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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14
15
16 GREG D. CROWDER, an individual;
17 TONY FREITAS, an individual,

18 Plaintiffs,

19 vs.

20 NBC UNIVERSAL, INC., a Delaware
21 corporation; SCOTT STUBER
22 PRODUCTIONS, INC., a California
23 corporation; BRANDON CAMP, an
24 individual; MIKE THOMPSON, an
25 individual; and DOES 1 through 20,

26 Defendants.

) Case No. CV 09-6681 ODW (AGR_x)
) Assigned to the Hon. Otis D. Wright II
)

) **OPPOSITION TO PLAINTIFFS'**
) **EX PARTE APPLICATION FOR**
) **TEMPORARY RESTRAINING**
) **ORDER AND ORDER TO SHOW**
) **CAUSE RE PRELIMINARY**
) **INJUNCTION; REQUEST FOR**
) **MONETARY SANCTIONS**
) **AGAINST PLAINTIFFS AND THEIR**
) **COUNSEL**

) [Declarations Of Brandon Camp, Mike
) Thompson, Scott Bernstein, Scott Stuber,
) Eddie Egan, Kelli L. Sager and Andrew
) J. Thomas With Exhibits A-F; Objections
) to Plaintiffs' Evidence; And Proposed
) Order Filed Concurrently.]

27)
28) Action Filed: September 15, 2009

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SUMMARY OF ARGUMENT

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3 In this action, plaintiffs seek to enjoin the nationwide release of a major
4 motion picture based entirely on a claim of copyright infringement that is so lacking
5 in support as to be sanctionable. The only thing that plaintiffs’ script “Truth” even
6 arguably has in common with Universal’s feature film Love Happens is that both
7 works include a character who has authored a book that can loosely be described as
8 being in the “self-help” genre (although even these basic characters are otherwise
9 dissimilar), and both ultimately reveal information about themselves that their
10 readers did not know. The stories otherwise are vastly different: Love Happens is a
11 classic romantic comedy/drama that centers around a love story between the quirky,
12 vulnerable Jennifer Aniston character and the quirky, sensitive Aaron Eckhart
13 character, whose “secret” is that he is a grief counselor who still grieves for his
14 deceased wife; plaintiffs’ story is a dark, tension-filled psychodrama with no love
15 story, featuring a sinister, manipulative male lead, with a story line that involves
16 child kidnapping, heroin addiction, gratuitous sex, and the murder of three people.

17 At its core, this lawsuit is a classic example of an idea submission/implicit
18 contract suit – a claim so common in the entertainment industry that one California
19 court described such lawsuits as evidencing “that obsessive conviction, so frequent
20 among authors and composers, that all similarities between their works and any
21 others which appear later must inevitably be ascribed to plagiarism.” Klekas v.
22 EMI Films, Inc., 150 Cal. App. 3d 1102, 1114 (1984). But because claims for
23 purported “theft” of ideas do not provide any basis for a threatened injunction (nor
24 any basis for federal jurisdiction), plaintiffs have concocted a baseless copyright
25 claim, to give them the leverage of seeking an eleventh-hour emergency injunction
26 on the eve of the nationwide release of Universal’s feature film.

27 In what can only be described as classic sandbagging, plaintiffs
28 opportunistically waited until the very last moment – the day that Love Happens

1 had its premiere, and only three days before its scheduled release in some 1,900
2 theaters – to ambush Universal with a massive set of moving papers, replete with
3 expert declarations and hundreds of pages of exhibits. The gamesmanship evident
4 in this TRO Application – filed months after defendant NBC Universal, Inc.
5 (“Universal”) first began advertising the film (see Egan Decl. ¶ 16), and more than
6 six weeks after plaintiffs admit they became aware of facts they cite as the basis for
7 their claim – is reason enough for its denial.

8 As demonstrated below, plaintiffs’ Application also should be denied because
9 plaintiffs have failed to show a likelihood of success on their copyright
10 infringement claim¹ and have failed to establish any concrete injury – let alone
11 irreparable harm – that they will suffer if a TRO is denied, and because the balance
12 of hardships weighs overwhelmingly in favor of Universal. The last-minute TRO
13 that plaintiffs seek would have catastrophic consequences for the defendants –
14 costing Universal tens of millions of dollars, leaving hundreds of theaters dark,
15 putting Universal in legal jeopardy with theater operators across the country, and in
16 all likelihood preventing Love Happens from being released theatrically at all in
17 2009, if ever. See Egan Decl. ¶¶ 21-26.

18 For all these reasons, this Court should deny plaintiffs’ ex parte TRO
19 Application and should impose sanctions against plaintiffs and their counsel of
20 record for their blatant abuse of the ex parte process.²

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26 ¹ Plaintiffs’ other claims also are meritless, but because those claims are not
offered as grounds for a TRO, they are addressed only briefly below.

27 ² This Court’s standing order states: “Sanctions may be imposed for misuse
28 of ex parte applications. Mission Power Engineering Co. v. Continental Casualty
Co., 883 F. Supp. 488 (C.D. Cal. 1995).”

**PLAINTIFFS FAIL TO JUSTIFY THE NEED FOR EX PARTE RELIEF
BECAUSE ANY “EMERGENCY” WAS CAUSED BY THEIR OWN
DECISION TO DELAY SEEKING INJUNCTIVE RELIEF**

Plaintiffs admit in their TRO Application that they had reason to know of the purported basis for their claims at least by August 2, 2009.³ Yet plaintiffs waited more than six weeks – until just three days before the nationwide theatrical release of Love Happens – to file this action and seek injunctive relief. On August 20, 2009, plaintiffs registered their script for copyright protection – a prerequisite to filing suit – so they surely had determined by August 20 that they were pursuing claims against Universal. Yet they still failed to provide any notice to Universal of their claims – let alone of their intent to seek an injunction – until September 14.

In a telephone conversation with Universal’s counsel on September 14, plaintiffs’ counsel admitted that the reasons for this delay were entirely tactical – plaintiffs did not want Universal to preemptively seek declaratory relief on their copyright claim (which could have resulted in that claim being addressed in an orderly manner with adequate time for briefing by both sides, not just plaintiffs), and they wanted sufficient time to complete the preparation of their own expert witness declarations. See Sager Decl. at ¶¶ 3-4.

³ They almost certainly knew about Love Happens even earlier, as it was advertised extensively in the Los Angeles area and the rest of the country beginning in June 2009. See Egan Decl. ¶¶ 10, 14-20. The movie trailers first appeared on Yahoo.com on June 17 and also in the “Access Hollywood” television show, and they then appeared at the beginning of numerous popular movies and on numerous other websites. See Egan Decl. ¶ 15. The film project also was described in numerous articles in the press beginning in 2007, including articles that described the protagonist, his secret, and the basic plot. See, e.g., Thomas Decl. Exs. D-F. The main trailer begins with a shot of the “A-Okay” motivational book written by Eckhart’s grief counselor character and a scene in which Eckhart is leading a large meeting in Seattle. See Egan Decl. Ex. B. Anyone seeing the trailers would learn that the movie’s story included a motivational speaker who was hiding a secret. Id.

1 In other words, plaintiffs waited until the last minute to seek emergency relief
2 to try to gain an unfair advantage by forcing Universal to respond within 24 hours
3 to a TRO Application supported by hundreds of pages of declarations and exhibits.
4 There is no legitimate reason why plaintiffs could not have filed suit and sought
5 relief in time for a preliminary injunction motion to have been heard on regular
6 notice.⁴ The last-minute “emergency” caused by the September 18 release date for
7 the motion picture thus is a situation entirely of plaintiffs’ own making.

8 That fact alone is reason enough for this Court to deny plaintiffs’ ex parte
9 application for a TRO. In the Central District of California, it is well established
10 that, to justify ex parte relief, plaintiffs must make two specific showings: first, that
11 their “cause will be irreparably prejudiced if the underlying motion is heard
12 according to regular noticed motion procedures”; and second, that plaintiffs are
13 “without fault in creating the crisis that requires ex parte relief, or that the crisis
14 occurred because of excusable neglect.” See Mission Power, 883 F. Supp. at 492.
15 Plaintiffs cannot satisfy this test. Indeed, their ex parte application highlights the
16 abuse that Judge Edwards denounced in Mission Power:

17 [E]x parte motions are inherently unfair, and they pose a threat to
18 the administration of justice. They debilitate the adversary system.
19 Though the adversary does have a chance to be heard, the parties’
20 opportunities to prepare are grossly unbalanced. Often, the
21 moving party’s papers reflect days, even weeks, of investigation
22 and preparation; the opposing party has perhaps a day or two. This
23 is due primarily to gamesmanship. The opposing party is usually
24 told by telephone when the moving party has completed all
25 preparation of the papers and has a messenger on the way to court
26 with them. The goal often appears to be to surprise opposing

25 ⁴ When Universal’s counsel asked plaintiffs’ counsel to agree to a reasonable
26 briefing schedule, he responded that “if the movie wasn’t coming out for a couple
27 of weeks,” he would do so, but because the movie is scheduled for national release
28 on Friday, and his clients’ “goal” is to stop its release, he would not agree to any
delay. See Sager Decl. ¶ 3-4. Of course, plaintiffs did have “a couple of weeks” –
and more – to schedule briefing on this matter, but chose instead to lie in wait until
a few days before the film’s scheduled release.

1 counsel or at least to force him or her to drop all other work to
2 respond on short notice.

3 883 F. Supp. at 490 (emphasis added). That is precisely what plaintiffs have done
4 here. This type of gamesmanship “detracts from the fundamental purpose of the
5 adversary system, namely, to give the court the best possible presentation of the
6 merits and demerits of the case on each side.” Id. at 491. As Judge Edwards noted,
7 the FRCP and this Court’s Local Rules “contemplate that regular noticed motions
8 are most likely to produce a just result ... because they give the adversary an
9 opportunity to prepare a thorough opposition (and, if needed, an opportunity for oral
10 argument) according to a predesigned, consistent timetable.” Id.

11 Importantly, these procedures only can be bypassed in extremely rare
12 circumstances. To make clear exactly how rare it is for a court to bypass the regular
13 noticed motion procedures, Judge Edwards provided two examples of when it is
14 appropriate to provide a party with ex parte relief. The first example concerns those
15 cases when “notice to the adversary might nullify the ability to ever achieve the end
16 sought” – where, for instance, the non-moving party might move a yacht to another
17 jurisdiction if it is alerted to the moving party’s attempts to seize it. See id. at 490.
18 The second example is where there is a “temporal urgency such that immediate and
19 irreparable harm will occur if there is any delay in obtaining relief.” Id. This latter
20 example concerns those cases where, as Judge Edwards aptly put it, “[t]he tomatoes
21 will spoil if we don’t move them immediately.” Id.

22 These examples drive home a simple point: ex parte relief is only appropriate
23 in a situation that can fairly be characterized as a “crisis.” Here, the only “crisis” is
24 the fact that Universal’s motion picture Love Happens is set for nationwide release
25 in two days – on Friday, September 18 – a “crisis” that plaintiffs could have
26 avoided completely by filing suit and seeking relief weeks ago, when – by their own
27 admission – they became aware of the purported basis for their claims. Judge
28 Edwards noted in Mission Power that “filing an ex parte motion ... is the forensic

1 equivalent of standing in a crowded theater and shouting, ‘Fire!’ There had better
2 be a fire.” 883 F. Supp. at 492. Here, there is no fire. Only smoke.

3 **3.**

4 **PLAINTIFFS INCORRECTLY STATE THE STANDARD FOR ISSUANCE**
5 **OF A TEMPORARY RESTRAINING ORDER**

6 The Ninth Circuit recognizes that “an injunction is a ‘harsh and drastic’
7 discretionary remedy, never an absolute right.” Abend v. MCA, Inc., 863 F.2d
8 1465, 1479 (9th Cir. 1988) (citation omitted). A preliminary injunction may issue
9 only upon a showing that: (1) the moving party will suffer irreparable injury if
10 injunctive relief is not granted, (2) the moving party probably will prevail on the
11 merits, (3) the moving party will be helped more than the non-moving party will be
12 harmed by the injunction, and (4) granting the preliminary injunction is in the
13 public interest. Stanley v. University of S. Cal., 13 F.3d 1313, 1319 (9th Cir. 1994).
14 The party seeking the injunction carries a heavy burden of making a “clear
15 showing” that the injunction should be granted. Id. at 1320 (emphasis added).

16 Plaintiffs rely heavily on older cases in asserting that plaintiffs in copyright
17 infringement actions are entitled to a presumption of irreparable harm upon
18 showing a likelihood of success on the merits. Recent decisions by the United
19 States Supreme Court and by this District, however, cast serious doubt on whether
20 this presumption exists, even assuming a plaintiff can establish a likelihood of
21 success on their copyright infringement claim (which plaintiffs here cannot do). In
22 eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391, 126 S. Ct. 1837 (2006), the
23 Supreme Court held that, “[a]ccording to well-established principles of equity,” a
24 plaintiff “must demonstrate” that the traditional four factors weigh in favor of
25 permanent injunctive relief.⁵ Following eBay, the Supreme Court recently rejected
26

27 ⁵ In eBay, the Supreme Court noted that it has “consistently rejected
28 invitations to replace traditional equitable considerations with a rule that an
injunction automatically follows a determination that a copyright has been
infringed.” Id. at 392-93. In a detailed analysis of eBay’s application to copyright

1 as “too lenient” the Ninth Circuit’s preliminary injunction standard, which allowed
2 for the issuance of injunctive relief on a showing of a mere “possibility” of
3 irreparable harm in circumstances where the plaintiff demonstrated a strong
4 likelihood of prevailing on the merits. Winter v. Natural Resources Defense
5 Council, Inc., ___ U.S. ___, 129 S. Ct. 365, 375-376 (2008). The Supreme Court
6 emphasized that “[i]ssuing a preliminary injunction based only on a possibility of
7 irreparable harm is inconsistent with our characterization of injunctive relief as an
8 extraordinary remedy that may only be awarded upon a clear showing that the
9 plaintiff is entitled to such relief.” Id. at 375-76. Instead, the Court said that the
10 moving party must satisfy the traditional four-factor equitable test, and must
11 demonstrate “that irreparable injury is likely in the absence of an injunction.” Id. at
12 375 (original emphasis); see also Johnson v. Couturier, 572 F.3d 1067, 1081 (9th
13 Cir. 2009) (noting that the Supreme Court “recently clarified” that preliminary
14 injunctive relief requires a showing of likelihood of irreparable harm).

15 In view of the unsettled state of the law in this area, this Court should not
16 take the extraordinary, draconian step of enjoining the nationwide release of a
17 motion picture based merely on the purported presumption of harm to plaintiffs.

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24 injunctions, Judge Stephen Wilson in Metro-Goldwyn-Mayer Studios, Inc. v.
25 Grokster, Ltd., 518 F. Supp. 2d 1197 (C.D. Cal. 2007), found that “the presumption
26 of irreparable harm no longer inures to the benefit of plaintiffs.” Id. at 1211; see
27 also Torspo Hockey Int’l, Inc. v. Kor Hockey Ltd., 491 F. Supp. 2d 871, 881 (D.
28 Minn. 2007) (“eBay’s logic forbids courts to categorically presume irreparable
harm in the preliminary-injunction context”). Judge Wilson relied on the Supreme
Court’s statement in eBay that plaintiffs “must demonstrate” that the traditional
factors favor an injunction, which he interpreted to mean that the plaintiff has the
burden of proof on the question of irreparable harm and that even a rebuttable
presumption is no longer permitted. Grokster, 518 F. Supp. 2d at 1211.

**PLAINTIFFS HAVE NOT MET THEIR BURDEN OF SHOWING A
LIKELIHOOD OF SUCCESS ON THE MERITS**

**A. Plaintiffs Cannot Establish A Likelihood Of Success On Their Claim for
Copyright Infringement.**

To establish copyright infringement, a plaintiff must prove “(1) ownership of a valid copyright and (2) copying by the defendant of protectable elements of the work.” CDN Inc. v. Kapes, 197 F.3d 1256, 1258 (9th Cir. 1999); accord Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000). Where, as here, there is no direct evidence of copying, the second element requires plaintiffs to prove both that the defendants had “access” to the plaintiffs’ copyrighted work and that there is “substantial similarity” of protected expression between the copyrighted work and defendants’ work. Three Boys Music Corp., 212 F.3d at 481; see also Chase-Riboud v. Dreamworks, Inc., 987 F. Supp. 1222, 1225 (C.D. Cal. 1997). Plaintiff cannot meet these requirements.

**1. Love Happens Was Independently Created By Writers And
Producers Who Never Heard Of Plaintiffs Or Had Access To
Plaintiffs’ Screenplay.**

To prevail, plaintiffs must show that the creators of Love Happens had “access” to the plaintiffs’ screenplay.⁶ Although plaintiffs present evidence that they submitted their screenplay to a Universal creative executive, Scott Bernstein, “Universal” is not a monolith. Plaintiffs have not presented and cannot present any

⁶ Proof of access “requires ‘an opportunity to view or to copy plaintiff’s work.’” Three Boys Music, 212 F.3d at 482 (quoting Sid & Marty Krofft Television Prod., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1172 (9th Cir. 1977)). “Opportunity” has been defined as a “reasonable opportunity or reasonable possibility of viewing the plaintiff’s work,” which is more than a “bare possibility.” Id. (citing 4 Nimmer, Nimmer on Copyright, § 13.02[A], at 13-19 (1999); Jason v. Fonda, 526 F. Supp. 774, 775 (C.D. Cal. 1981)). Access “may not be inferred through mere speculation or conjecture.” Id. (quoting Nimmer).

1 evidence that the writers and producers who actually created the film Love Happens
2 ever had access to plaintiffs’ work, had any contact with plaintiffs, or collaborated
3 in any way on Love Happens with Mr. Bernstein or anyone else who knew anything
4 about plaintiffs’ screenplay.

5 To the contrary, Universal’s incontrovertible evidence establishes that the
6 script for Love Happens was written by Brandon Camp and Mike Thompson “on
7 spec”⁷ in 2006 and submitted to Scott Stuber Productions, Inc. that same year. See
8 Camp Decl. ¶ 4; Thompson Decl. ¶ 4; Stuber Decl. ¶¶ 3-4. Mr. Camp and Mr.
9 Thompson did not have any contact with plaintiffs and never saw plaintiffs’ script.
10 See Camp Decl. ¶ 7; Thompson Decl. ¶ 7. They also did not have any contact with
11 Scott Bernstein, and had never heard of plaintiffs or their script until this lawsuit
12 was filed. See id. Mr. Stuber likewise never had any contact with plaintiffs and
13 never saw plaintiffs’ script. See Stuber Decl. ¶¶ 6-8. Mr. Bernstein did not give
14 plaintiffs’ screenplay to – or ever discuss it with – anyone involved in the
15 development of Love Happens, including Mr. Stuber, Mr. Camp or Mr. Thompson.
16 See Bernstein Decl. ¶ 2; Stuber Decl. ¶ 7; Camp Decl. ¶ 7; Thompson Decl. ¶ 7.

17 Proof of independent creation defeats a claim of copyright infringement.
18 Three Boys Music, 212 F.3d at 486; Granite Music Corp. v. United Artists Corp.,
19 532 F.2d 718, 720 (9th Cir. 1976); Rice v. Fox Broadcasting Co., 148 F. Supp. 2d
20 1029, 1061 (C.D. Cal. 2001), aff’d in part, 330 F.3d 1170 (9th Cir. 2003).
21 Accordingly, even assuming, for sake of argument, that plaintiffs could show both
22 access and substantial similarity – which they cannot – any inference of copying is
23 defeated by proof that Love Happens was independently created, and not copied
24 from plaintiffs’ copyrighted work. Three Boys Music, 212 F.3d at 486.

25
26 _____
27 ⁷ A “spec script” is one written with the speculation that it will be sold; one
28 that the Variety entertainment industry’s language dictionary defines as being
“shopped or sold on the open market, as opposed to one commissioned by a studio
or a production company.” See Thomas Decl. Ex. C.

1 **2. Plaintiffs Also Have Failed To Make Out A Prima Facie**
2 **Case Of Infringement Based On Substantial Similarity.**

3 Plaintiffs base their entire similarity argument on a comparison between their
4 script “Truth” and an early draft – dated October 3, 2007 – of the screenplay for
5 Love Hurts. (TRO App. at 17-21, Plaintiffs’ Exs. C, H.) This comparison is
6 irrelevant for purposes of an analysis of substantial similarity under the Ninth
7 Circuit law. Courts in this Circuit consistently have held that only the final version
8 of a work, as presented to the public, should be considered when deciding copyright
9 infringement claims. See Chase-Riboud, 987 F. Supp. at 1227 (citation omitted)
10 (refusing to consider allegedly infringing scenes that were removed from the final
11 film as basis for claim of substantial similarity). As one court in this District has
12 noted, “reliance on earlier scripts for a showing of actionable infringement in the
13 final screenplay is without solid foundation in law ...” Idema v. Dreamworks, Inc.,
14 162 F. Supp. 2d 1129, 1185 n.67 (C.D. Cal. 2001). Relying on Ninth Circuit
15 precedent, another district court likewise refused to consider earlier script drafts on
16 the ground that “[c]onsideration of earlier versions of [a] screenplay is too
17 unreliable in determining substantial similarity.” Walker v. Time Life Films, Inc.,
18 615 F. Supp. 430, 435 (S.D.N.Y. 1985) (citing Litchfield v. Spielberg, 736 F.2d
19 1352, 1356 (9th Cir. 1984), aff’d, 784 F.2d 44 (2d Cir. 1986). Plaintiffs’ failure to
20 compare the final version of the Love Happens screenplay (or the motion picture
21 being released on Friday) with their script is thus fatal to their copyright
22 infringement argument.

23 **3. Any Purported Similarities Between Plaintiffs’ Script And**
24 **Love Happens Are Unprotectable Ideas Or Scenes À Faire.**

25 To determine whether there is substantial similarity, the Ninth Circuit uses an
26 “extrinsic/objective” test to compare the works. Apple Computer, Inc. v. Microsoft
27 Corp., 35 F.3d 1435, 1442 (9th Cir. 1994); Kouf v. Walt Disney Pictures &
28 Television, 16 F.3d 1042, 1045 (9th Cir. 1994); Three Boys Music, 212 F.3d at 485.

1 The “extrinsic” component tests for similarity of ideas and expression is
2 based on objective external criteria, whereas the “intrinsic” component tests for
3 “similarity of expression from the standpoint of the ordinary reasonable observer” –
4 a subjective test. Apple Computer, 35 F.3d at 1442. The extrinsic test usually
5 requires “analytical dissection.” Three Boys Music, 212 F.3d at 485; Dr. Seuss
6 Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1398 n.3 (9th Cir.
7 1997). For fictional works, the extrinsic test focuses on articulable similarities
8 between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of
9 events in the two works. Kouf, 16 F.3d at 1045. In comparing the works, the court
10 must filter out any parts of the copyrighted work that are not protected; only
11 “protected expression” is relevant to assess “substantial similarity.” See Shaw v.
12 Lindheim, 919 F.2d 1353 (9th Cir. 1990) (party claiming infringement “may place
13 no reliance upon any similarity in expression resulting from unprotectable
14 elements”); Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002).

15 In filtering out unprotectable material, “it is an axiom of copyright law that
16 the protection granted to a copyrighted work extends only to the particular
17 expression of the idea and never to the idea itself.” Sid & Marty Krofft, 562 F.2d at
18 1163; Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985)
19 (“no author may copyright facts or ideas”); 17 U.S.C. § 102. Under the “merger
20 doctrine,” where an idea is capable of being expressed in limited ways, the
21 expression “merges” with the idea and is not subject to copyright protection. Ets-
22 Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1082 (9th Cir. 2000).

23 Similarly, the scènes à faire doctrine holds that forms of expression that are
24 “standard, stock, or common to a particular subject matter or medium are not
25 protectable under copyright law.” Satava v. Lowry, 323 F.3d 805, 809 (9th Cir.
26 2003); accord Apple Computer, 35 F.3d at 1443 (“similarities derived from the use
27 of common ideas cannot be protected; otherwise, the first to come up with an idea
28 will corner the market”). Thus, “[f]amiliar stock scenes and themes that are staples

1 of literature” – the ideas or scenes that flow naturally from other ideas or basic plot
2 premises or scenes – are not protected by copyright. Cavalier, 297 F.3d at 823

3 As the Ninth Circuit explained, “courts will not protect a copyrighted work
4 from infringement if the expression embodied in the work necessarily flows from a
5 commonplace idea; like merger, the rationale is that there should be no monopoly
6 on the underlying unprotectable idea.” Ets-Hokin, 225 F.3d at 1082 (emphasis
7 added); see also Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985) (no
8 protection for idea of “criminal organizations that murder healthy young people,
9 then remove and sell their vital organs to wealthy people in need of organ
10 transplants” and a young professional who investigates and exposes the criminals);
11 Olson v. NBC, 855 F.2d 1446, 1450 (9th Cir. 1988) (common ideas, such as a
12 “group action-adventure series designed to show Vietnam veterans in a positive
13 light,” are unprotectable); Rice, 148 F. Supp. 2d at 1055 (finding no substantial
14 similarity between two television shows on magic tricks because there are “only so
15 many ways to make a show about revealing the secrets of known magic tricks”).

16 Because of the importance of analytic dissection in separating out
17 unprotectable elements from any comparison of the works at issue, courts have
18 condemned lists of purported similarities frequently proffered by copyright
19 plaintiffs and their hired experts as being “inherently subjective and unreliable.”
20 Litchfield v. Spielberg, 736 F.2d at 1356.

21 Here, many of the supposed similarities highlighted by plaintiffs relate to
22 generic attributes that would be common to the movie industry’s portrayal of any
23 successful author and speaker – being well-dressed and articulate, scenes showing
24 the celebrity speaking to large audiences, and using a common mantra or catch-
25 phrase.⁸ See TRO App. at 17. Likewise, the presence of a manager or mentor

26 _____
27 ⁸ Plaintiffs’ “Own It” phrase (which is not in Universal’s film) is not subject
28 to copyright protection any more than Paris Hilton’s “That’s Hot,” Donald Trump’s
“You’re Fired” or many other catch phrases that people say as part of every day life.

1 character is a stock device in nearly any work about a successful entertainer, and the
2 presence of a supporting “buddy” or “sidekick” character is common to many works
3 of literature and film. See id. at 18; see also Nichols v. Universal Pictures Corp., 45
4 F.2d 119, 122 (2d Cir. 1930) (use of “stock figures” and “common characters” in an
5 expressive work – in that classic case, dueling plays depicting warring Irish and
6 Jewish families exacerbated by the marriage of their children – “is no more
7 susceptible of copyright than the outline of Romeo and Juliet”).

8 Indeed, the premise of a charismatic motivational speaker who is less than
9 honest has been the subject of numerous prior works, including the Tom Cruise
10 motivational speaker in Magnolia, the self-help counselor played by Terrence
11 Stamp in the Jim Carrey comedy Yes Man, the fake faith healer played by Steve
12 Martin in Leap of Faith, and the ethically challenged preacher in Upton Sinclair’s
13 best-selling novel Elmer Gantry. The concept of a purported hero with a past that is
14 not known also is an idea often depicted in the movies, as exemplified by Clint
15 Eastwood’s “Preacher” in Pale Rider and the Lawrence Olivier character in the
16 Alfred Hitchcock movie Rebecca, who is hiding a secret and feeling guilty over the
17 mysterious circumstances of his first wife’s death, among many others.

18 **4. Plaintiffs’ Script and Love Happens Are Not Substantially**
19 **Similar In Characters, Sequence Of Events, Plot, Dialogue,**
20 **Mood Or Themes.**

21 Plaintiffs’ discussion of the purported “substantial similarity” between their
22 screenplay and Universal’s feature film⁹ illustrates the fallacy of relying on “lists”
23 of purported similarities – most of which are contrived, at best, and wholly
24 concocted, at worst. Plaintiffs rely heavily on the fact that both works contain a
25 lead character who is an author of a self-help book of some kind – but there the
26 similarity ends.

27 _____
28 ⁹ Compare Plaintiffs’ Exs. C (their screenplay) and H (Oct. 3, 2007 draft of
Universal screenplay). See also Universal Ex. A (spec script).

1 Universal's film is a classic romantic comedy/drama, in which the storyline
2 follows the relationship between the quirky, vulnerable female lead played by
3 Jennifer Aniston, and the sensitive, vulnerable male lead played by Aaron Eckhart.
4 The film follows their "meet-cute" moment (where Eckhart's character literally runs
5 into Aniston's character at a hotel, and she pretends to be deaf to escape the
6 encounter) through the development of their relationship as they experience their
7 first date, get to know each other, fall in love, break up, and ultimately get reunited.
8 Throughout the film, the Eckhart character is portrayed as a genuinely caring,
9 compassionate man who is trying to help other people deal with grief, while
10 struggling with his own loss of his wife in a tragic car accident. (Plaintiffs' Ex. H.)

11 In contrast, plaintiffs' screenplay is a dark, tension-filled psycho-drama,
12 featuring a creepy, sinister male lead who uses his charisma and psychological tools
13 to manipulate people for his own purposes, in a storyline that ultimately involves
14 the murder of three people. There is gratuitous sex – the lead character describes
15 himself at one point as a "sex addict" and uses his manipulative powers to set up
16 sexual liaisons among other minor characters as well as for himself – but no
17 character that could even remotely be described as a "romantic" female lead. Nor
18 can this story remotely be described as a romantic comedy. The mood, description
19 of events, and ultimate "message" (if there is one) can only be described as somber
20 and dark. The lead character is portrayed as largely self-absorbed, with a thinly
21 veiled contempt for most of the other people in the film, and his mantra is designed
22 to inspire people to get what they want for themselves, not to help others.
23 (Plaintiffs' Ex. C.) Given this over-arching difference on the intrinsic level – where
24 the overall expression could hardly be more different – it is plain that the average
25 viewer would not remotely view these two screenplays as similar, let alone
26 "substantially" similar.

27 Moreover, given the vast differences between the two works, it is not
28

1 surprising that plaintiffs and their experts attempt to rely on lists of so-called
2 “similarities” from the most inane and even inaccurate description of events, while
3 ignoring the basic plot, themes, mood, setting, sequence of events, dialogue, and
4 characters that make up the extrinsic test for similarity in this Circuit. For example:

5 Plot: Universal’s film is a classic boy-meets-girl, boy-loses-girl, boy-gets-
6 girl romantic comedy/drama, which follows the relationship between the two leads
7 as it evolves. On the other hand, plaintiffs’ screenplay is a film noir drama, where
8 the lead character is portrayed as manipulating other minor characters through
9 sexual dalliances, bribery, and three murders.

10 Mood: Plaintiffs’ screenplay is grim, dark, and gritty. The “emotion”
11 projected to the audience is tension, fear, and discomfort. The ending is non-
12 committal, ambiguous. Universal’s film is light, quirky, and romantic. The
13 “emotion” projected to the audience alternatives between cheerfulness and good
14 humor to empathetic sadness, with a happy and satisfying ending.

15 Dialogue: Plaintiffs do not even attempt to claim any similarity between the
16 light-hearted and often imaginative dialogue in Universal’s film, and the heavy-
17 handed, somber dialogue in their own screenplay. There is nothing that is the same
18 or even similar in the dialogue evidenced in these two screenplays. (Compare
19 Plaintiffs’ Ex. C, H.)

20 Characters: As described above, the lead male characters share only a
21 generic professional connection as authors in a loosely-described self-help field, but
22 even in that broad genre, the two male leads do not share any characteristics,
23 personality traits, or background. The second primary character in the Universal
24 film – the romantic female lead – is nonexistent in plaintiffs’ screenplay. The
25 “manager” figures (a generic character that is common to almost all stories
26 involving a ‘celebrity’ character) are not at all similar – plaintiffs’ is a father figure
27 (who appears until the very end of the script to be the actual father of plaintiffs’ lead
28 character, until it is revealed that he kidnapped the male lead when the latter was a

1 child, and who is depicted by the end of the script as a murderer and religious sect
2 fanatic); Universal’s supporting male lead is a friend of the author – identified as
3 being roughly the same age (contrary to plaintiffs’ false description) – who looks
4 out for the author and helps him get back together with the Aniston character at the
5 end. None of the other minor characters are similar (a heroin addict mother in the
6 plaintiffs’ screenplay; compared to an even quirkier female buddy/employee for the
7 Aniston character (who performs slam poetry), and Aniston’s ex-boyfriend
8 musician who winds up befriending her new beau).

9 Setting: Although plaintiffs make much of the fact that both author-
10 characters appear at public events, that also is a common element for a “celebrity”
11 character. The events are very different in their portrayal, however, from the
12 televangelistic preaching style of the plaintiffs’ character, and his superficial
13 interactions with his “fans,” compared to the intimate group-therapy feel of the
14 Eckhart character’s interactions with individuals attending his sessions, the flash-
15 backs to his wife (no flash-backs exist in plaintiffs’ script), and the flower shop and
16 gardens where the Aniston character spends time with Eckhart and others.

17 Even the sequence of events is dissimilar. Although plaintiffs falsely claim
18 that both scripts “begin” with a tour where the male leads are speaking before a
19 large audience, that is not the case. Universal’s film does begin with Eckhart’s
20 character arriving in Seattle for an event, and his early meeting of Aniston’s
21 character occurs immediately after this introductory session. Plaintiffs’ screenplay
22 runs for 30 pages (roughly one-third of its total length) portraying its male lead
23 interacting with a variety of characters in a manipulative way, before he takes the
24 stage to give his controlled speech to a cheering audience. (Plaintiffs’ Ex. C.)¹⁰

25
26
27 ¹⁰ Plaintiffs and their “experts” also purport to describe other “similarities” in
28 the two works that are either overblown or do not exist as the Application describes
them, including the way plaintiffs portray the characters revealing themselves.

1 Because there is no protectable expression that is similar between the
2 Universal film and the plaintiffs' screenplay – let alone “substantial” similarity of
3 protectable expression – plaintiffs cannot demonstrate likelihood of success on the
4 merits of their copyright claim.

5 **B. Plaintiffs Cannot Base A TRO On Their Meritless Lanham Act Claim.**

6 Plaintiffs' Second Claim for Relief under the federal Lanham Act alleges
7 that the defendants have falsely “induc[ed] the impression” among the public that
8 defendants, and not plaintiffs, are the authors of Love Happens. See Complaint at
9 ¶ 35. This claim, however, squarely is foreclosed by the U.S. Supreme Court's
10 2003 decision in Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23,
11 123 S. Ct. 2041 (2003), which held that such claims of false attribution of literary
12 works are not cognizable under the Lanham Act.

13 In Dastar, the Supreme Court held that an alleged false representation about
14 the authorship of an expressive work – in that case, a failure to attribute authorship
15 to the alleged original creator – cannot give rise to any claim for “false designation
16 of origin” under Section 43(a) of the Lanham Act. Id., 539 U.S. at 31-37. The case
17 involved a video producer's editing and repackaging of a documentary television
18 series about World War II. The producer of the original series (Fox) brought claims
19 under the Lanham Act based on a theory of “reverse passing off” – i.e., on an
20 alleged misrepresentation by the defendant of “someone else's goods or services as
21 his own.” Id. at 27-28 & n.1. Specifically, Fox alleged that Dastar's conduct
22 amounted to a “false designation of origin” or false or misleading statement of fact
23 “as to the origin of [the] goods” under Section 43(a). Id. at 31.

24 The Supreme Court rejected Fox's contention that the term “origin of the
25 goods” under Section 43(a) could refer to the creator of the underlying expressive
26 content that Dastar copied. Instead, the Court held that “origin of the goods” in this
27 context denotes only the manufacturer or producer of “physical goods” sold in the
28 marketplace – in that case, the videotapes themselves – and not the person or entity

1 “that originated the ideas or communications that [the] ‘goods’ embody or contain.”
2 Id. at 32. To hold otherwise, the Supreme Court concluded, would bring the
3 Lanham Act into conflict with the Copyright Act, which governs the use of creative
4 works and the scope of author’s rights. Id. at 34-35. Here, because plaintiffs’
5 Lanham Act claim is based on an alleged false attribution of authorship of a literary
6 work, namely the film Love Happens, the claim is foreclosed under Dastar.¹¹

7 **5.**

8 **THE BALANCE OF HARDSHIPS WEIGHS OVERWHELMINGLY**
9 **IN FAVOR OF UNIVERSAL**

10 Plaintiffs’ assertion (TRO App. at 22) that this Court does not need to
11 conduct a “balancing of hardships” analysis is overstated, at best. Just last year, the
12 United States Supreme Court emphasized that

13 [a] preliminary injunction is an extraordinary remedy never
14 awarded as of right. In each case, courts must balance the
15 competing claims of injury and must consider the effect on each
16 party of the granting or withholding of the requested relief. In
17 exercising their sound discretion, courts of equity should pay

18 ¹¹ Plaintiffs do not even attempt to base their request for a TRO on the merits
19 of their Third Claim for Relief, for breach of implied contract, nor could they;
20 breach of contract claims are classic examples of the types of claims for which
21 damages are an adequate remedy. See Flynt Distributing Co. v. Harvey, 734 F.2d
22 1389, 1396 (9th Cir. 1984) (holding that district court erred in granting injunction
where money damages provided an adequate remedy for breach of contract);
Stanley v. Univ. of S. California, 13 F.3d at 1320 (no irreparable harm where
money damages for breach of contract provided an adequate remedy).

23 In any event, independent creation is a complete defense to a breach of
24 implied contract claim. See Hollywood Screentest of America, Inc. v. NBC
25 Universal, Inc., 151 Cal. App. 4th 631, 646-49 (2007); Mann v. Columbia Pictures,
26 128 Cal. App. 3d 628, 648-50 (1982); Teich v. General Mills, 170 Cal. App. 2d
27 791, 794, 803-05 (1959); see, supra, Section 4(A)(1). Additionally, because this is
28 essentially a case based on the alleged use of material from a copyrighted work,
with no allegations that specific contract terms were discussed, the state law implied
contract claim is preempted. See, e.g., Worth v. Universal Pictures, 5 F. Supp. 2d
816, 821-822 (C.D. Cal. 1997) (because “[m]ovie screenplays, the subject matter at
issue, are encompassed within federal copyright law,” the plaintiffs’ claims for
breach of implied contract were preempted).

1 particular regard for the public consequences in employing the
2 extraordinary remedy of injunction.

3 Winter, 129 S. Ct. at 375-76 (internal citations and quotation marks omitted;
4 emphasis added). In the context of motion pictures, courts have refused to enjoin
5 the release of a film where the balance of hardships weighed in the defendant's
6 favor. For example, in Chase-Riboud, 987 F. Supp. at 1233, the Central District of
7 California refused to enjoin the theatrical release of the movie Amistad because the
8 balance of hardships tipped in defendant's favor. The plaintiff's claim that she
9 would suffer irreparable injury from losing a market for film rights to her novel did
10 not outweigh the hardship to defendant studios, which had invested \$70 million to
11 \$75 million and were on the verge of releasing the movie. Id.¹²

12 Here, plaintiffs have not submitted any evidence to show that they face the
13 risk of severe, irreparable hardship. By contrast, the hardship Universal would
14 suffer from entry of a TRO would be catastrophic, and it severely outweighs any
15 hardship that plaintiffs would suffer from the denial of this Application.

16 **A. Any Theoretical Harm To Plaintiffs From Not Obtaining A Restraining
17 Order Is Compensable.**

18 As shown above, plaintiffs should not be given any presumption of
19 irreparable harm. Section 3, infra. This is particularly true where, as here, plaintiffs

20 _____
21 ¹² See also Monster Communications, Inc. v. Turner Broadcasting Sys., Inc.,
22 935 F. Supp. 490, 493-497 (S.D.N.Y. 1996) (declining to enjoin television
23 broadcast of documentary because balance of equities favored defendant); Tsiolis v.
24 Interscope Records, Inc., 946 F. Supp. 1344, 1357 (N.D. Ill. 1996) (“the harm to the
25 defendants in delaying the sale of the Album until after trial far outweighs the
26 potential harm to Tsiolis ...”); John Lemmon Films, Inc. v. Atlantic Releasing
27 Corp., 617 F. Supp. 992, 996-97 (W.D.N.C. 1985) (where defendant already had
28 spent \$470,000 on its “Starchaser” promotional campaign, court refused request for
injunctive relief); U.S. Shoe Corp. v. Brown Group, Inc., 740 F. Supp. 196, 200-01
(S.D.N.Y. 1990) (balance of hardships favored not forcing defendant to incur the
expense of developing substantial new advertising after spending more than
\$200,000 to develop and place ads, some of which had been printed and
distributed); Belushi v. Woodward, 598 F. Supp. 36, 37 (D.D.C. 1984) (refusing to
issue injunction that would disrupt “the coordination of advertising, serialization,
author appearances, and reviews and the release to the public of the book”).

1 have a low likelihood of succeeding on the merits of their claims.¹³ Because there
2 is no presumption of irreparable harm, plaintiffs must “demonstrate immediate
3 threatened injury.” Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674
4 (9th Cir. 1988) (emphasis in original).¹⁴

5 Here, plaintiffs have failed to show any injury that could justify the
6 extraordinary relief of a TRO. Without citing any supporting legal authorities –
7 because there are none – plaintiffs allege that deprivation of writer’s credits in Love
8 Happens (which Universal’s evidence shows that plaintiffs did not write) will cause
9 them “extreme harm” and “certain harm to their careers” justifying injunctive relief.
10 See TRO App. at 22, 23. These speculative claims are made without legal or
11 factual justification; as the Supreme Court held last year, claims like these that – at
12 most – recite the mere “possibility” of harm do not justify injunctive relief. See
13 Winter, 129 S. Ct. at 375-76; Goldie’s Bookstore, Inc. v. Superior Court, 739 F.2d
14 466, 472 (9th Cir. 1984) (overturning district court finding that plaintiff would lose
15 “untold customers” and profits as speculative); Big Country Foods, Inc. v. Board of
16 Education, 868 F.2d 1085 (9th Cir. 1989) (loss of contract not sufficient injury
17 where no evidence presented that contract would have been profitable).

18
19 _____
20 ¹³ Even if there were a presumption of irreparable injury, a very questionable
21 proposition under these circumstances, such a presumption is rebutted if the parties
22 are not competitors. LucasArts Enter. v. Humongous Enter., 815 F. Supp. 332, 337
23 (N.D. Cal. 1993) (rejecting presumption of irreparable harm because the parties
were not in competition), cited by Cadence Design Sys., Inc. v. Avant! Corp., 125
F.3d 824, 830 (9th Cir. 1997). Here, there is no evidence that plaintiffs are
producers or distributors of motion pictures and, thus, plaintiffs have made no
showing that they and Universal are competitors.

24 ¹⁴ It is well established that a party seeking interim injunctive relief must
25 show a greater likelihood of harm as the probability of their success on the merits
26 decreases. MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 516 (9th Cir.
1993); see also Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d at 830 (“[t]he
27 balance of hardships factor may assume significance in cases where the plaintiff has
not established a strong likelihood of success on the merits”). Given the
28 unlikelihood that plaintiffs will be able to make out any claim for copyright
infringement, a preliminary injunction would be warranted only if plaintiffs could
show that the absence of such an order would cause them extreme hardship.

1 Furthermore, mere economic losses, which are compensable by a damage
2 award, also do not constitute irreparable harm. Sampson v. Murray, 415 U.S. 61,
3 90 (1974); Los Angeles Mem. Coliseum Comm'n v. NFL, 634 F.2d 1197, 1202 (9th
4 Cir. 1980). Plaintiffs do not explain why monetary damages would not adequately
5 compensate them in the extremely unlikely event that they ultimately prevail on
6 their claims.¹⁵ Finally, plaintiffs assert that release of the movie will render their
7 script unmarketable. See TRO App. at 22. The plaintiff made the same argument
8 to no avail in Chase-Riboud, where the plaintiff had a much stronger claim than
9 plaintiffs here because she had written a well-known novel¹⁶ based on the
10 “Amistad” historical events, Echo of Lions, that she had submitted to the studio
11 prior to the making of the film Amistad. See Chase-Riboud, 987 F. Supp. at 1224,
12 1233. Because plaintiffs have not shown¹⁷ that they will suffer any concrete harm,
13 let alone irreparable harm, without a TRO, their Application should be denied.

14 **B. Plaintiffs’ Delay In Seeking Relief Confirms That Any Theoretical**
15 **Harms They Face Are Not Irreparable.**

16 Plaintiffs’ claims about irreparable harm causing hardship also are
17 undermined by plaintiffs’ delay in filing suit or seeking injunctive relief. As the
18 court stated in Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374
19 (9th Cir. 1985), “[p]laintiff’s long delay before seeking a preliminary injunction
20 implies a lack of urgency and irreparable harm.” Id. at 1377; see also Metromedia
21 Broadcasting Corp. v. MGM/UA Entertainment Co., 611 F. Supp. 415, 427 (C.D.
22

23 ¹⁵ Indeed, plaintiffs make clear in their Complaint that compensatory
24 damages would suffice, by including detailed requests for monetary compensation.
See Complaint at pp. 12-13 (seeking actual damages in excess of \$2 million).

25 ¹⁶ The novel had sold more than 500,000 copies. See id.

26 ¹⁷ The lack of substantial similarity between plaintiffs’ script and Love
27 Happens also tips the balance of hardships in Universal’s favor. See Section
28 4(A)(4), supra. Because the two works do not have the same feel and do not target
the same audiences (i.e., one’s dark, the other’s a romantic drama), it is not as if
there could not be two movies emanating from these two very different ideas.

1 Cal. 1985) (four-month delay in filing suit after plaintiff was aware of claim
2 supported denial of injunction motion). Here, plaintiffs admit that they knew about
3 Love Happens at the least by August 2, 2009 (see Complaint ¶ 26), yet plaintiffs
4 waited some six weeks – until just three days before the nationwide release of the
5 film – to file an application for a TRO. Moreover, Love Happens was being
6 discussed in print, online and broadcast media well before August 2 (see Thomas
7 Decl. Exs. D-F), and billboards advertising the movie were featured prominently
8 around the Los Angeles area, where plaintiffs reside. Under these circumstances,
9 plaintiffs cannot establish an injury that justifies the extraordinary relief of a TRO.

10 **C. The Hardship To Universal From The Issuance Of A TRO Vastly**
11 **Outweighs Any Hardship To Plaintiffs.**

12 On the other side of the balance, the magnitude of the harm to Universal that
13 would result from the issuance of the requested injunction also mandates its denial.
14 Plaintiffs are requesting that the Court indefinitely delay the film’s release, even
15 though Universal already has spent more than \$12 million marketing the film and
16 will have spent more than \$20 million on marketing by the day the film opens on
17 September 18, 2009. See Egan Decl. ¶ 15. Universal has a full First Amendment
18 right to exhibit its films (see Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)),
19 and it certainly would not be in the public interest if the millions of people who
20 have seen the film’s advertising and are planning to go to the movies to watch Love
21 Happens cannot do so because of this lawsuit. See Winter, 129 S. Ct. at 375-76.

22 As set forth in the Egan Declaration, Universal would suffer severe economic
23 harm if the release of Love Happens were delayed. See Egan Decl. at ¶¶ 21-26. An
24 injunction would upset Universal’s release schedule, which would jeopardize any
25 possible commercial success. Id. at ¶ 11-13, 23-24. If the motion picture had to be
26 rescheduled at a later date, Universal not only would lose the tens of millions of
27 dollars that it already has put into the marketing, but it would have to incur these
28

1 expenses again, and would do so with considerably worse prospects for success
2 since the movie would be considered “old” and “troubled.” See id. at ¶ 23-24.

3 Furthermore, entry of a TRO would prevent Universal from fulfilling its
4 contractual obligations with motion picture exhibitors across the country, who have
5 the right to display Love Happens, and undoubtedly would result in theaters sitting
6 dark with no films to show at all, since it is now too late for theater operators to
7 book new films for this weekend and next week. See Egan Decl. at ¶ 25. As Mr.
8 Egan explains, motion picture release dates are set months in advance, and theaters
9 are now booked through the remainder of the fall and the holiday season. Thus,
10 even a temporary injunction against the release of Love Happens would mean that
11 film could not open in theaters for many months, and might well mean that the film
12 could never have a theatrical release. See Egan Decl. at ¶¶ 23-24.¹⁸ For these
13 additional reasons, plaintiffs’ request for an eleventh-hour TRO must fail.

14 **D. If The Court Is Inclined To Issue A TRO, Plaintiffs Should Be Required**
15 **To Post A Bond In The Amount Of At Least 40 Million Dollars.**

16 No TRO or preliminary injunction may be issued without requiring the party
17 seeking the injunction to first post security “in such sum as the court deems proper,
18 for the payment of such costs and damages as may be incurred or suffered by any
19 party who is found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P.

20
21 _____
22 ¹⁸ Causing such harm to Universal also would be particularly unjust in light
23 of the fact that plaintiffs did not file suit until just three days before the scheduled
24 release of Love Happens. Under the doctrine of laches, plaintiffs are barred from
25 obtaining their sought equitable relief because of their dilatory conduct. See
26 generally Abbott Labs. v. Gardiner, 387 U.S. 136, 155, 87 S. Ct. 1507, 18 L. Ed. 2d
27 681 (1967) (laches provides defense to injunction request because it is an equitable
28 remedy), abrogated on other grounds in Califano v. Sanders, 430 U.S. 99 (1977);
see also Trust Co. Bank v. Putnam Pub. Group, Inc., 5 U.S.P.Q.2d 1874 (C.D. Cal. Jan. 6,
1988). As set forth above, Universal will have expended more than \$20 million in
marketing costs for Love Happens by the date of its September 18, 2009 release.
See Egan Decl. at ¶ 15. Substantial efforts have been made to set up promotional
tours, purchase advertising space and broadcast time, and schedule theaters. Id. at
¶¶ 16-19. Plaintiffs’ unjustified conduct in waiting to seek any kind of relief until
the eve of the movie’s release irreparably and inevitably harms Universal.

1 65(c); see also Nintendo of America, Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032,
2 1036-1037 (9th Cir. 1994) (presumption that wrongfully enjoined party “is entitled
3 to have the bond executed and recover provable damages up to the amount of the
4 bond”). A court’s failure to require such a bond is reversible error. See Hoechst
5 Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 421 (4th Cir. 1999).

6 Plaintiffs’ attempt to avoid a bond is premised entirely on the supposition that
7 Universal has infringed plaintiffs’ copyright in their script (see TRO App. at 23-25),
8 but the whole point of the bond requirement is that the plaintiff must post security
9 to protect the defendant in the event that the Court ultimately determines that there
10 was no infringement and that the injunction or restraint was wrongly entered. See,
11 e.g., 4 Nimmer on Copyright § 14.06[A][6][C] (the court’s “task at hand is not to
12 facilitate plaintiff in avoiding the evil of defendant’s wrongdoing, but instead to
13 fairly evaluate that the injunction ‘may be mistaken’ at the end of the day, and so to
14 avoid the evil that defendant may be deprived of its due by court order. An
15 appropriate bond renders defendant whole for any harm it may have suffered”).¹⁹

16 Universal unquestionably will suffer significant and immediate monetary
17 harm if the injunction is issued. The studio has committed to spend more than \$20
18 million in marketing expenses by the film’s opening date of September 18,
19 including more than \$12 million already spent on marketing. See Egan Decl. ¶ 15.
20 Moreover, the film cost more than \$20 million to make. Id. at ¶ 4. If the release of
21 Love Happens were enjoined, Universal faces the prospect of losing its entire
22 investment in this movie, since it may not be commercially viable to release it

23 _____
24 ¹⁹ Exceptions to the bond requirement are “so rare that the requirement is
25 almost mandatory.” Frank’s GMC Truck Center, Inc. v. General Motors Corp., 847
26 F.2d 100, 103 (3d Cir. 1988); see also Continuum Co. v. Incepts, Inc., 873 F.2d
27 801, 803 (5th Cir. 1989). These exceptions include cases where: (1) there is no
28 likelihood of harm to the party opposing the injunction; (2) the overwhelming
balance of hardships weighs in favor of the injunction; or (3) there is a strong
likelihood of success on the merits. Jorgensen v. Cassidy, 320 F.3d 906, 919 (9th
Cir. 2003); Elliott v. Kiesewetter, 98 F.3d 47, 60 (3d Cir. 1996); Scherr v. Volpe,
466 F.2d 1027, 1035 (7th Cir. 1972). None of those circumstances exists here.

1 theatrically at a later date. See id. at ¶¶ 21-26. Because Universal indisputably
2 would suffer concrete monetary damages the moment a TRO was granted, plaintiffs
3 must be made to post a bond to secure the reimbursement to Universal of its hard
4 costs and damages if any injunction is ultimately found to be wrongfully imposed.²⁰
5 Under such a scenario, Universal would suffer damages of the \$20 million in
6 marketing costs and more than \$20 million in production costs. Id. at ¶¶ 4, 15. The
7 bond should be for \$40 million.

8 **6.** 9 **CONCLUSION**

10 Plaintiffs' filing of an application for a temporary restraining order three days
11 before the release of Love Happens in theaters nationwide is untimely, unwarranted
12 and contrary to this Court's rules and the leading case law. See, e.g., Mission
13 Power, 883 F. Supp. at 490. Plaintiffs have failed to show any likelihood of success
14 on their copyright infringement claim, and have failed to establish any concrete
15 injury – let alone irreparable harm – that they will suffer if the TRO application is
16 denied. In contrast, the undue hardships that Universal would suffer if the film's
17 release were enjoined – millions and millions of dollars in losses – easily outweighs
18 any claimed injury by plaintiffs. For all these foregoing reasons, Universal
19 respectfully requests that this Court deny plaintiffs' TRO application and grant
20 sanctions against plaintiffs for their blatant misuse of the ex parte process.

21 DATED: September 16, 2009

DAVIS WRIGHT TREMAINE LLP

22 By: /s/ Kelli L. Sager

Kelli L. Sager

23 Attorneys for Defendant
24 NBC UNIVERSAL, INC.

25 _____
26 ²⁰ The amount of the bond should cover all potential damages that may be
27 incurred by Universal as a result of the preliminary injunction. Fed. R. Civ. P.
28 65(c). Hoechst Diafoil Co., 174 F.3d at 421. In addition, “when setting the amount
of security, district courts should err on the high side” Mead Johnson & Co. v.
Abbott Lab., 201 F.3d 883, 888 (7th Cir. 2000).