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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN TV PROGRAMS, LITERARY
WORKS FOR TV PRODUCTION AND
EPISODE GUIDES

Inv. No. 337-TA-886

**ORDER NO. 18: INITIAL DETERMINATION GRANTING RESPONDENTS'
MOTION FOR SUMMARY DETERMINATION OF NO
COPYRIGHT INFRINGEMENT AS A MATTER OF LAW AND
ORDER DENYING COMPLAINANTS' MOTION TO STRIKE**

(February 6, 2014)

I. INTRODUCTION AND SUMMARY

On January 6, 2014, Respondents Thunderbird Films, Inc., Mindset Television, Inc., and The Walt Disney Company ("Respondents") filed a motion for summary determination pursuant to Commission Rule 210.18, alleging that there are no genuine issues of material fact in dispute with respect to copyright infringement and that they are entitled to a determination of no copyright infringement as a matter of law (the "Motion"). (Motion Docket No. 886-021.) On January 16, 2014, Complainants Emir Tiar and E.T. Radcliffe, LLC ("Complainants"), filed an opposition to Respondents' Motion (the "Opposition"). On January 16, 2014, Staff filed a response in support of Respondents' Motion ("Staff's Response"). Having reviewed the parties' pleadings, applicable law, and the record, Respondents' motion for summary determination is GRANTED. No genuine issue of material fact exists on the issue of copyright infringement and Respondents are entitled to summary determination in their favor as a matter of law.

Put simply, Respondents have established that the allegedly infringing work, *Mr. Young*, was independently created *before* Complainants submitted their copyrighted work, *Student*

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Teacher, to Respondents. By law and logic, Respondents cannot be liable for copying when the allegedly infringing work was independently created. Complainants have raised no genuine issue of material fact regarding Complainants' evidence establishing independent creation. Because there is no genuine issue of material fact in dispute and Respondents are entitled to a determination of non-liability for copyright infringement as a matter of law, Complainants' allegations under 19 U.S.C. 1337(a)(1)(B) are hereby dismissed.¹

II. PROCEDURAL BACKGROUND

On June 7, 2013, Complainants filed a complaint under 19 U.S.C. § 1337(a)(1)(A) and (B) ("section 337"), alleging unfair methods of competition and unfair acts, as well as infringement of copyrights, in the importation of certain articles by Respondents, specifically, a television program entitled *Mr. Young*. The program allegedly was imported from Canada to the United States and has "aired on the Disney Channel." (Complaint at ¶ 1.) The Investigation was instituted on July 15, 2013. 78 Fed. Reg. 42,106-107 (July 15, 2013).

Complainants claim copyright in original literary works registered with the United States Copyright Office, specifically *Student Teacher Pilot* [with Show Bible] (Registration No. PAU003415849); *Student Teacher Derivative Work* (as revised) (Registration No. TXU001832727); and *Student Teacher Show Bible* (as revised) (Registration No. PAU003639268). Complainants allege that Mr. Tiar presented the *Student Teacher Derivative Work* and *Student Teacher Show Bible* to William Morris Endeavor Entertainment, LLC ("WME") around July 2009. Shortly thereafter, according to Complainants, Dan Signer, a

¹ For the sake of completeness, this decision addresses the arguments made in, and denies the relief requested by, Complainants' Motion to Strike Signer-Related Exhibits in Appendix to Respondents' Motion for Summary Determination of No Copyright Infringement filed on January 13, 2014 ("Mot. to Strike"). (Motion Docket No. 886-022.) In addition, by Order issued this date (Order No. 886-019), Complainants are required to show cause why their remaining allegations under 19 U.S.C. § 1337(a)(1)(A) should not be dismissed in light of the factual findings made herein.

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producer represented by WME, presented similar materials to respondent Thunderbird and later *Mr. Young* was produced and aired.

According to Complainants, *Student Teacher* tells the story of a middle school student named Mattie Drake, who becomes the teacher of students his own age. The cast of characters, according to Complainants, includes a mysteriously appearing and disappearing janitor, a bullying classmate, a romantic interest who loves science fiction and professes her belief in aliens, an authority figure who wears thick black rimmed glasses, supervises Mattie, and is also a teacher at the school, and Mattie's mother, who works in the mobile catering industry.

Complainants allege that *Mr. Young* similarly tells the story of a boy who is teaching students of his own age group. According to Complainants, the boy, Adam Young, is supported by a cast made up of a mysteriously appearing and disappearing janitor, a class bully, a romantic interest who loves science fiction and a fuddy duddy authority figure who wears thick black rimmed glasses. Complainants also assert that Adam's mother works in the mobile catering industry.

On November 15, 2013, Complainants filed a motion for partial summary determination on the issue of substantial similarity, claiming that *Student Teacher* and *Mr. Young* are so similar that a finding in Complainant's favor on this issue is required as a matter of law. (Motion Docket No. 886-012.) Respondents and Staff opposed the motion. Order No. 17, issued January 15, 2014, denied Complainants' motion based on the evidence of record and accepted principles of copyright law.

III. PARTIES' ARGUMENTS

A. Respondents' Arguments for Summary Determination

On January 6, 2014, Respondents filed their Memorandum of Points and Authorities in Support of the Motion ("Mot. Mem."). Respondents raise three separate grounds for granting

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summary determination on copyright infringement. First, they maintain that Complainants do not own the copyrights in *Student Teacher*; second, they allege that Complainants have not demonstrated any genuine issues of material fact with respect to substantial similarity between *Mr. Young* and *Student Teacher*; and third, they assert that *Mr. Young* was independently created.²

1. Lack of Exclusive Ownership

Respondents allege that ownership of a copyright is necessary to prove copyright infringement. They state that the undisputed evidence demonstrates that Complainant Emir Tiar and his wife Cindy Tiar originally owned and registered the copyrighted works. Accordingly, Respondents allege, the copyrights constituted community property under California law. (Mot. Mem. at 6.) Respondents point to a Chapter 7 bankruptcy petition filed by Mrs. Tiar on August 5, 2010, note that Mrs. Tiar, as a debtor, had a duty to schedule all of her assets on her bankruptcy petition, and allege that she failed to list *Student Teacher*. (*Id.*) According to Respondents, by operation of bankruptcy law, the result is that the bankruptcy estate retains rights in *Student Teacher*. (*Id.* at 6-7.)

Respondents allege that, even if Mr. Tiar retained a 50% ownership interest in the copyrights, the assignment of the Tiars' interests to E.T. Radcliffe, LLC, in September 2012, after Mrs. Tiar's discharge in bankruptcy in May 2011, is invalid. (Mot. Mem. at 7-8 (citing *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008)).) Respondents assert that, unless all co-owners join in granting an exclusive right to an assignee, a single co-owner

² The significance of the term "independent creation" varies, depending on the context. In some cases, the term independent creation is used to "rebut the inference of copying that arises when access and substantial similarity are demonstrated." MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT ("NIMMER") §13.03 F [5]. In that context, when the requirements for establishing copyright infringement – access and substantial similarity – have been proven, "[c]ourts view such evidence [of independent creation] skeptically." *Id.* Here, the term independent creation is used in a different context: to determine in the first instance whether the works are substantially similar.

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can grant only a nonexclusive license to exploit the copyright. Respondents assert that, because Complainants do not hold the exclusive rights to *Student Teacher*, they do not have standing to bring the instant action for copyright infringement, and the action must be dismissed.

2. No Substantial Similarity

Respondents claim that Complainants must prove that *Student Teacher* was copied and that, absent evidence of direct copying, they must show copying inferentially by demonstrating substantial similarity between *Student Teacher* and *Mr. Young*. Citing the Ninth Circuit's law on substantial similarity, Respondents compare the two works with reference to eight factors: plot, sequence of events, characters, pace, mood, theme, setting and dialogue. They conclude that the two works are not substantially similar under this analysis. (Mot. Mem. at 12-25.)³

3. Independent Creation

Preliminarily, Respondents assert that Complainants' allegation that Mr. Signer had access to *Student Teacher* is mere speculation or conjecture, without evidentiary support. Respondents point to the un rebutted statements by Mr. Weitz that he never shared the *Student Teacher* materials with anyone, either inside or outside WME. Respondents argue that the mere fact that Mr. Weitz had a professional association with Mr. Signer does not create a triable issue of fact concerning access, which is required to prove copying by inference. Respondents cite case law involving an agent who receives a copyrighted work and is employed in a firm that also represents the alleged infringer, through another agent. (Mot. Mem. at 27 (citing *e.g.*, *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp.2d 1043 (C.D. Cal. 2010)).) The case law, according to Respondents, indicates that a plaintiff in such a case cannot create a triable issue

³ The Ninth Circuit's "metaphysical" approach, requiring "extrinsic" consideration by a judge of the factors noted above, aided by "expert" opinions, followed by "intrinsic" analysis of substantial similarity by a jury, has justly been criticized by Professor Nimmer. See NIMMER § 13.03[E][3][b][v]. See also Judge Kozinski's lament in *Metcalf v. Bochco*, 294 F.3d 1069, 1071 (9th Cir. 2002) ("We delve once again into the turbid waters of the 'extrinsic test' for substantial similarity under the Copyright Act.").

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concerning access without more evidence. (Mot. Mem. at 27.)

Respondents next address the argument that the similarities between *Student Teacher* and *Mr. Young* give rise to an inference of access. Respondents argue that in order to give rise to such an inference regarding access, the works must be more than substantially similar – the similarity must be “striking.” (*Id.* at 28.) According to Respondents, the works must be “in virtually every detail . . . identical,” once unprotectible elements are filtered out. (*Id.* at 28 (quoting *Hofmann v. Pressman Toy Corp.*, 790 F. Supp. 498, 509 (D.N.J. 1990)).) Respondents state that any similarity between the two works in this case falls below the level required to establish that independent creation of *Mr. Young* was impossible, and therefore does not raise a triable issue concerning access.⁴

Respondents assert further that the evidence that Mr. Signer created *Mr. Young* independently rebuts any inference of copying. They recite the facts contained in a Declaration by Mr. Signer, accompanied by documentary evidence, showing that his ideas for *Mr. Young* were developed in the early 2000s, committed to paper in 2006, and pitched to two television program development executives at the “Disney Channel” in 2007. The Declaration states that Mr. Signer preserved the materials he developed for the project in zip files that he emailed to himself in June 2008. The subsequent development of the program by Mr. Signer also is documented, Respondents assert.

B. Complainants’ Opposition

Complainants allege that genuine issues of material fact exist as to all of Respondents allegations. (Opp. at 2.) Complainants state that *Student Teacher* is the story of Mattie Drake, a middle school student who becomes a teacher, with the “unique twist” that he “is teaching

⁴ To clarify, the degree of similarity required to establish *access* inferentially is “striking” similarity. See NIMMER §§ 13.02[B], 13.03[D]. The degree of similarity required to establish *copying* inferentially is only “substantial” similarity. See NIMMER § 13.03[A].

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students of his own age who would otherwise be his classmates.” (*Id.* at 4.) Complainants accuse Respondents of producing and airing a show with “a virtually identical story line and substantially similar characters,” including a bullying classmate, a romantic interest who loves science fiction, a fuddy duddy authority figure at the school “who wears thick black-rimmed glasses,” and the boy’s mother, “who works in the mobile-catering industry.” (*Id.*) The scenes are “primarily humorous,” according to Complainants, and “the teacher/friend tension . . . is a constant underlying theme that drives the storyline forward.” (*Id.* at 4-5.)

1. Ownership

Complainants respond that Mrs. Tiar had no ownership interest in *Student Teacher* as of the commencement of her bankruptcy case, and therefore the copyrights were “never a part of the bankruptcy estate.” (*Id.* at 6-7.) Complainants state that Mrs. Tiar’s rights in *Student Teacher* were granted to a limited liability company, E.T.C., E.T.C. LLC (“ETC”) at least as early as April 17 or 19, 2009. (*Id.* at 3, 8.) Complainants point to the original copyright registration and deposit filed with the copyright office in 2009. (*Id.* (citing Opp. Exs. 2-4).)

2. Substantial Similarity

Complainants develop several themes in their discussion of substantial similarity. They note that “the question to be addressed is whether there are substantial similarities in protectable expression.” (Opp. at 9-10.) They assert that the proper focus is on similarities, not differences, between the two works. They lay stress on case law holding that even individually unprotectable elements can constitute a protectable work if the particular expression of the elements is original. (*Id.* at 10-11.) They rely heavily on the decision in *Metcalf v. Bochco*, where the court held that “the presence of so many generic similarities and the common patterns in which they arise” created a jury issue. 294 F.3d 1069, 1074 (9th Cir. 2002). Complainants also assert that “there

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are more similarities between the works than Respondents wish to admit.” (Opp. at 11.)

Complainants then compare the two works in some detail. With respect to plot and sequence of events, Complainants claim that it is not the stock school characters that matter but the way they interact “that makes of [sic] the protectable expression.” (*Id.*) They claim that the “total concept and feel of the works is substantially similar.” (*Id.* at 12.) According to Complainants, the two works tell the same “story of a young man teaching a class of his peers and how he balances the whole teacher/peer relationship.” (*Id.*) Complainants state “Adam and Mattie share the identical conflict – the teacher/friend dichotomy.” (*Id.* at 13.) Complainants state that the two shows target the same audience, viewers aged six to 14. (*Id.* at 14.)

Complainants claim that there are substantial similarities between two episodes of *Student Teacher* and *Mr. Young*, “First Student” and “Mr. Meteor.” Despite apparent differences in these episodes, “the reality is the specific conflict in both works is the same and in the end both protagonists get what they want.” (*Id.* at 15.)

With respect to the comparison of characters in the two works, Complainants concede that there is a “wide array” of stock characters “in the teen/tween universe,” but assert that *Student Teacher* and *Mr. Young* feature “identical characters behaving in substantially similar ways.” (*Id.* at 16.) Complainants then review the characters in the two works, pointing out their similarities. (*Id.* at 16-21.) Complainants meticulously avoid discussing the characters’ differences, asserting that, when “looked at on the whole, rather than focusing on discreet [sic] traits, they are strikingly similar.” (*Id.* at 20 (comparing “Slab” and “Smokey”).)

Complainants assert that there also is substantial similarity of themes, principally the theme of “being both friend and teacher.” (*Id.* at 21.) Complainants find similarity as well in the mood and tone of the works. (*Id.* at 22.) Complainants state that the pace of both works also is

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“identical.” (*Id.* at 23.)

3. Access

Complainants refute the Respondents’ reliance on *Bernal* on the ground that, unlike the agent in that case, Mr. Weitz actually received the *Student Teacher* materials and spoke with Mr. Tiar about them. (*Id.* at 24.) They claim that *Student Teacher* and *Mr. Young* are not only substantially but “strikingly” similar, such that access by Mr. Signer to *Student Teacher* may be inferred. (*Id.* at 25-27.)

4. Independent Creation

Complainants allege: “The *only* evidence supporting Respondents’ argument that Mr. Signer independently created Mr. Young prior to Tiar creating Student Teacher is based entirely and exclusively on electronic data from Mr. Signer’s hard disk drive that existed before this litigation began” (*Id.* at 27 (emphasis in original).) Complainants allege further that, seventeen days before Complainants’ forensic expert began his review of Mr. Signer’s hard drive, Mr. Signer deleted zip files and “accessed documents relied upon by Respondents.” (*Id.*) Complainants allege spoliation and seek to strike documents relied upon by Respondents that were located on Mr. Signer’s hard drive. (*See* Mot. to Strike.) They state that Mr. Signer’s idea for *Mr. Young* in 2007 was “abstract” and “generic” and that he did not create a pilot script and show bible for the project until 2009, after Mr. Tiar had submitted *Student Teacher* to Mr. Weitz. (Opp. at 27-28.)

C. Commission Investigative Staff’s Response

On January 16, 2014, the Commission Staff (“Staff”) submitted its response to Respondent’s Motion. Staff states that the Respondent’s Motion is ripe for summary determination of no copyright infringement. Using the Ninth Circuit’s extrinsic/intrinsic

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distinction, Staff identifies unprotectable elements of *Student Teacher*, such as *scenes a faire*, “general” ideas and “stock school characters.”⁵ Staff also notes significant differences between the two works in terms of characters and plot, but points out that detailed comparison of the two works is impossible, because most of *Student Teacher* consists of short episode summaries, without draft scripts. Staff concludes that there is no substantial similarity in any protectable expression of plot, themes, dialogue, mood, setting, pace and sequence of events.

Staff asserts that the material facts related to WME’s access to the copyrighted works are not disputed. Staff also asserts that the material facts concerning *Mr. Young*’s date of creation cannot be disputed. Staff takes issue with Complainants’ argument that Mr. Signer’s computer files are unreliable and notes that Complainants’ expert was able to confirm that key documents were created by Mr. Signer before 2009, when the *Student Teacher* materials were submitted to WME. Staff continues that independent, objective evidence confirms that on September 14, 2007, Mr. Signer pitched an earlier version of his show to program development executives at a Disney subsidiary. Staff maintains that the independent creation of *Mr. Young* by Mr. Signer constitutes an additional reason supporting Respondents’ motion for summary determination. Staff asserts that ownership of *Student Teacher* involves disputed issues of material fact, however.

IV. DISCUSSION

A. Overview

This decision granting summary determination of no copyright infringement rests on the

⁵ Scenes a faire are “those elements that follow naturally from the work’s theme, rather than from the author’s creativity.” *Kohus v. Mariol*, 328 F.3d 848, 856 (6th Cir. 2003) (quoting NIMMER, § 13.03[F][3]). They are “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.” *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1295-96 (D.C. Cir. 2002) (quoting *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982), *superseded on other grounds by* 1985 Amendments to Fed. R. Civ. Pro. 52(a)).

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lack of substantial similarity between *Student Teacher* and *Mr. Young*. Complainants have failed to raise a genuine issue of material fact with respect to Mr. Signer's creation of *Mr. Young* at least two years before the *Student Teacher* materials allegedly were presented to WME. Mr. Signer's independent, earlier creation of *Mr. Young* compels the conclusion that he did not copy *Student Teacher*.

Under settled copyright law, unprotected elements of a copyrighted work must be excluded before the work is compared with the allegedly infringing work for substantial similarity. The filtering process encompasses elements that were created independently of the copyrighted work, as well as other non-protectable elements. *Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 326 (6th Cir. 2004). Accordingly, the elements of *Mr. Young* that were created independently (i.e., before Mr. Signer allegedly had access to *Student Teacher*) must be filtered out before a comparison of the two works for substantial similarity is undertaken. Only the elements remaining after filtering determine substantial similarity. As discussed below, the filtering process leaves nothing of substance to compare in these two works. Such similarities as may be found are insignificant elements of the works and/or not subject to copyright protection, in any event.

In reaching this determination, the facts are viewed in the light most favorable to Complainants and all justifiable inferences resolved in their favor, consistent with the principles governing summary determinations. A motion for summary determination cannot be defeated by mere argument, however—the non-movant must present admissible evidence to create a genuine issue of fact. 19 C.F.R. §§ 210.18(b)-(c). Careful examination of this record reveals no admissible evidence challenging the truthfulness of Mr. Signer's Declaration or the probative value of the documents *produced by third parties* corroborating his statements concerning the

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earlier, independent creation of *Mr. Young*.⁶ Accordingly, Respondents are entitled to summary determination of no substantial similarity between *Student Teacher* and *Mr. Young*. Under the law, this finding defeats the Complainants' allegation of copyright infringement entirely and requires termination of their copyright claim under 19 U.S.C. § 1337(a)(1)(B).

B. Applicable Law

1. Choice of Law

The parties have briefed the issues with reference to the substantive copyright law of the Ninth Circuit. The Ninth Circuit's law is not controlling, however. In a case arising under section 337, the pertinent authority is to be found in the Federal Circuit's law, the Commission's decisions, and federal law under Title 17 of the U.S. Code. 17 U.S.C. §§ 101-1332.

In general, the Federal Circuit has exclusive jurisdiction over patent infringement claims, but not over other types of claims involving intellectual property. *See* 28 U.S.C. § 1295(a)(1). The Federal Circuit creates national law on patent questions. *See Voda v. Cordis Corp.*, 476 F.3d 887, 903 (Fed. Cir. 2007) ("Congress unified our patent jurisprudence by creating the Federal Circuit and granting exclusive jurisdiction of appeals on patent claims.") (citations omitted). When the Federal Circuit addresses ancillary non-patent claims that arise in U.S. district court cases involving patents, it generally decides those non-patent claims under the substantive law of the regional circuit. *See TianRui Group Company, Ltd. v. USITC*, 661 F.3d 1322, 1327 (Fed. Cir. 2011) (noting that it is "true as a general matter" that state law trade secret

⁶ To be noted, Complainants attach as Exhibit 1 to their opposition a declaration from Mr. Tiar. Mr. Tiar's declaration addresses ownership of the asserted works and the alleged disclosure to WME, but does not address Mr. Signer's alleged independent creation. (*See* Opp. Ex. 1.) Similarly, Complainants attach as Exhibit 9 to their opposition the deposition transcript of their expert on domestic industry, Ms. Kathryn Arnold. Her testimony is similarly irrelevant to the issue of independent creation. (*See* Opp. Ex. 9.) Complainants also attach as Exhibit 7 to their complaint the declaration from Respondents' expert, Mr. David McKenna. Complainants argue that Mr. McKenna's declaration demonstrates that the two works are directed to the same target audience. Because there is no evidence that the target audience for Mr. Signer's work changed over time, the similarities between the target audiences would be filtered out for the same reasons explained in Section IV.F, *infra*. (*See* Opp. Ex. 7.)

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claims that are before the Federal Circuit under supplemental jurisdiction are decided under state law). Copyright infringement is a non-patent claim; as a result, if this claim had been ancillary to a patent infringement claim filed in a district court, the regional circuit's copyright law would apply on appeal. *See Chamberlain Group, Inc., v. Skylink Techs., Inc.*, 381 F.3d 1178, 1191 (Fed. Cir. 2004); *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 837 (Fed. Cir. 1992).

In contrast, the Federal Circuit has exclusive jurisdiction over appeals arising out of investigations under section 337, regardless of the type of intellectual property involved. 28 U.S.C. § 1295(a)(6). As a result, the Federal Circuit applies its own law concerning claims arising in Investigations before the Commission. *See TianRui*, 661 F.3d at 1327. This copyright infringement Investigation therefore is governed by the Federal Circuit's copyright jurisprudence. The Federal Circuit's decisions under section 337 and the Commission's decisions provide relevant precedent. Guiding precedent also may be found in federal common law, as articulated in the decisions of the Supreme Court, the regional circuits, and in accepted statements of the law, such as NIMMER.

2. Summary Determination

Commission Rule 210.18 governing summary determination states, *inter alia*:

The determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.

19 C.F.R. § 210.18(b).

The evidence "must be viewed in the light most favorable to the party opposing the motion ...with doubts resolved in favor of the nonmovant." *Crown Operations Int'l, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002); *see also Xerox Corp. v. 3Com Corp.*, 267

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F.3d 1361, 1364 (Fed. Cir. 2001) (“When ruling on a motion for summary judgment, all of the nonmovant’s evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant’s favor.”). “Issues of fact are genuine only ‘if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party.’” *Id.* at 1375 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The trier of fact should “assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial.” *EMI Group North America, Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998) (citations omitted). “In other words, ‘[s]ummary judgment is authorized when it is quite clear what the truth is,’ [citations omitted], and the law requires judgment in favor of the movant based upon facts not in genuine dispute.” *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993). Moreover, “[b]ecause substantial similarity is customarily an extremely close question of fact, summary judgment has traditionally been frowned upon in copyright litigation.” *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002) (quoting *A.A. Hoehling v. University City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980)). Notwithstanding, summary judgment frequently is granted to defendants, and “is still permissible and may even be required.” *Murray Hill*, 361 F.3d at 321 (citations omitted).

3. Copyright Infringement

“In order to sustain a claim of copyright infringement, a plaintiff in federal court is required to demonstrate two elements: (1) ownership of the copyright in question; and (2) copying by the defendant.” *Certain Coin-Operated Audio-Visual Games (“Games I”)*, Inv. No. 337-TA-87, Comm’n Op., 1981 WL 50518, at *5 (June 25, 1981) (citations omitted). In *Games*

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I, The Commission identified copying by the defendant as a “substantive element necessary to sustain a copyright infringement action.” *Games I*, 1981 WL 50518, at *7. The Commission stated that, in the absence of direct evidence of copying, a claimant can establish copying by inference with evidence of 1) access and 2) substantial similarity. *Id.*; see also *Certain Personal Computers and Components Thereof*, Inv. No. 337-TA-140, Comm’n Op., 1984 WL 15659, at *8, 13 (March 9, 1984). The Commission’s decision is consistent with general federal law, which holds that, to prevail in a copyright infringement action, a plaintiff must demonstrate “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citations omitted). In the absence of direct copying, ““proof of infringement involves fact-based showings that the defendant had access to the complainant’s work, and that the two works are substantially similar.”” *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006) (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000)).

Applying federal copyright law, the record does not permit a finding that *Student Teacher* and *Mr. Young* are substantially similar. Because a claimant must prove both access and substantial similarity to prevail on a copyright claim, finding that there is no substantial similarity between the two works makes consideration of access unnecessary, and requires a determination for Respondents as a matter of law.

a. Substantial Similarity

In *Games I*, the Commission used the “ordinary observer” test for determining substantial similarity, defining similarity in relation to the ordinary observer: a person who is otherwise not attempting to discover disparities, but would be disposed to overlook them and regard the

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aesthetic appeal of the two articles in question as the same. 1981 WL 50518, at*8.⁷ The Commission explained in *Games I* that the ordinary observer test had been modified by developing case law in the Second and Ninth Circuits. The Ninth Circuit had adopted a two-step analysis: “First the court would examine whether there is a substantial similarity between the ‘general ideas’ of the two works. If such substantial similarity exists, the second stage would determine whether such similarity constitutes infringement by analyzing the ‘response of the ordinary reasonable person.’” *Games I*, 1981 WL 50518, at *8 (citing *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977), *superseded on other grounds by* 17 U.S.C. § 504(b)). The Commission concluded in *Games I* that, whether it applied the ordinary observer test directly or the two pronged test adopted by the Second and Ninth Circuits, it was “abundantly clear” that the products alleged to infringe were “almost identical” to the copyrighted materials. This conclusion was based on “exhaustive observations” by the ALJ, the Commission, and the Commission’s staff. *Games I*, 1981 WL 50518, at *8.

Since the Commission’s decision in *Games I*, there has been extensive development of federal copyright law regarding substantial similarity. *See generally Kohus*, 328 F.3d at 854-57. The Ninth Circuit, in particular, has refined its two step analysis of substantial similarity into an elaborate protocol to address the issue, including consideration, under the first prong, of expert reports. *Krofft* 562 F.2d at 1164-65, *superseded on other grounds by* 17 U.S.C. § 504(b).⁸ Other

⁷ Citing *Games I*, the “ordinary observer” test was summarized in the Initial Determination in *Certain Products With Gremlin Character Depictions (“Gremlins”)*. Inv. No. 337-TA-201, Initial Determination at 15-16, 1985 WL 303620, at *8 (September 12, 1985). On review, the Commission “reverse[d] that part of [the] ID that found complainant’s licensing program to be a domestic industry under section 337,” and therefore terminated the investigation. *Gremlins*, Comm’n Notice at 1 (January 16, 1986). The “ordinary observer” test was not discussed. *See id.*

⁸ In the Sixth Circuit, the ordinary observer test does not require the opinion of an expert, except where the copyrighted material is “technical and [] appropriate for patent treatment.” *Kohus*, 328 F.3d at 858. An informative discussion of the use of experts in copyright cases is found in *Sturdza*, 281 F.3d at 1300. In *Sturdza*, as here, the question of the admissibility of expert reports was not necessary to the ruling on the motion for summary judgment.

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circuits have taken different approaches. See NIMMER § 13.03[E][1]. In the Sixth Circuit and the D.C. Circuit, the two pronged test for substantial similarity calls for: 1) identifying ““which aspects of the artist’s work, if any, are protectable by copyright,”” and 2) determining ““whether the allegedly infringing work is ‘substantially similar’ to protectable elements of the artist’s work.”” *Kohus*, 328 F.3d at 855 (quoting *Sturdza*, 281 F.3d at 1295-96).

Importantly, regardless of how the test for substantial similarity is formulated, the circuit courts generally agree that only protectable elements of a copyrighted work are to be compared for substantial similarity. “The canonical statement of law is that *non-protectible elements* must be filtered out.” *Murray Hill*, 361 F.3d at 325 (citing *Kohus*, 328 F.3d at 855) (emphasis in original); accord, e.g., *Funky Films*, 462 F.3d at 1077 (citing *Cavalier v. Random House*, 297 F.3d 815, 822 (9th Cir. 2002)).⁹ “[B]efore comparing similarities between two works a court should first identify and eliminate those elements that are unoriginal and therefore unprotected.” *Kohus*, 328 F.3d at 853. As stated by NIMMER, “[i]nfringement is shown by a substantial similarity of *protectible expression*, not just an overall similarity between the works.” NIMMER, § 13.03[F].

b. What is Protectable?

Under federal copyright law, the starting point for determining substantial similarity is “filtering out of the analysis elements of plaintiff’s work that are not protectible or are otherwise non-actionable, such as those than can be proven to have been independently created.” NIMMER § 13.03 [E][1][b] (footnotes omitted). “Logic also supports the filtering of

See *id.* at 1299-1301.

⁹ As noted in *Kohus*, this was the approach taken by the Supreme Court in *Feist*, “in which a telephone company sued a publishing company that had reprinted some of its directory listings.” *Kohus*, 328 F.3d at 853. The Supreme Court ruled that “the copied listings were taken from ‘a garden-variety white pages directory, devoid of even the slightest trace of creativity,’” and therefore lacked the originality required for copyright protection. *Id.* “In sum, the Court filtered out the unoriginal, unprotected elements, and then determined that there was nothing original to be protected.” *Id.*

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independently-created elements.” *Murray Hill*, 361 F.3d at 326. As explained by the Sixth Circuit, the purpose of substantial similarity analysis is “to answer the question whether the defendant copied the work of the plaintiff.” *Id.* Where the defendant created an earlier work containing the same elements as the copyrighted work, the defendant had no need to copy the plaintiff’s work. “Therefore, where an element occurs both in the defendant’s prior work and the plaintiff’s prior work, no inference of copying can be drawn.” *Id.* (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936)).

The Sixth Circuit in *Murray Hill* addressed directly, as a matter of first impression, the question whether the elements of an earlier independent creation must be filtered out before works are compared for substantial similarity. 361 F.3d at 325. Citing “persuasive precedent and reason,” the court determined that independently created elements must be discounted. *Id.* at 325-26. The court looked first to the Ninth Circuit’s decision in *Apple Computer v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994). In that case, “Microsoft had obtained a license from Apple for some, but not all, elements of Apple’s software.” *Id.* at 326. The Ninth Circuit in *Apple* used “analytic dissection to determine the scope of copyright protection before works are considered as a whole.” *Id.* (quoting *Apple*, 35 F.3d at 1443). The Ninth Circuit applied the doctrine of filtering to excise from the comparison any elements, whether or not they were otherwise protectable, that were used with Apple’s permission. *Id.* The Sixth Circuit in *Murray Hill* construed *Apple* as support for extending the doctrine of filtering beyond non-protectible elements. *Id.*

The Sixth Circuit found further support for filtering of independently created elements in *Sturdza*, where an architect brought a claim against the United Arab Emirates (“UAE”) alleging that the design of its new embassy infringed on the copyright of architectural drawings plaintiff

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had submitted in a competition. UAE defended on the ground that the final building design actually was based on the drawings submitted by another architect, and were not copied. In performing the substantial similarity analysis, the district court filtered out elements of the embassy design that appeared in drawings submitted by the other architect *before* the plaintiff's materials were submitted to UAE. The district court's methodology was not challenged on appeal and therefore was followed by the D.C. Circuit. *See Murray Hill*, 361 F.3d at 326; *Sturdza*, 281 F.3d at 1297.

The Sixth Circuit in employed this filtering technique in *Murray Hill*, a case that closely tracks the facts of the case at bar. The court overturned a jury verdict for plaintiff Murray Hill, which alleged that, during creation of the movie "Jingle All the Way" ("JATW") Murray Hill submitted to Fox a screenplay entitled "Could This Be Christmas" ("CTBC"). *Murray Hill*, 361 F.3d at 313-14. "After the theatrical release of JATW, Murray Hill sued Fox, alleging that the JATW movie infringed upon its copyright of the CTBC screenplay." *Id.* at 314. The jury returned a verdict for Murray Hill. Fox appealed, arguing that the case should not have been submitted to a jury, and that summary judgment based on the lack of substantial similarity should have been awarded to Fox instead. The Sixth Circuit agreed. *Id.*

In support of its argument for summary judgment, Fox adduced a six page "treatment" that was registered by a third party *before* Fox had access to the CTBC screenplay. *Murray Hill*, 361 F.3d at 325. Of the twenty four alleged similarities in the works being compared, "all but six already existed in the independently created treatment." *Id.* As a result, the Sixth Circuit concluded, "only those six elements could possibly have been taken by Fox from the CTBC screenplay." *Id.* Having filtered out the elements contained in the independently created screenplay, the Court compared the remaining elements and concluded that, "[e]ach of these

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similarities is tenuous.” *Id.*

Based on the authorities cited above and, as noted by the Sixth Circuit in *Murray Hill*, using “logic,” elements of an independent creation expressed before the alleged infringer had access to the copyrighted work must be filtered out when considering the question of substantial similarity. In the instant case, it defies reason to assert that Mr. Signer copied work from Mr. Tiar that Mr. Signer created *before* he allegedly had access to *Student Teacher*. Therefore, unless there is a genuine issue of material fact concerning the independent creation of *Mr. Young*, elements of that work must be filtered before a comparison is made with *Student Teacher* to determine substantial similarity. The next section addresses the question whether there is a genuine issue of material fact regarding independent creation of *Mr. Young*.

C. Respondents’ Evidence of Independent Creation

In his Declaration, attached as Exhibit 13 to Respondents’ Motion, Mr. Signer states that he is a television producer and writer with dual U.S. and Canadian citizenship. (Signer Decl. at ¶ 3.) He states that he created, wrote and produced the television series *Mr. Young*, which began production in October 2010 and was first broadcast in Canada on March 1, 2011, and in the U.S. on Disney XD on September 26, 2011. (*Id.* at ¶ 4.)

Mr. Signer states that *Mr. Young* had its genesis in a story idea from the early 2000s. (*Id.* at ¶ 5.) Originally, “the kid” passed his exams early and decided to become a janitor at his school so that he could be near his friends. (*Id.*) In 2006, Signer changed the character from a “kid janitor” to a “kid teacher.” (*Id.* at ¶ 6.) “He had to be a genius kid who had graduated early.” (*Id.*)

Mr. Signer states that he typed up notes for the “kid teacher television show” entitled “My Name is Mr. Porter” in June 2006. (*Id.* at ¶ 7.) These notes are attached to his Declaration

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as Exhibit A. The protagonist of the show, Jake Porter, is “a child prodigy who went to college at the age of ten. Now, at 14, he’s a college graduate and ready to enter the workforce . . . as a high school teacher.” (Signer Decl. Ex. 13A at 1.) He is the same age as the students he is teaching, so he will become “friends with some of his students, while having to be colleagues with adults. He’ll be trapped between two worlds,” but will deal with “all of the usual” high school issues – “bullies, girls, jocks, the strict principal.” (*Id.*) Among the other characters listed in the notes are Jake’s best friend Derby, a bully named Mound or Slab who becomes Jake’s friend and protector, Heather, a “cute girl” Jake has a crush on, Mrs. Bird, “the world’s oldest English teacher,” and Mr. Moseby, the “long-suffering headmaster” who hired Jake because of a teacher shortage. (*Id.*)

Mr. Signer started working on ideas for episodes in a series based on the *Mr. Porter* idea in July 2006. (Signer Decl. at ¶ 8.) His typewritten notes appear at Exhibit 13B of his Declaration. Mr. Signer states that in around August 2007, he renamed the series “Working Class.” (*Id.* at ¶ 9.) He submits a note with the words “working class” at the top as Exhibit 13C to his Declaration. (*Id.*) He states that in September 2007, he typed up revised character descriptions, including characters named Adam, Brady, Echo, Slab, Ivy, Mr. Tator, Mrs. Sadowski, and Dang. (*Id.* at ¶ 10.) Descriptions of each of these characters appear in Exhibit 13D to Mr. Signer’s Declaration. The characters include: Adam Porter, a child genius and science prodigy who graduated college at age 14; Brady, Adam’s naughty best friend; Echo, a “cute” girl who is Adam’s love interest, but who does not reciprocate his attention; “Slab” Slabinsky, a big kid who is bullying at first but becomes Adam’s friend; Ivy Porter, Adam’s pretty but empty headed older sister; Principal Tator, who resents Adam’s brain power; Mrs. Sadowski, an elderly English teacher, and Dang, a Vietnamese janitor who has martial arts

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superpowers. (Signer Decl. Ex. 13D at 1-2.) Dang functions as a *deus ex machina* to assist Adam.

Mr. Signer states that he typed up a draft outline containing ideas for the pilot episode of the show that would eventually become *Mr. Young* in or about September 2007. (Signer Decl. at ¶ 11.) A copy of the draft outline is attached to his Declaration as Exhibit 13E. The pilot episode concerns Adam's first day as a teacher, in the course of which he visits Mrs. Sadowski's classroom to borrow chalk, gets locked out of his classroom, and teaches Slab a lesson about electricity. (See Signer Decl. Ex. 13E.)

Mr. Signer states that on September 14, 2007, he "pitched" his "genius kid teacher idea to { } two television program development executives at Disney Channel in Burbank, California." (*Id.* at ¶ 12.) Exhibit 13F to his Declaration is a copy of a September 12, 2007 email Mr. Signer received informing him that the meeting with { } was scheduled for September 14, 2007. (*Id.*)

Mr. Signer states that Exhibit 13G to his Declaration is a true and correct copy of hand written notes that he believes were made by { } at the September 14, 2007 meeting. (Signer Decl. ¶ 13.) Mr. Signer states that the notes were produced in response to a subpoena in a civil action pending in Los Angeles Superior Court. (Signer Decl. at ¶ 13.) Attached to his Declaration as Exhibit 13G is a Declaration by { } stating that, as custodian of records on behalf of non-party ABC Cable Networks Group ("ABCNG"), the records produced in response to a subpoena in a related state court case are true and correct copies of business records of ABCNG. The second page of Exhibit 13G consists of handwritten notes, with the statement at the top "Dan Signer 9/14/07," and a notation at the bottom of the page: "Adam Porter: genius kid, went to college when he was 8, now he's 14 and entering the workforce as a

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teacher Entering high school w/other kids his age.” (Signer Decl. Ex. 13G.)

Mr. Signer states that he sent an email to himself on June 3, 2008, enclosing the materials that were in his file for the “Working Class” project. (Signer Decl. at ¶ 14.) These materials are attached to his Declaration as Exhibit 13H. Attached as Exhibit 13I are character descriptions for the “Working Class” project that Mr. Signer typed up in July 2008. (*Id.* at ¶ 15.) Under the title of the work, the following statement appears: “The first day of high school is stressful for any 14 year old. It’s worse when you’re also the teacher.” (Signer Decl Ex. 13I at 1.) In the character description, the English teacher is identified as Mrs. Bird, not Mrs. Slabowski. (*Id.* at 5.)

Mr. Signer states that in April or May 2009 he had several meetings with executives of Thunderbird Films Inc., about his ideas for the series. (Signer Decl. at ¶ 16.) In June 2009, he “came up with the new title “Mr. Young.” (*Id.* at ¶ 17.) Thunderbird optioned the series and hired Mr. Signer to write and produce it. (*Id.* at ¶ 18.) A copy of the agreement with Thunderbird is attached to the Declaration as Exhibit 13J. Thereafter, Thunderbird developed a deal with YTV that eventually led to the production of *Mr. Young* in 2010. (*Id.* at ¶¶ 19-25.)

D. Complainants’ Evidence Disputing Independent Creation

Complainants’ effort to establish genuine issues of material fact in opposition to the evidence of Mr. Signer’s earlier, independent creation of *Mr. Young* consists of two conclusory paragraphs near the end of their memorandum in opposition. (*See Opp.* at 27-28.) In those paragraphs, Complainants make three arguments: 1) that Mr. Signer tampered with and destroyed evidence on his computer’s hard drive; 2) that Mr. Signer in 2009 had only “an abstract idea and generic characters” for *Mr. Young*; and 3) that Mr. Signer did not have a pilot script and show bible for *Mr. Young* in the fall of 2009, when negotiations were under way

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between Thunderbird and Corus Entertainment to develop the program.

Complainants provide not a single affidavit or declaration made on personal knowledge to support these arguments.¹⁰ They present no more than mere allegations—unsupported by “affidavits, answers to interrogatories, or [] otherwise.” 19 C.F.R. § 210.18(c).¹¹ Complainants have failed to comply with Rule 210.18(c), and nothing more is required to grant the summary determination sought by Respondents.¹²

The discussion that follows may therefore be deemed superfluous, but it demonstrates that all of the discernible arguments made by Complainants, even those not properly submitted in accordance with Rule 210.18, have been considered and rejected. The result of this careful consideration makes it plain that there is “no reasonable version of the facts . . . whereby” Complainants could prevail. *EMI Group*, 157 F.3d at 891.

As noted above, Complainants state, “[t]he *only* evidence supporting Respondents’ argument that Mr. Signer independently created Mr. Young prior to Tiar creating Student Teacher is based entirely and exclusively on electronic data from Mr. Signer’s hard disk drive that existed before this litigation began.” (Opp. at 27 (emphasis in original).) This statement is not supported by the record; rather, on the contrary, the handwritten notes by { } memorializing the meeting in 2007 at which Mr. Signer proposed the *Mr. Young* series to third parties were maintained in the business records of ABCNG—they did not come from Mr.

¹⁰ See *supra* note 6.

¹¹ Commission Rule 210.18(b) states that a party opposing a motion for summary determination may file opposing affidavits within 10 days after serviced of the motion for summary determination. 19 C.F.R. § 210.18(b). Commission Rule 210.18(c) states that supporting and opposing affidavits “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” 19 C.F.R. § 210.18(c). Commission Rule 210.18 (c) states further: “When a motion for summary determination is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of the opposing party’s pleading, but the opposing party’s response, by affidavits, answers to interrogatories, or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue of fact for the evidence hearing.” *Id.*

¹² Complainants make no showing that witnesses with personal knowledge were unavailable to submit affidavits concerning the events in question.

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Signer's hard drive—and they demonstrate that Mr. Signer had created the key elements of *Mr. Young* years before he had any access to *Student Teacher*. (See Signer Decl. at ¶ 13; Signer Decl. Ex. 13G.) This documentary corroboration lends substantial support to Mr. Signer's version of events, which is otherwise consistent, plausible, and un rebutted.

Complainants also allege that Mr. Signer “never had more than vague ideas about his ‘genius teacher’ project.” (Opp. at 28.) As support for this assertion, they point to an email from Jocelyn Hamilton, an employee of Corus Entertainment, asking Mr. Signer in the fall of 2009 for a pilot script and show bible for the program. (Citing Opp. Ex. 10.) Complainants allege that this email “allows for the conclusion that Signer did not have these documents at the time that he first pitched any ideas about a ‘genius kid teacher’ to Corus Entertainment.” (*Id.*)

Although Complainants are entitled to all justifiable inferences in their favor when opposing a motion for summary determination, this email exchange does not help them to establish a genuine issue of fact for trial, even inferentially. On September 22, 2009, Thunderbird Films Inc., submitted to Michael Shepard “the pitch pages, as well as the development budget for the proposed kids sitcom, *Mr. Young* – created by Dan Signer” and promised to “send the development schedule in the next day or so” (Opp. Ex. 10 at TB_025229.) In response, Jocelyn Hamilton on September 23, 2009, referred to a “current budget” including { } for “scripting” and asked Mr. Shepard to specify the delivery elements and to provide a schedule “(doesn’t need to be fast).” (*Id.* at TB_025228-29.) Mr. Shepard replied on September 25, 2009, “[t]he attached plan is to write only the pilot script in order to bring us in at { } (Id. at TB_025227-28.) Ms. Hamilton answered on October 1, 2009, that a “Pilot script & mini-bible with story ideas is what we want” “so we understand all the characters better and what kind of stories we intend on telling.” (*Id.* at TB_025226-27.)

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While the employees at Corus apparently did not have a pilot script and mini-bible for *Mr. Young*, they obviously had enough information to commit to develop the project. On October 14, 2009, Mr. Signer was informed by Thunderbird that a development agreement had become “official.” (Signer Decl. ¶ 20; Signer Decl. Ex. K.) Mr. Signer did not provide a bible until November 18, 2009 or a pilot script until January 14, 2010. (Signer Decl. ¶¶ 21-22; *See* Signer Decl. Exs. M-N.) Thus, Corus had committed to develop the program based on the submitted “pitch pages” alone. The emails in Exhibit 10 to Complainants’ Opposition do not raise an inference that Mr. Signer’s Declaration is false. That Corus was asking for a pilot script and mini-bible for *Mr. Young* in 2009 creates no implication that Mr. Signer had not developed the ideas for the program earlier, including creating the “pitch pages” that are referred to in Exhibit 10. Complainants cite no authority for the proposition that Mr. Signer needed to have developed a finished product to establish independent creation of *Mr. Young*, and there is authority to the contrary. *See Murray Hill*, 361 F.3d at 314 (granting summary judgment for defendants based on a six page treatment).

E. Complainants’ Motion to Strike

Complainants seek to rely on their Motion to Strike to provide sufficient evidence to withstand Respondents’ Motion for summary determination.¹³ Granting Complainants’ Motion to Strike would effectively deprive Respondents of their defense of independent creation. For the reasons discussed below, no such action is warranted.

Complainants allege that their forensic expert could not determine the identity of documents that were deleted by Mr. Signer from his hard drive seventeen days before forensic

¹³ As indicated above, for this purpose I put to one side the fact that Commission Rule 210.18(c) does not contemplate an opposition to a motion for summary determination being based on information alleged in a separate pleading.

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inspection. They allege that counsel for Mr. Signer “limited the scope of the inspection, preventing Complainants’ forensic evidence [sic] from obtaining all of the metadata necessary to determine the files that were deleted. . . .” (Mot. to Strike at 1-2.) They allege that Respondents should not be permitted to rely on documents derived from a “corrupted source of evidence,” namely, Mr. Signer’s hard drive. They seek to strike the documents from the record or, in the alternative, request that “an adverse inference be attached to these documents.” (*Id.* at 3.)¹⁴

Respondents oppose the Motion to Strike, stating that it is procedurally improper, mischaracterizes the evidence, and fails to satisfy the requirements of the spoliation doctrine. They assert that the Motion to Strike “is an improper attempt to rehash” the same claims made in previous, unsuccessful attempts by Complainants to compel further examination of Mr. Signer’s computer. (Respondents’ Opp. Mot. to Strike at 2.) Respondents assert that the documents attached to Mr. Signer’s Declaration are authentic, and that Complainants’ challenge to the authenticity of the documents ignores the fact that key documents were created and maintained by { }, not by Mr. Signer. (Citing Respondents’ Motion for Summary Determination Exhibits 13, 13F and 13G.) Respondents also state that Complainants’ expert, Mr. Sloves, actually was able to authenticate some of the documents that corroborate Mr. Signer’s independent creation of *Mr. Young*. (Respondents’ Opp. Mot. to Strike at 4-5 & n.3 (citing Respondents’ Opp. Mot. to Strike Ex. A at 65:20-25, 68:6-12).) Respondents note, additionally, that Mr. Sloves’ deposition testimony does not support Complainants’ allegations of adulteration and spoliation of evidence. Mr. Sloves stated at his deposition that he could not

¹⁴ Complainants assert that they “brought this grave issue to the attention of the ALJ, but the issue is still pending.” (Mot. to Strike Mem. at 7.) As discussed herein, the issue was not properly presented and is not pending. Complainants were informed in a Notice issued December 5, 2013, that no action would be taken in response to their improper attempt to submit the issue for adjudication in an untimely “Status Report.” (See Notice to Counsel for Complainants Regarding Status Report on Subpoenas to Dan Signer at 1 (Dec. 5, 2013).)

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make any conclusions with respect to whether Mr. Signer did “anything inappropriate to manipulate his electronic data.” (*Id.* at 5 (citing Respondents’ Opp. Mot. to Strike Ex. B at 84:25-85:7).)

Staff also opposes the Motion to Strike. Staff points to the presumption of regularity attached to documents under the Ground Rules. Staff notes that Mr. Signer signed his Declaration under penalty of perjury and asserts that Complainants may seek to undermine the authenticity of the documents at hearing. Staff notes further that Complainants argue only that Mr. Signer may *possibly* have altered documents, and states that even this mere possibility is unsupported by evidence. Staff notes Mr. Signer’s testimony that he did not delete any documents that pertained to *Mr. Young*. (Staff’s Opp. Mot. to Strike at 3 n.2.) Staff also states that the hand written notes from { } corroborate Mr. Signer’s independent creation of *Mr. Young*.

Staff remarks that the Complainants’ expert, Mr. Sloves, did not assert at his deposition that any improper actions were taken with respect to the documents on Mr. Signer’s hard drive. In addition, Staff states that Mr. Sloves “effectively authenticated key, electronically preserved documents relating to *Mr. Young* on Mr. Signer’s hard drive.” (*Id.* at 5.) According to Staff, Mr. Sloves identified approximately 90 electronically preserved documents and files potentially relating to *Mr. Young* or its precursors that were created and/or modified before July 2009, when Mr. Signer allegedly obtained access to the *Student Teacher* materials. Staff also notes that Complainants did not use the procedures required by the Commission’s Rules to seek enforcement of the subpoena against Mr. Signer. Staff asserts that the elements of the claim of spoliation have not been satisfied by Complainants.

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Upon review, it is plain that the Motion to Strike is without merit, for many reasons. The motion is procedurally improper and is denied on that ground alone. *See infra* Part IV.D.1. In addition, Complainants adduce no evidence to support their allegations of “corruption” of Mr. Signer’s hard drive and “spoliation.” *See infra* Part IV.D.2. Accordingly, the Motion to Strike is denied on substantive grounds, as well, as discussed below.

1. Procedural Impropriety

On December 3, 2013, Complainants filed a “Motion to Compel Dan Signer Regarding Hard Disk Drive Irregularities” through the Commission’s electronic filing system (EDIS). Because the motion did not attach a valid certificate of service (the certificate was dated November 3, 2013, the document was presented for filing on December 3, 2013), the motion was rejected by the Docket Services case manager. On December 4, 2013, Complainants’ counsel was informed that the motion had been rejected by Docket Services, and that Complainants would need to refile the motion with a valid certificate of service. Complainants’ counsel also was informed that because the deadline for filing motions to compel fact discovery was December 3, 2013 (*see* Order No. 11), Complainants would need to seek leave to file the motion out of time. Additionally, Complainants were reminded that Mr. Signer was a third party and were directed to the Commission Rules regarding the appropriate process for seeking to “compel” discovery from third parties.

Instead of following the suggestions and filing their motion properly, Complainants on December 4, 2013, submitted a “Status Report” with respect to “Dan Signer’s Hard Disk Drive Irregularities.” The “Status Report” requested “that the ALJ compel the information requested.” (Status Report at 3.) This “Status Report,” which is not a submission contemplated by the Commission’s Rules or the Ground Rules, was filed without leave and, as a renewed

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request to compel discovery, again was untimely. On December 5, 2013, a notice was issued to Complainants that there would be “no action in response to the ‘Status Report.’” (Notice to Counsel for Complainants Regarding Status Report on Subpoenas to Dan Signer at 1 (Dec. 5, 2013).) The Notice explained that Complainants’ request was not timely and did not seek leave to file out of time. Further, the Motion was procedurally improper to the extent it sought to enforce discovery against a third party through a motion to compel rather than using the process set forth in Commission Rule 210.32(g) for enforcing a subpoena. (*Id.*; see also *Certain Omega-3 Extracts From Marine or Aquatic Biomass and Products Containing the Same*, Inv. No. 337-TA-877, Order No. 34, 2013 WL 6576512, *2 (November 15, 2013) (“The proper mechanism to compel the deposition of a third-party pursuant to a subpoena is for a request for judicial enforcement under Commission Rule 210.32(g), not a motion to compel.”) (citations omitted).)¹⁵

Moreover, the relief sought by Complainants is in the nature of a discovery sanction. Commission Rule 210.33(b)(3) provides that violation of an order to provide discovery may result in a rule preventing a party from introducing into evidence or otherwise relying on “material in support of his position in the investigation.” 19 C.F.R. § 210.33(b)(3). The sanction described in Rule 210.33(b), however, applies by the terms of the rule to “a party or an officer or agent of a party.” *Id.* The record reveals no evidence that Mr. Signer was a party, an officer, or an agent of a party at the time this Investigation was instituted. The rules do not permit discovery sanctions to be invoked against Respondents because of Mr. Signer’s alleged failure to provide discovery.

¹⁵ Non-compliance with a subpoena can be remedied by seeking judicial enforcement pursuant to Commission Rule 210.32(g). In order to obtain judicial enforcement, the party seeking enforcement must first obtain from the administrative law judge an order certifying to the Commission a request for such enforcement. 19 C.F.R. § 210.32(g). No such certification ever was sought by Complainants.

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2. Substantive Reasons for Denying the Motion to Strike

The substance of the Motion to Strike also lacks merit. The allegations that Mr. Signer changed and destroyed evidence on his hard drive are purely speculative. Complainants' own expert has testified that he cannot make any conclusions regarding whether Mr. Signer did anything wrong with his hard drive. (Respondents' Opp. Mot. to Strike Ex. B at 84:17-85:7.) Most notably, Mr. Sloves' Declaration in support of the Motion to Strike, attached to the motion as Exhibit 1, is silent as to any improprieties concerning the strongest evidence corroborating Mr. Signer's version of events—the handwritten notes by { } memorializing the 2007 meeting with Signer about his ideas for *Mr. Young*. (See Sloves Decl.)¹⁶ These notes, based on unrebutted evidence in the record, were not maintained on Mr. Signer's hard drive, but are business records obtained from a third party. (See Signer Decl. at ¶ 13; Signer Decl. Ex. 13G at 1.)

In addition, as Staff and Respondents have observed, Mr. Sloves by his own testimony actually was able to confirm the authenticity of key documents that were created by Mr. Signer before Mr. Tiar allegedly approached WME with his *Student Teacher* materials. (See Staff's Response at 5-6 (showing a table of approximately 90 documents validated by Mr. Sloves that were related to Mr. Signer's independent creation of *Mr. Young*).) For all the reasons noted herein, Complainants' Motion to Strike fails to establish any factual or legal basis for granting the extraordinary relief they seek. Accordingly, the analysis proceeds with a comparison of the two works for substantial similarity, *excluding* the elements in Mr. Signer's independent creation.

¹⁶ Indeed, Mr. Sloves, Complainants' expert, does not provide support for any of the broad allegations made by Complainants in their Motion to Strike. He states only that the data he has received "do not provide the necessary metadata to verify or challenge the authenticity of that evidence." (Sloves Decl. at ¶¶ 9-10.) Also notable is the date of Mr. Sloves Declaration – October 23, 2013. Complainants had more than sufficient time to address the discovery issues they identify before the deadline for filing motions to compel on December 3, 2013.

F. Comparison of the Works for Substantial Similarity

Having concluded that the evidence of Mr. Signer's independent creation of *Mr. Young* is un rebutted by evidence in accordance with Commission Rule 210.18(c), the next step is to identify the elements that were contained in Mr. Signer's idea for *Mr. Young* before he allegedly gained access to Complainants' copyrighted materials. The elements are:

- A male student becomes the teacher of students of his own age who would otherwise be his classmates
- A fun loving but mischievous male student is the protagonist's best friend
- A bullying classmate causes complications for the protagonist
- A romantic interest who is cute and sweet does not return the protagonist's affection, causing him heartache
- The protagonist has conflicts with an authority figure (the principal)
- The protagonist has conflicts with a superannuated English teacher
- A Vietnamese janitor with martial arts superpowers helps the protagonist

Because these elements were expressed in Mr. Signer's work before Mr. Tiar's submission of the *Student Teacher* materials to WME in 2009, they were not copied, and so could not support a finding of copyright infringement. Therefore, the elements described above must be filtered out before a comparison is made between *Mr. Young* and *Student Teacher*.

"Once plaintiff's work has been filtered down to its protectible core, comparing those protected elements against defendant's program poses essentially a value judgment, involving an assessment of the importance of the material that was copied." NIMMER, § 13.03[F][5]; see also *Sturdza*, 281 F.3d at 1296 (once unprotectable elements are excluded, the next step is "determining whether the allegedly infringing work is 'substantially similar' to protectable

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elements of the artist's work"). In this instance, it is difficult to discern any substantial elements in *Student Teacher* that survive filtering of the elements found in Mr. Signer's independent creation.

The basic idea is the same in both works – that of a boy who becomes a teacher of students his own age. The plot lines in both works turn on the difficulties caused by the boy's employment as a teacher. The boy, his romantic interest, his friend, and the class bully are present in both works. In addition, there is a school janitor who advises and assists the protagonist. These elements were not copied because they appeared in Mr. Signer's earlier creation, and must be filtered out before the allegedly infringing work is compared with *Student Teacher*.

Beyond the elements that must be filtered out, the salient points in the comparison involve dissimilarities. The boy in *Student Teacher* is an 11-year old middle schooler who teaches classes occasionally, while the protagonist in *Mr. Young* is 14 and a college graduate hired to teach high school science full time. Mattie in *Student Teacher* has a father who owns a bowling alley and a skating rink, "a good guy through and through." (Complaint Ex. 3A, *Student Teacher Show Bible*, PAU 3-639-238 at 3.) There is no mention in *Mr. Young* of a father. The janitor in *Mr. Young* is a Vietnamese martial arts expert with amazing physical powers. The janitor in *Student Teacher*, Mr. Slickham, is a "swarve [sic] and debonair" "former talent agent for 'Killiam Orris,'" "a humble man," who "can help market anyone, should they need it." (*Id.* at 4-5.) Mattie has a smart younger brother, while Adam has a ditzzy older sister. (*Id.* at 2.) There is no character in *Student Teacher* who resembles the aged and ornery English teacher in *Mr. Young*. Instead, there is a "cool and laid back young looking thirty year old" female dean. (Complaint Ex. 2A, *Student Teacher Derivative Work*, TXU 1-832-727 at 8.) Most of the

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episodes of *Mr. Young* have no analog in the *Student Teacher* materials.¹⁷ A couple of plot lines are similar, but only just – not substantially and certainly not strikingly so. *See Murray Hill*, 361 F.3d at 325 (“striking similarity” is so marked as to preclude “all possibilities but copying”).

As to the upper crust, fuddy duddy character who appears in *Student Teacher* as Mr. Cunningham, no similar figure appears in *Mr. Young*. A hostile principal features in *Mr. Young*, but he is not upper crust, although he is arguably fuddy duddy and does wear thick, black rimmed glasses. The principal does not speak British English, however, as Mr. Cunningham does in *Student Teacher*. In any event, an upper crust fuddy duddy who wears thick glasses is a stock character and cannot be protected as such (for a classic portrayal, see Tony Curtis as the phony millionaire in Billy Wilder’s “SOME LIKE IT HOT” (Ashton Productions, Mirisch Corp. 1959)). As to the science fiction loving girlfriend, Adam Young’s romantic interest, Echo, is not noticeably enamored of science fiction. In one episode, “Mr. Meteor,” she states that she knows 12 alien languages, but this is an isolated comment and not a theme of the work. In the episode “Mr. Alligator,” Mr. Young is reading Echo’s diary and discovers that she is a member of the sci-fi club. That isolated reference is not enough to establish substantial similarity between these works. As to the boy’s mother, the *Student Teacher* materials do not state that she is in the mobile catering business, as alleged by Complainants. Based on one episode of *Mr. Young*, the mother appears to be occupied in providing food for senior citizens. Again, this is not developed as a theme. Overall, the allegedly similar aspects of the two works are tangential to the main themes and insufficient as a matter of law to raise a triable issue of fact on “substantial similarity.” “Where, as here, the slight similarities are not thematically related, the whole is no

¹⁷ As Staff points out, “the totality of Complainants’ comparison of episodes . . . is focused on only three episodes of *Student Teacher* and three episodes of *Mr. Young*.” (Staff’s Response at 6 n.1.) “In contrast, the *Mr. Young* series has already shown three full seasons in Canada . . . totaling 80 shows. . . .” (*Id.*)

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greater than the sum of the parts.” *Murray Hill*, 361 F.3d at 325.

Complainants assert that both shows are “primarily humorous,” but *Mr. Young* features almost non-stop mindless slapstick, while *Student Teacher* is, as described by Complainants, “light-hearted,” which describes a different mood. (Opp. at 8, 22.) Complainants’ identify the mood of *Student Teacher* as “a young man doing something in the education system that is different than what has been done before.” (*Id.* at 23.) This certainly does not describe the dominant mood of *Mr. Young*, which consists of perpetual mayhem, cartoonish sight gags, puerile jokes, pubescent sexual innuendo, and grotesque ethnic and gender stereotypes. The stark contrast with the mood of *Student Teacher* is plain. (See Opp. Ex. 2 (detailing “Plot points” for *Student Teacher*: “Mattie will share with the audience all the good things about rules at school (and the benefits of school uniform in private school),” and “Mattie changes the school system making it so, that kids can focus more time on the subjects they like and have strengths for”).)

Complainants assert nevertheless that, looking at the two works as a whole, there is substantial similarity. (See Opp. at 25-27 (relying on *Metcalf*, 249 F.3d at 1074).) To paraphrase Complainants’ argument: “protectable expression may arise through the ways in which artists combine even unprotectible elements.” *Sturdza*, 281 F.3d at 1296. As stated in *Metcalf*, there may be a finding of substantial similarity even if none of the plot elements in a literary or theatrical work is original in itself; and, in a proper case, the fact that both works contain a number of similar events can give rise to a triable question of substantial similarity. 294 F.3d at 1074 (“[T]he totality of the similarities . . . goes beyond the necessities of the . . . theme and belies any claim of literary accident.”) (quoting *Shaw v. Lindheim*, 919 F.2d 1353, 1363).¹⁸ The

¹⁸ (See also Opp. at 15-16 (“[W]hy choose these characters and have them acting in this way? Why not choose the lunch lady, or the gym coach, or other ‘stock characters?’”) .)

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problem with the argument in this case is that the works, in their totality, are not similar, except in ways that must be discounted because they were present in Mr. Signer's independent creation.

Viewing these works as a whole, there is nothing about the way they are expressed that suggests copying. On "the level of actual expression they differ significantly, and at any level of abstraction . . . they are ubiquitous in literature and the cinema." *Murray Hill*, 361 F.3d at 325. Literary/theatrical creations based on the escapades of children at school, from *Tom Brown's School Days*, originally published in 1857, to the *Harry Potter* series, are not original, and they typically share the elements of a protagonist, his friends, his nemeses, his struggles with school authority figures, etc. As stated by Complainants, the "unique twist" in these works is that the young protagonist is a teacher of his peers and must deal with situations that arise from that fact. (Opp. at 4.) This "unique twist" plainly appears in Mr. Signer's earlier creation. Complainants allege further that the pacing of the two works is "identical." (*Id.* at 23.) The pacing of the works also is identical to every half hour television sitcom, and therefore is not protectable as original expression.

To summarize: other than the similarity of elements that must be filtered out, there is not enough similarity between the two works to create a genuine issue of material fact on substantial similarity. While they share the same premise, *Mr. Young* and *Student Teacher* take entirely different paths as the stories develop, with entirely different plot lines, characterizations, moods, and themes.

3. CONCLUSION

Taking as true the few facts properly set forth by Complainants in their Opposition, and drawing all justifiable inferences in their favor, no substantial similarity exists between *Student*

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Teacher and *Mr. Young*. Therefore, *Mr. Young*, as a matter of law, does not infringe Complainants' copyrights.

ORDER

Accordingly, it is my Initial Determination that Respondents' motion for summary determination of no copyright infringement (Motion Docket No. 886-021) is GRANTED. Complainants' allegations under section 337(a)(1)(B) are hereby terminated. This Initial Determination, along with supporting documentation, is hereby certified to the Commission.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues herein.

Additionally, Complainants' motion to strike (Motion Docket No. 886-022) is DENIED.

Findings of Fact

Based upon all of the foregoing, and pursuant to 19 C.F.R. § 210.18(e), the following facts appear without substantial controversy and are deemed established:

1. The following elements of *Mr. Young* were independently created, before any alleged access by Mr. Signer to the asserted works:
 - a. A male student becomes the teacher of students of his own age who would otherwise be his classmates
 - b. A fun loving but mischievous male student is the protagonist's best friend
 - c. A bullying classmate causes complications for the protagonist

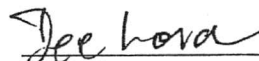
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- d. A romantic interest who is cute and sweet does not return the protagonist's affection, causing him heartache
 - e. The protagonist has conflicts with an authority figure (the principal)
 - f. The protagonist has conflicts with a superannuated English teacher
 - g. A Vietnamese janitor with martial arts superpowers helps the protagonist
2. There is no substantial similarity in any of the copyrightable elements that remain after filtering out the independently created elements of *Mr. Young*.
3. The statements provided in Mr. Signer's declaration are unrebutted and established as true.

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submission may be made by facsimile and/or hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.



Dee Lord

Administrative Law Judge

**CERTAIN TV PROGRAMS, LITERARY
WORKS FOR TV PRODUCTION AND
EPISODE GUIDES PERTAINING TO SAME**

337-TA-886

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, **John Shin, Esq.**, and the following parties as indicated, on

FEB 20 2014



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