by a panel of judges. (Lobenfeld Decl., Ex. 25-27.) Finally, aside from the finale in Bryant Park, *Project Runway* does not feature a live audience or a comedic host who interacts with the public. (Id.)

The similarities between the Treatment and *Project Runway* which Plaintiffs highlight in their submissions are

predominantly *scenes a faire*. (See Fisher Decl., Ex. B.) The use of a panel of judges composed of fashion industry experts, a design workroom with sewing machines, a specific number of contestants, professional models, hairstylists, make-up artists, weekly episodes and the setting of New York (among other enumerated similarities) all necessarily flow from the uncopyrightable idea of a fashion design reality show. See Williams, 84 F.3d at 589 (noting that electrified fences, automated tours, dinosaur nurseries, and uniformed workers are classic *scenes a faire* that flow from the uncopyrightable concept of a dinosaur zoo.); Walker, 784 F. 2d. at 50 (finding that elements such as drunks, prostitutes, vermin and derelict cars would appear in any realistic work about the work of policemen in the South Bronx . . . such similarities therefore are unprotectible *scenes a faire*).

Consequently, I find that the concept, feel and theme of *Project* Runway are plainly distinguishable from those of *American Runway*. *Project Runway* does not ostensibly bend to its audience; the viewer is given a glimpse into the world of high fashion and is allowed to watch the fashion elite decide which of the contestants deserves admission into their exclusive enclave. *American Runway* is much more populist and inclusive; the viewer has a powerful voice in

the outcome of the show, and the program caters to engaging the fashion sensibilities of its "real American" audience.

C. Independent Creation

While it may not, standing alone, provide a sufficient basis for an award of summary judgment, the Court observes that Defendants have also produced ample evidence that they created *Project Runway* independently of any purported exposure to the Treatment. See Eden Toys, 675 F.2d at 501 ("Evidence of independent creation may be introduced by a defendant to rebut a plaintiff's prima facie case of infringement"); but see Glover v. Austin, No. 06-4756-cv, 2008 WL 2873549, at *3 (2d Cir. July 24, 2008) (noting the Court of Appeals' "usual reluctance to grant summary judgment based on the defendants' claims of independent creation" alone). Defendants have produced substantial, undisputed testimonial and documentary evidence that *Project Runway* was developed through a series brainstorming meetings and outline revisions by Defendants before they could ever have viewed Plaintiffs' Treatment. Defendants have shown that, in September of 2002, Weinstein, Klum, Gruber and Holzman discussed an idea for a television program about a fashion designer competition (Lobenfeld Decl., Ex. 18 at 36-38); that on September 3, 2002, Holzman emailed Gruber and Cha an outline of the structure of a

show called *Project Runway* (Holzman Decl., Ex. A); that through September of 2002, Defendants' original *Project Runway* outline went through several revisions (Lobenfeld Decl., Ex. 8 at 40-41, 46-47, Ex. 18 at 55-58, Ex. 19); that over the next several months, Holzman and Gruber pitched the *Project Runway* outline to HBO and MTV Networks, but neither network elected to pick up the show (id. Ex. 8 at 100-101, 170-171); and that, in early April of 2003, Weinstein, Klum, Cha and Gruber brainstormed their *Project Runway* outline yet again and created a final *Project Runway* outline (the "Outline") on April 8, 2003, (id. Ex 18 at 96, 163-168; Ex. 16.)

The Outline, authored approximately one month before Plaintiffs ever gave their Treatment to 7th on Sixth or TWI, describes a reality television program featuring a fashion design competition. (Id. Ex. 16.) Specifically, the Outline contemplates a program wherein several amateur fashion designers compete in different weekly elimination design challenges until only three remain.[12] (Id.) Those three finalists are then given a set period of time to design, produce and execute their own fashion shows during fashion week in a final elimination challenge. (Id.) The

[12] For example, in the one week, contestants might be told to design a Halloween costume; in the next, the remaining contestants might have to design a bathing suit. (See id.)

winner receives a spread of his or her winning design line in a fashion magazine and a partnership to produce items from that line with a major clothing label. (Id.) A panel of judges decides who is eliminated. (Id.) The contestants all live and work together in the same space in New York where they can watch each other labor and where the judges can stop by to offer criticism and advice to the competitors as they prepare their designs for that week's challenge. (Id.) The Outline also includes an ancillary competition between a group of working models who vie to be featured in the fashion show in the show's final episode. (Id.)

This body of uncontradicted evidence clearly substantiates that the central copyrightable elements of *Project Runway* evolved slowly over an extended period of time well before Plaintiffs' Treatment could have been available to Defendants through Plaintiffs' theory of access. Indeed, *Project Runway* is much more similar to Defendants' Outline than it is to Plaintiffs' Treatment. (Id. at Ex 21; 25-27).

I therefore find that Defendants have presented uncontradicted evidence of independent creation which, combined with Plaintiffs' inadequate showing of either access or similarity, is sufficient to warrant summary

judgment. See Scholastic Inc. v. Speirs, 28 F.Supp.2d 862, 869 (S.D.N.Y. 1998).

D. Plaintiffs' State Law Claims are Preempted by the Copyright Act

Plaintiffs additionally state claims for misappropriation, unfair competition and unjust enrichment under New York law. A state law claim is preempted by the Copyright Act when (1) it applies to works of authorship fixed in a tangible medium of expression falling under one of the categories of copyrightable works (including literary works and motion pictures) and (2) the claim involves acts of reproduction, adaptation, performance, distribution or display. See 17 U.S.C. §§ 102-103, 106; see also Briarpatch Ltd., L.P. v. Phoneix Pictures, Inc., 373 F.3d 296, 305 (2d Cir. 2004).

The Court of Appeals has held that a state law claim should not be preempted by the Copyright Act where it includes extra elements rendering an otherwise equivalent claim qualitatively different from a copyright infringement claim. Nat'l Basketball Ass'n, Inc. v. Motorola, Inc., 105 F.3d 841, 851 (2d Cir. 1997). However, the Court of Appeals has explicitly ruled that that New York misappropriation, unfair competition and unjust enrichment claims are fundamentally similar to copyright infringement

claims and thus are preempted by the Copyright Act. See Nat'l Basketball Ass'n, 105 F.3d at 352 (holding that New York state misappropriation claim was preempted unless falling into the narrow "hot news" misappropriation claim category); Walker, 784 F.2d at 53 (holding that New York state unfair competition claim was preempted); Briarpatch, 373 F.3d at 306-07 (holding that New York state unjust enrichment claim was preempted because an extra element of enrichment is insufficient to render claim qualitatively different from copyright infringement claim). Because Plaintiffs' claims are grounded in the same fundamental allegation that Defendants copied Plaintiffs' copyrighted Treatment for *American Runway*, Plaintiffs' claims for misappropriation, unfair competition and unjust enrichment are preempted and, therefore, must be dismissed.

III. CONCLUSION

For the reasons stated above, defendants' motion for summary judgment [dkt. no. 35] is GRANTED. The Clerk of the Court shall mark this action closed and all pending motions denied as moot.

SO ORDERED:

Dated: September 30, 2008
New York, New York

Loretta A. Preska

LORETTA A. PRESKA, U.S.D.J.