



top gun: maverick copyright infringement claim shot down on summary judgment

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In 2022, Shosh Yonay and Yuval Yonay sued Paramount Pictures Corporation, principally asserting a copyright infringement claim related to the 2022 motion picture *Top Gun: Maverick*—sequel to the 1986 film *Top Gun*. Plaintiffs are the widow and son of Ehud Yonay, the author of a 1983 magazine article (the “Article”), which chronicled the experiences of pilots training at the Navy’s Fighter Weapons School (also known as “Top Gun”). Their First Amended Complaint asserted claims for breach of contract, declaratory relief, and copyright infringement.

The breach of contract claim turned on Defendant’s failure to credit Ehud Yonay in *Top Gun: Maverick*, which, Plaintiffs contended, was required under an assignment-of-rights agreement. Plaintiffs also sought a declaration that *Top Gun: Maverick* is a derivative work of the Article under the Copyright Act. And, as part of the copyright infringement claim, the First Amended Complaint asserted that “key elements” of *Top Gun: Maverick* are substantially similar to the Article.

Defendant moved for summary judgment on the grounds that the works were not substantially similar and that Defendant did not breach the assignment-of-rights agreement, in part because Plaintiffs’ terminated the agreement before *Top Gun: Maverick*’s release. On April 5, 2024, Judge Percy Anderson of the United States District Court for the Central District of California granted summary judgment as to all three claims. *Shosh Yonay, et al. v. Paramount Pictures Corporation, et al.*, Case No. CV 22-3846 PA (GJSx), (C.D. Cal. April 5, 2024).

Substantial Similarity in Protected Expression

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The court ruled that Plaintiffs failed to create a triable issue of material fact as to substantial similarity between the works, thus dooming both their copyright infringement and declaratory relief claims. The Court noted that, on summary judgment, the Ninth Circuit's extrinsic test for substantial similarity of expression involves an "objective comparison of specific expressive elements, which focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works." This comparison only takes place after "filtering" unprotectable elements of the works at issue, such as facts, general plot ideas, and stock scenes or settings inherent to a particular genre.

In undertaking this comparison, the Court disregarded the testimony of Plaintiffs' expert – a writer and former film school professor – for failing to filter the unprotectable elements from the works before engaging in his analysis. The experts' improper process meant that his testimony was unhelpful within the meaning of Federal Rule of Evidence 702(a), which provides that an expert's "specialized knowledge" must "help the trier of fact to understand the evidence or to determine a fact in issue." Because the testimony did not apply the extrinsic test properly, the court disregarded it. The court did, however, consider the testimony of Defendant's expert – a Commanding Officer in the Navy Reserve – who opined on "the factual elements of the Article as historical facts" as opposed to creative, protectable expression.

Next, the Court concluded that while the plots of the Article and "Top Gun: Maverick" feature a training school, its instructors, and its graduates, "Top Gun" "is a real fighter pilot school, and the graduates and instructors mentioned in the Article are real people." As such, those "factual elements are not protected by copyright law." In that same vein, the Judge Anderson noted that the dialogue in the Article is unprotected because it is "presented as real statements made by actual people." In other words, the dialogue had to be taken as uncopyrightable facts.

Although Plaintiffs contended that scenes of pilots training or carrying out missions are substantially similar between the works, the Court ruled that such "general plot ideas" are unprotectable. Also unprotectable are settings inherent to the genre such as "a jet's cockpit, the sky, a classroom, an aircraft carrier, and a bar or 'officer's club.'" Plaintiffs also asserted that the themes of the works were substantially similar, but the Court rejected that claim as well, deeming them "unprotected stock themes" ("the bonds that form in military service," "the sheer love of flying," and "true grit").

As for the pacing and sequencing, the Court concluded that the works dissimilar, noting that the Article is structured in a "non-linear fashion," while "Top Gun: Maverick" "proceeds in a linear fashion."

Plaintiffs' Selection and Arrangement Theory

Plaintiffs contended that even if individual elements were uncopyrightable, the selection and arrangement of those elements were substantially similar in the works and also protectable. The Court disagreed, explaining that, although under a selection and arrangement analysis, "substantial similarity can be found in a combination of elements, even if those elements are individually unprotected," there is only actionable infringement when "the works share, in substantial amounts, the 'particular,' *i.e.*, the 'same,' combination of unprotectable elements." That was not the case here. Rather, the Court found the alleged similarities Plaintiffs identified to be "random similarities scattered throughout" the works and thus "insufficient to establish substantial similarity of 'selection



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and arrangement.”

The Breach of Contract Claim

Plaintiffs also alleged that Defendant breached a 1983 Assignment of Rights by not crediting Ehud Yonay in “Top Gun: Maverick.” When the original *Top Gun* was released in 1986, Ehud Yonay received a “suggested by” credit. But Plaintiffs terminated the Assignment of Rights in 2020 under 17 U.S.C. § 203(a). The Court therefore concluded that Defendant was not required to credit Yonay because *Top Gun: Maverick* was not “produced under” the Assignment of Rights, both because of the termination of the assignment and because *Top Gun: Maverick* does not infringe the Article’s copyright.

The court’s ruling touches important issues surrounding works based on or inspired by true events. Mitchell Silberberg & Knupp LLP will continue to watch litigation in this area as it develops.