

Evidence in the Wastebasket: The Use of Preliminary Drafts in Copyright Litigation

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Once a motion picture has been released, is there any reason to keep preliminary drafts of the film's script? The answer may seem to be no, but recent court action suggests otherwise.

In recent years, plaintiffs have filed lawsuits claiming that movies such as *The Peacemaker*, *Monsters, Inc.*, and *Little Nicky* infringed the copyright in their works. In each of these suits, the plaintiffs attempted to use preliminary scripts as evidence to establish that the defendant's motion picture is substantially similar to the plaintiffs' own work. However, for over thirty years, federal courts consistently have held that only the final version of the defendant's work, as presented to the public, should be considered in determining substantial similarity. As recently as March 2009, the U.S. District Court for the Southern District of New York restated this rule in *Flaherty v. Filardi*, a case involving an infringement claim regarding the motion picture *Bringing Down the House*, starring Steve Martin and Queen Latifah.

Although this rule suggests that there is no need to hold onto preliminary drafts, other recent case law indicates that, in fact, preliminary drafts can play an important role in determining material issues in copyright infringement lawsuits. Preliminary drafts may be relevant to prove independent creation or the lack thereof. Depending upon the facts of the case, a defendant may attempt to use such drafts to prove that it created its work without copying the plaintiff's work, and a plaintiff may attempt to use the same drafts to prove that the defendant copied the plaintiff's work. Preliminary drafts might also be relevant to establish that the defendant had access to the plaintiff's work. Although the precise application of preliminary drafts to the copyright analysis

is not always clear, what is clear is that such drafts can be relevant to a copyright infringement claim, although not necessarily for the reasons that plaintiffs may think.

Copyright Infringement Claims

To establish copyright infringement, the plaintiff must plead and prove that (1) the plaintiff is the owner of a valid copyright, and (2) the defendant copied elements of the plaintiff's work that are both original and subject to copyright protection.¹ To satisfy the second element in the Ninth Circuit,² the plaintiff must show that the defendant had access to the plaintiff's work and that the two works are substantially similar in those elements that are protected by the Copyright Act.³

To prove access, the plaintiff must show that the alleged infringer had a reasonable opportunity to view or copy the plaintiff's work; a "bare possibility" of access will not suffice.⁴ Access can be proven circumstantially either by establishing a particular chain of events connecting the plaintiff's work to the defendant or by showing that the plaintiff's work has been widely disseminated.⁵ Additionally, if the two works are so "strikingly similar" as to preclude the possibility that the defendant independently arrived at the same result, access need not be proven and instead may be inferred as a matter of law.⁶

To determine whether two works are substantially similar, courts in the Ninth Circuit⁷ apply intrinsic (subjective) and extrinsic (objective) tests to determine if the two works share substantial similarity in expression resulting from copyright protected elements.⁸ "The intrinsic test, which examines an ordinary person's subjective impressions of the similarities between two works, is exclusively the province of the jury."⁹

In applying the extrinsic test, a court must first filter out and disregard unprotectable elements, such as basic stock ideas and concepts and situations

and incidents that flow naturally from generic plot lines (referred to as *scènes à faire*).¹⁰ Once the court has filtered out and disregarded the unprotectable elements, the court "must take care to inquire only whether 'the protectable elements, standing alone, are substantially similar.'"¹¹ The protectable elements must show "not just 'similarity,' but 'substantial similarity,' and it must be measured at the level of the concrete 'elements' of each work, rather than at the level of the basic 'idea,' or 'story,' that it conveys."¹² The extrinsic test "focuses on 'articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events' in the two works."¹³

To negate an inference of copying, a defendant often seeks to show independent creation, i.e., that the defendant created its work without copying the plaintiff's work.¹⁴ Copying is a critical element of a plaintiff's prima facie case, and "since copying is the obverse of independent creation, a defendant arguably does not bear the burden of proving independent creation."¹⁵

Preliminary Drafts Excluded

Although there are several appropriate purposes for which parties to a copyright infringement suit may introduce a defendant's preliminary scripts, plaintiffs occasionally attempt to introduce such preliminary scripts for improper purposes. Most commonly, plaintiffs attempt to establish that the defendant's and plaintiff's works share substantial similarity in expression by focusing on a defendant's preliminary scripts. Federal courts repeatedly have held that only the final version of a work, as presented to the public, is to be considered in evaluating whether an allegedly infringing work is substantially similar to a plaintiff's work.¹⁶

In March 2009, the federal district court for the Southern District of New York held that preliminary drafts cannot be considered to evaluate a claim of infringement by a motion picture. In

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Flaherty v. Filardi,¹⁷ plaintiff had sought reconsideration of a 2007 grant of summary judgment to defendants regarding her allegation that various defendants, including the Walt Disney Company, had infringed the copyright in her screenplay, *Amoral Dilemma*, in creating the movie *Bringing Down the House*.¹⁸ Plaintiff argued in part that defendants should have been required to produce interim draft screenplays in order to establish that the film was noninfringing.¹⁹ The court stated that “the contents of screenplay drafts that are not reflected in the finished motion picture are not relevant to the substantial similarity analysis with respect to the motion picture” and thus denied plaintiff’s motion for reconsideration.²⁰

“Ultimate Test of Infringement”

Flaherty followed a similar line of cases extending back more than three decades. In 1975, the Southern District of New York clearly stated this proposition in *Fuld v. National Broadcasting Co.*²¹ Plaintiff in *Fuld* claimed that defendant’s television movie *The Virginia Hill Story* infringed his unpublished screenplay, *Bugsy*.²² Plaintiff compiled

In *Flaherty v. Filardi*, the Southern District of New York followed a similar line of cases extending back for three decades.

a list of eighteen points of similarities between his screenplay and defendant’s two original scripts.²³ The court pointed out that seven of the allegedly similar scenes were not incorporated into the film as broadcast; and “since the ultimate test of infringement must be the television film as produced and broadcast,” the court confined its analysis to the remaining eleven allegedly similar scenes that were included in the version of *The Virginia Hill Story* aired by defendant.²⁴ The court determined that plaintiff’s remaining alleged similarities did not establish substantial similarity and granted defendant’s motion for summary judgment.²⁵

In 1982, the Southern District of New York reiterated that preliminary

scripts are not considered in determining infringement in *Davis v. United Artists, Inc.*²⁶ In *Davis*, plaintiff alleged that defendants’ movie about the Vietnam War, *Coming Home*, infringed his novel with the same title and subject matter.²⁷ Opposing summary judgment, plaintiff submitted detailed exhibits to establish similarity between his novel and both the motion picture and defendants’ screenplays.²⁸ The court, citing *Fuld*, stated that “the ultimate test of infringement must be the film as produced and broadcast” and refused to consider defendants’ preliminary scripts in evaluating the similarity between the works.²⁹ The court stated that had it been unaware of plaintiff’s infringement action, “it never would have dawned upon it, as an average observer, that there was the slightest connection between the two works other than in the common title and the subject of the Vietnam War.”³⁰ Accordingly, the court concluded that there was no similarity between the works.³¹

In 1983, the U.S. District Court for the Central District of California similarly concluded in *Marshall v. Yates* that preliminary scripts are not relevant in evaluating substantial similarity.³² Plaintiff in *Marshall* alleged that defendants’ motion picture, *Frances*, infringed the copyright in his book, *Shadowland*.³³ The court refused to consider any of the draft screenplays or the shooting script of *Frances* in evaluating the similarity between plaintiff’s book and defendants’ film because “such preliminary drafts are not relevant in this regard.”³⁴ Although the court did not explain why the preliminary drafts were not relevant, the court did consider the release script of *Frances*, stating that it did so because the release script “contains everything that is in the film shown to the public.”³⁵ The court ultimately determined that plaintiff’s infringement claim was without merit.³⁶

Southern District of New York Reiterates Position

In 1985, the Southern District of New York reiterated its position regarding preliminary scripts in *Walker v. Time Life Films, Inc.*³⁷ Plaintiff in *Walker* had authored a book, *Fort Apache*, and alleged that defendant Time Life Films, Inc. and various people engaged by Time Life to write, produce, and direct the film *Fort Apache, The Bronx* infringed Walker’s copyright in making

the film.³⁸ Walker requested that the court compare the similarity between the two works on the basis of earlier scripts of defendants’ screenplay.³⁹ The court rejected his request, explaining that “the Court considers the works as they were presented to the public. . . . Courts have routinely rejected requests to consider earlier drafts of the screenplay. Consideration of earlier versions of the screenplay is too unreliable in determining substantial similarity.”⁴⁰ The court conducted a thorough examination of the works and determined that no reasonable observer could find substantial similarity and dismissed plaintiff’s copyright infringement claims.⁴¹

More than a decade later, in 1997, the Central District of California agreed and, quoting *Walker*, stated that, as a matter of law, “only the final version of defendant’s film as presented to the viewing public” is relevant to the substantial similarity analysis.⁴² The court then denied plaintiff’s request for a preliminary injunction to enjoin the release of the movie *Amistad*.⁴³

In 2001, in *Idema v. Dreamworks, Inc.*, the Central District of California again stated that plaintiffs cannot rely on earlier scripts to establish infringement by a final screenplay.⁴⁴ Plaintiff in *Idema* claimed that defendants’ movie *The Peacemaker* infringed his copyright in eight different works.⁴⁵ Plaintiff sought to establish substantial similarity in part by pointing to the similarity of dialogue between his work and early drafts of defendants’ final screenplay.⁴⁶ The court stated that plaintiff’s “reliance on earlier scripts for a showing of actionable infringement in the final screenplay is without solid foundation in law.”⁴⁷ The court found no triable issue of fact that substantial similarity existed and granted defendants’ motion for summary judgment as to plaintiff’s copyright claims.⁴⁸

In 2002, the U.S. District Court for the District of Wyoming stated in *Madrid v. Chronicle Books*⁴⁹ that a court need only consider the works as presented to the public in determining substantial similarity. Plaintiff in *Madrid* claimed that defendant publisher and film studios misappropriated her poem entitled “There’s a Boy in My Closet” in the development of the full length feature film *Monsters, Inc.*⁵⁰ Defendants sought summary judgment, and plaintiff requested additional time to take discovery.⁵¹ The court stated

that because it considers the works as they were presented to the public, the discovery sought by plaintiff relating to the creation of defendants' work "would be pointless."⁵² In ultimately deciding that no substantial similarity existed, the court further explained that "either similarities exist, or they do not. If Defendants' works are derivative works fashioned on Plaintiff's [work] . . . then they have been changed to such an extent as to fail the substantial similarity test required for a copyright infringement claim to succeed."⁵³

In 2004, the Sixth Circuit cited both *Davis* and *Walker* in affirming the district court's decision not to permit plaintiff to take discovery of preliminary scripts.⁵⁴ In *Stromback v. New Line Cinema*, plaintiff alleged that defendant's motion picture *Little Nicky* infringed plaintiff's poem and original motion picture treatment, each entitled "The Keeper."⁵⁵ The district court granted defendant's summary judgment motion, but plaintiff appealed on the grounds, inter alia, that he should have been permitted discovery of preliminary scripts to fully develop his claim.⁵⁶ The court affirmed summary judgment on plaintiff's claim, noting that "only the version of the alleged infringing work presented to the public should be considered" and adding that "'intermediate copying'" during the genesis of the final product has been recognized only "'in a very limited application to cases involving computer programs."⁵⁷

Rationale for Reliance on Final, Publicly Shown Version

Several rationales exist for the rule that only the final, publicly shown version of a defendant's work is relevant to the similarity analysis. First, "a defendant 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."⁵⁸ As the Ninth Circuit explained in *See v. Durang*, in flatly rejecting plaintiff's request that the court consider (and permit discovery of) earlier drafts "on the theory [that] 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."⁵⁹ Indeed, it is well-established that a defendant may avoid infringement by purposely making changes to a plaintiff's

work.⁶⁰ For example, in *Huie v. National Broadcasting Co.*, a 1960 case before the Southern District of New York, plaintiff sought a preliminary injunction against defendants' presentation of a television show entitled *The American*, which allegedly copied from a story written by plaintiff.⁶¹ The court allowed into evidence defendants' penultimate script and observed that the changes made between that script and the final script "indicate the elimination of a number of verbal similarities between the plaintiff's story and the TV script."⁶² Based on the fact that defendants made these changes, the court concluded that defendants' script had been "prepared with great care to avoid infringement of plaintiff's copyright" and denied plaintiff's motion for a preliminary injunction.⁶³

As one commentator noted, another rationale for the rule that only the final, publicly shown version of a defendant's work is relevant to the similarity analysis is that "the real harm to the copyright owner is not that the defendant created a draft that involved substantial copying, but that the defendant is selling his final version to the public."⁶⁴ Moreover, this rule offers several practical advantages: it "permits authors to borrow from prior works, so long as what they finally produce is not, in the end, substantially similar" and permits "the court to evaluate only one of defendant's works, the final version, rather than requiring the court to evaluate numerous drafts to determine whether any of them constitute a single infringing copy."⁶⁵

One tactic that plaintiffs recently have used to attempt to avoid this principle of law is to plead separate and distinct infringement claims based upon each and every preliminary draft of the defendant's work. At least one court has recently rejected such a theory in the context of preliminary drafts of a defendant's work. In *Flaherty*, Judge Laura Taylor Swain of the Southern District of New York held that where the court finds that defendant's finished film is not an infringing work, "the drafts prepared in the course of film development and production constitute interim drafts of a published non-infringing final work, and are not actionable under the Copyright Act."⁶⁶

Preliminary Drafts Considered

Notwithstanding the principles weighing against the consideration of preliminary drafts in copyright actions,

a defendant's preliminary scripts may, in some cases, be used appropriately to prove other elements of an infringement claim, such as independent creation (or the lack thereof) and access.

Independent Creation

A defendant may introduce preliminary scripts to prove that its work was created independent of the plaintiff's work because any elements that the defendant created prior to having access to the plaintiff's work must be filtered out of the infringement analysis.⁶⁷ In *Benjamin v. Walt Disney Co.*, for example, a 2007 case before the Central District of California, plaintiff producer alleged that his screenplay, *Rescue Me*, was the basis for the film *Sweet Home Alabama*.⁶⁸ The court found that because the people who created and pitched *Sweet Home Ala-*

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bama to the studio did not have access to plaintiff's screenplay when they first pitched the film, their original seventeen-page pitch treatment could not have been copied from plaintiff's work.⁶⁹ Thus, because "'elements . . . that were created prior to access to plaintiff's work are to be filtered out'" from the similarity analysis, the court removed all elements that appeared in the seventeen-page treatment from its analysis in concluding that no substantial similarity existed between *Sweet Home Alabama* and plaintiff's screenplay.⁷⁰

On the other hand, a plaintiff may use early drafts of a defendant's work in order to show a lack of independent creation.⁷¹ For example, in *Miller v. Universal Studios, Inc.*, a 1981 case before the Fifth Circuit, plaintiff alleged that defendant had copied his book, *83 Hours Till Dawn*, in writing the script for defendant's television movie, *The Longest Night*.⁷² At trial, plaintiff was permitted to introduce into evidence several preliminary scripts in order to prove defendant's lack of independent creation.⁷³ On appeal, the Fifth Circuit affirmed the trial court's

decision, holding that examination of the various scripts was relevant to permit plaintiff to show the process by which the book was transformed into the movie.⁷⁴ The court concluded that the preliminary scripts “were relevant and admissible on the issue of independent creation, even though the ultimate test of infringement was the film as broadcast.”⁷⁵

Access

Courts may also examine a defendant’s unpublished first or early drafts in order to compare them to plaintiff’s work to determine if they are so strikingly similar to plaintiff’s work that defendant’s access to plaintiff’s work may be inferred.⁷⁶ In *Mowry v. Viacom International, Inc.*, a 2005 case before the Southern District of New York, plaintiff alleged that defendants’ motion picture, *The Truman Show*, infringed on his unpublished screenplay entitled *The Crew*.⁷⁷ After the court determined that plaintiff was unable to establish access, the court granted plaintiff’s request to compare his work to both a draft script and the finished version of *The Truman Show*, explaining that “unpublished first (and/or early) drafts are examined for striking similarity for purposes of inferring access.”⁷⁸

Conclusion

For well over thirty years, federal courts have followed the principle of law that in evaluating whether a defendant’s work (such as a motion picture) is substantially similar to the plaintiff’s work, only the final version of the defendant’s work, as presented to the public, should be considered. Put differently, preliminary drafts of the defendant’s work are not considered at all in the substantial similarity analysis in copyright cases.

At first glance, it might appear that this rule makes the preliminary drafts of a defendant’s final work irrelevant to the copyright analysis. However, preliminary drafts are not only relevant but also, depending on the facts of the case, could prove vital to other material issues in copyright claims. A defendant may want to use its drafts in order to show independent creation, i.e., as proof that it created its work without copying the plaintiff’s work. On the other hand, the plaintiff may request the defendant’s drafts to show a lack of such independent creation. Indeed, such drafts might also be relevant to the issue of actual copying, which is explicitly part of the

test at least in any copyright infringement case pending in the Second Circuit. Likewise, such drafts could also be relevant to the issue of access, i.e., whether the defendant had a reasonable opportunity to view the plaintiff’s work.

What is not yet clear is how the courts will react to new theories proffered by plaintiffs to get around the rule that a defendant’s preliminary drafts are irrelevant to the substantial similarity analysis. Will courts permit plaintiffs to bring a separate copyright claim based upon an alleged infringement by each and every preliminary draft that a defendant created? Moreover, even if the courts do permit such a theory, it remains to be seen whether it will have any practical effect other than complicating the case, particularly because statutory damages are calculated by the number of works infringed and not by the number of infringements. Although actual damages might be available, plaintiffs may need to get creative to establish that they have suffered an injury stemming from a defendant’s unpublished, interim draft (as opposed to the defendant’s completed, publicly distributed work). Of course, the courts may reject this theory outright, as the *Flaherty* court recently did, stating that where the defendant’s finished work is not infringing work, that defendant’s interim drafts are not actionable under the Copyright Act. Although the rules may be clear regarding the appropriate uses of a defendant’s preliminary drafts in copyright cases, it is equally clear that several questions remain unanswered. ■

Endnotes

1. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

2. In the Second Circuit, to satisfy the second prong of the test (copying), a plaintiff must show both that the defendant actually copied the plaintiff’s work and that the copying is illegal because a substantial similarity exists between the defendant’s work and the protectable elements of the plaintiff’s work. *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139–40 (2d Cir. 1992). Under normal circumstances, direct evidence of actual copying is rarely available; as a result, actual copying is ordinarily established indirectly by demonstrating that the person who composed the defendant’s work had access to the copyrighted material and that probative similarity exists between the two works. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON

COPYRIGHT § 13.01[B], at 13-11 to 13-12.

3. *See, e.g., Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).

4. *See Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977); *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984).

5. *Benjamin v. Walt Disney Co.*, 2007 U.S. Dist. LEXIS 91710, at *7 (C.D. Cal. June 5, 2007).

6. *Gaste v. Kaiserman*, 863 F.2d 1061, 1067–68 (2d Cir. 1988) (citing *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir. 1946); *Ferguson v. Nat’l Broad. Co.*, 584 F.2d 111, 113 (5th Cir. 1978)).

7. In order to assess substantial similarity, courts in the Second Circuit employ the “ordinary observer” test, which considers “whether, in the eyes of the average lay observer, the [defendants’] works are substantially similar to the protectable expression in the [plaintiff’s works].” *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996). This assessment “requires a side-by-side comparison of the relevant works.” *Historical Truth Prods., Inc. v. Sony Pictures Entm’t, Inc.*, 1995 U.S. Dist. LEXIS 17477, at *19 (S.D.N.Y. Nov. 21, 1995).

8. *Krofft*, 562 F.2d at 1164.

9. *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

10. *Id.* (“[W]e ‘filter out and disregard the non-protectable elements in making [our] substantial similarity determination.’” (citations omitted)).

11. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (quoting *Williams*, 84 F.3d at 588).

12. *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1179 (C.D. Cal. 2001) (quoting *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985)).

13. *Funky Films, Inc.*, 462 F.3d at 1077 (quoting *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1044 (9th Cir. 1994)). The Second Circuit’s ordinary observer test focuses on the plot, theme, characters, dialogue, pace, mood, sequence, setting, and total concept and feel of the two works. *Williams*, 84 F.3d at 588; *Arden v. Columbia Pictures Indust., Inc.*, 908 F. Supp. 1248, 1260 (S.D.N.Y. 1995); *see Risdon v. Walt Disney Prods.*, 1984 U.S. Dist. LEXIS 22250, at *2–7 (S.D.N.Y. Nov. 2, 1984).

14. *See* 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:32, at 9-77, § 9:36, at 9-83 to 9-84 (West 2009).

15. *Id.* § 9:36, at 9-84 to 9-85. As one commentator persuasively argues, independent creation is not an affirmative defense,

although some courts and defendants occasionally treat it as such. *Id.* § 9:36, at 9-83 to 9-86.

16. *Chase-Riboud v. DreamWorks, Inc.*, 987 F. Supp. 1222, 1227 n.5 (C.D. Cal. 1997); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1375 (5th Cir. 1981); *Stromback v. New Line Cinema*, 384 F.3d 283, 299-300 (6th Cir. 2004); *Fuld v. Nat'l Broad. Co.*, 390 F. Supp. 877, 882 n.4 (S.D.N.Y. 1975); *Marshall v. Yates*, 1983 U.S. Dist. LEXIS 12305, at *4 n.2 (C.D. Cal. Oct. 26, 1983); *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 434-35 (S.D.N.Y. 1985); *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 724 n.9 (S.D.N.Y. 1982).

17. 2009 U.S. Dist. LEXIS 22641 (S.D.N.Y. Mar. 20, 2009).

18. *Id.* at *30.

19. *Id.*

20. *Id.* at *31, 37.

21. *Fuld*, 390 F. Supp. at 877.

22. *Id.* at 878.

23. *Id.* at 882 n.4.

24. *Id.*

25. *Id.* at 882-84.

26. *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 722 (S.D.N.Y. 1982).

27. *Id.* at 723.

28. *Id.* at 724 n.9 and accompanying text.

29. *Id.* at 724 n.9 (citing *Fuld*, 390 F. Supp. at 882 n.4).

30. *Id.* at 725.

31. *Id.*

32. 1983 U.S. Dist. LEXIS 12305, at *4 n.2 (C.D. Cal. Oct. 26, 1983).

33. *Id.* at *1-2.

34. *Id.* at *4 n.2

35. *Id.*

36. *Id.* at *10.

37. 615 F. Supp. 430, *aff'd*, 784 F.2d 44 (2d Cir. 1986).

38. *Id.* at 432-33.

39. *Id.* at 434.

40. *Id.* at 434-35.

41. *Id.* at 434-39.

42. *Chase-Riboud v. DreamWorks, Inc.*, 987 F. Supp. 1222, 1227 n.5 (C.D. Cal. 1997).

43. *Id.* at 1233.

44. 162 F. Supp. 2d 1129, 1180-81 (C.D. Cal. 2001).

45. *Id.* at 1144.

46. *Id.* at 1185 n.67.

47. *Id.*

48. *Id.* at 1198.

49. 209 F. Supp. 2d 1227 (D. Wyo. 2002).

50. *Id.* at 1230-31.

51. *Id.* at 1233.

52. *Id.* at 1234.

53. *Id.* at 1235.

54. *Stromback v. New Line Cinema*, 384 F.3d 283, 299-300 (6th Cir. 2004).

55. *Id.* at 289.

56. *Id.* at 299.

57. *Id.* at 299-300 (citing *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 724 n.9 (S.D.N.Y. 1982); *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 435 (S.D.N.Y. 1985); quoting *Madrid*, 209 F. Supp. 2d at 1236).

58. *Warner Bros. Inc. v. Am. Broad. Co.*, 720 F.2d 231, 241 (2d Cir. 1983).

59. 711 F.2d 141, 142 (9th Cir. 1983) (refusing to permit further discovery of early drafts of defendant's play).

60. 4 NIMMER & NIMMER, *supra* note 2, § 13.03[B][1][b], at 13-70.

61. 184 F. Supp. 198, 199 (S.D.N.Y. 1960).

62. *Id.*

63. *Id.* at 199-200.

64. ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW § 2:7 (2006).

65. *Id.*

66. *Flaherty v. Filardi*, 2007 U.S. Dist. LEXIS 69202, at *10 (S.D.N.Y. Sept. 19, 2007); *but see Walt Disney Prods. v. Filmmation Assocs.*, 628 F. Supp. 871, 876 (C.D. Cal. 1986) (“[T]he [Copyright] Act prohibits the creation of copies, even if the creator considers those copies mere interim steps toward some final goal.”). As a practical matter, other

than complicating the case, a plaintiff might not gain any significant tactical advantage by adding separate infringement claims based on preliminary drafts where there are no actual damages from the creation of such preliminary drafts. Equally important, statutory damage awards “are to be calculated according to the numbers of works infringed, not the number of infringements.” *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990). In other words, “only one penalty lies for multiple infringements of one work,” and so statutory damages awards will not provide much, if any, incentive for a plaintiff to base separate infringement claims upon the preliminary scripts themselves. *Id.*

67. *See, e.g., Burns v. Imagine Films Entm't, Inc.*, 2001 U.S. Dist. LEXIS 24653, at *35-39 (W.D.N.Y. Aug. 23, 2001) (permitting defendants to use early drafts at trial to prove that story elements in the early drafts were independently created and noninfringing).

68. *Benjamin v. Walt Disney Co.*, 2007 U.S. Dist. LEXIS 91710, at *1-2 (C.D. Cal. June 5, 2007).

69. *Id.* at *8-11.

70. *Id.* at *10-20 (quoting *Murray Hill Publ'ns v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 326 (6th Cir. 2004)).

71. *See, e.g., Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1375 (5th Cir. 1981).

72. *Id.* at 1367.

73. *See id.* at 1375.

74. *Id.*

75. *Id.*

76. *E.g., Mowry v. Viacom Int'l, Inc.*, 2005 U.S. Dist. LEXIS 15189, at *38 n.15 (S.D.N.Y. July 29, 2005) (“[U]npublished first (and/or) early drafts are examined for striking similarity for purposes of inferring access.”).

77. *Id.* at *1.

78. *Id.* at *38 n.15 and accompanying text.