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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARK GABLE a/k/a MARK PIZZUTI,)	CV 08-4013 SVW (FFMx)
)	
)	
Plaintiff,)	
)	
v.)	ORDER GRANTING DEFENDANTS'
)	MOTIONS FOR SUMMARY JUDGMENT
NATIONAL BROADCASTING COMPANY)	[21] [43] [JS-6]
("NBC"), a California)	
corporation, GREGORY THOMAS)	
GARCIA, an individual, 20th)	
CENTURY FOX FILM CORPORATION, a)	
corporation, 20th CENTURY FOX)	
HOME ENTERTAINMENT AND DOES 1)	
through 10, inclusive,)	
)	
Defendants.)	

I. INTRODUCTION

Defendants NBC Universal, Inc., Gregory Garcia, Twentieth Century Fox Film Corporation, and Twentieth Century Fox Home Entertainment LLC (collectively "Defendants") move for summary judgment against Plaintiff Mark Gable ("Gable" or "Plaintiff"). Plaintiff claims that the television show My Name is Earl ("Earl") was copied from Plaintiff's screenplay Karma! Defendants argue that Plaintiff cannot show that

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1 Defendants had access to Plaintiff's screenplay or that the two works
2 are substantially similar; thus, summary judgment should be granted.

3 For the following reasons, the Court GRANTS Defendants' Motions
4 for Summary Judgment.

5 **II. FACTS**

6 **A. Background**

7 In late 1994, Plaintiff Gable wrote Karma!, a dramatic screenplay
8 about a dirty cop's journey toward redemption. (Plaintiff's Statement
9 of Genuine Issues ["PSGI"] 3-5 [Docket No. 54].) Gable registered the
10 screenplay with the Writer's Guild of America on March 10, 1995. (Id.
11 6.) On September 20, 2004, he registered Karma! with the United States
12 Copyright Office. (Id. 7.)

13 In April 1995, Gable, with the help of his girlfriend Cindy
14 Cramer, sent Karma! to four talent/literary agents and two friends
15 working in the entertainment industry. (Id. 13-15.) Relevant to the
16 current matter, Plaintiff sent the script to David Gersh, a talent
17 agent at The Gersh Agency ("TGA"). (Id. 14.) Gersh had not solicited
18 the script and claims to have never heard of it. (Defendants'
19 Statement of Uncontroverted Facts ["DSUF"] 2, 5 [Docket No. 22].)
20 Plaintiff did not receive a response from TGA. (PSGI 25.)
21 Plaintiff has produced no documentary evidence supporting his claim
22 that he sent Karma! to TGA.

23 In 1995, TGA consisted of approximately 20 to 25 agents. (PSGI
24 32.) One of the agents at TGA during this period was Ken Neisser.
25 (Id.) Neisser, a literary agent, represented Defendant Gregory Garcia,
26 the subsequent creator of Earl. (Garcia Decl. 6.) Neisser represented
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1 Garcia from 1993 until mid-2000, when Garcia left TGA for another
2 agency. (Garcia Decl. 7.)

3 In the spring of 2000, Garcia left TGA and obtained representation
4 from Creative Artists Agency ("CAA"). (Id.) Garcia maintains that he
5 conceived of the idea for Earl three years later, in the summer of
6 2003. (Id. 10.) Garcia stated that by the late summer/early fall of
7 2003, he had drafted portions of the pilot episode for Earl and began
8 pitching the concept to various persons working in the television
9 industry. (Id. 16.) In the fall of 2004, representatives from NBC
10 Universal ("NBCU") expressed interest in Earl, and told Garcia that if
11 he could find an actor to play the title character, "NBC would
12 greenlight the project." (Id. 17.) After a lengthy casting process,
13 the actor Jason Lee agreed to play Earl in the spring of 2005. (Id.
14 17.) The pilot for Earl first aired on September 20, 2005. (Id. 3.)
15 The show is currently in its fourth season. (Id.)

16 In or about September 2005, Plaintiff watched Earl on NBC.
17 Plaintiff contends that he was immediately struck by the similarities
18 between Karma! and Earl. After viewing several episodes, Plaintiff
19 formed the belief that the creator of Earl had infringed upon
20 Plaintiff's copyrighted screenplay, Karma!.

21 **B. Overview of Karma!**

22 Karma! depicts the journey of Frankie Augustus, a dirty cop, who
23 through the help of a guardian angel called "Angel Man," creates good
24 karma for himself and his unborn son by making amends for bad acts in
25 his past. Frankie is a sarcastic forty-year-old Italian American with
26 no moral compass. The opening scenes of Karma! depict Frankie taking
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1 bribes from a drug dealer, his subsequent arrest, prison time, and
2 release.

3 After his release, Frankie is in dire straights. Behind on his
4 rent, he attempts to steal money from a blind street performer, and
5 eventually picks the pocket of a man on the subway. Disgruntled with
6 the small amount of money in the stolen wallet, Frankie thumbs through
7 the wallet to find a picture of an angel. Frankie stares at it, and
8 states:

9 A picture of an angel, well that's appropriate. Anyone with a
10 buck and some chump change, better have an angel to pray too
11 [sic], huh? . . . Yea! Well Mr. Guardian angel where are you
12 now?! I stole your buddies [sic] wallet right under his nose and
13 you're nowhere to be found. Shit! I'm hip to your shit!! . . .
14 You ever hear of angel dust? That's what's you're gonna be.
15 Actually I wouldn't mind a hit of that right now. A little
16 numbness would do me some good.

17 (Decl. of Jill Rubin, Exh. D., pg. 82-83 [Karma! screenplay].) As
18 Frankie speaks, he attempts to light the picture on fire, but it will
19 not ignite. Instead, Frankie looks at the picture and sees the angel
20 shaking his finger at Frankie. Frankie responds by throwing the
21 picture into the wind. The wind carries the picture away over the
22 river, but then carries it back and drops it on Frankie's shoulder. An
23 angel then appears before Frankie.

24 The script refers to the angel as "Angel Man" and describes him as
25 follows: "[The angel] look's [sic] like a young man about 27 years
26 old. With opalescent skin, and white hair, resembling an albino, and a
27 slender physique, clothed in blue gun metal. There's a solid gold
28 sword hanging from his waist." (Id. at 83.) Angel Man warns Frankie
that he has "fallen off the path like a stray dog" and asks Frankie to
meet him in front of Frankie's mother's grave at twelve midnight the
next night. (Id.)

1 The next night, Frankie goes to his mother's grave. It is pouring
2 down rain, and the cemetery is empty. When Angel Man appears, he
3 closes his eyes and makes a prayer with his hands, which instantly
4 stops the rain. Angel Man also brings dying flowers back to life with
5 the wave of his hand. Then, Angel Man tells Frankie that he has come
6 to help Frankie save the soul of his unborn son. Frankie, being
7 single, thinks Angel Man has the wrong person. However, Angel Man
8 tells Frankie that Frankie had sex with a girl named Betty Alonzo who
9 is now pregnant with his child. Angel Man then warns Frankie:

10 Your sons soul [sic] is at stake here! Your sons soul [sic] is
11 coming into this world with your karma along with his Mothers
12 [sic]. And I don't think I have to tell you . . . Your karmas
13 [sic] not gonna be up for any awards this year!

14 (Id. at 89.) Angel Man then "creates a cloud of mist." (Id.) "A
15 picture forms within the cloud revealing Frankies [sic] unborn son at
16 the age of ten years old. It's obviously Frankies son [sic] he looks
17 just like Frankie. Seemingly destined to follow Frankies [sic]
18 footsteps his son is brandishing a stolen 38 odd special in front of
19 his friends." (Id.)

20 Frankie asks what he can do to save his son's soul. Angel Man
21 responds with three instructions: (1) "make amends with the people
22 you've really hurt in the past," (2) "get your life together, stop
23 stealing, stop taking drugs, and get a straight job as soon as
24 possible," and (3) "in the very near future you're going to come into
25 some wealth, use it wisely." (Id. at 91.)

26 After his meeting with Angel Man, Frankie begins to follow Angel
27 Man's instructions. Frankie refuses to take drugs, calls a friend and
28 admits stealing money from her, and then visits an ex-girlfriend to
confess that he had an affair with her sister while they were dating.

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1 Frankie then goes to Times Square where he sees a man drop his wallet.
2 Frankie picks up the wallet, and instead of stealing it, he gives the
3 wallet back to the man. The man then introduces himself to Frankie,
4 and offers him a job as a bartender.

5 Frankie then purchases a lottery ticket and a scratcher from a
6 liquor store.¹ Frankie wins three hundred dollars from the scratcher.
7 Frankie flashes back to Angel Man telling him to use it wisely.
8 Accordingly, Frankie buys teenagers some candy that they were about to
9 steal, and revisits the blind street performer, this time putting money
10 into his tin instead of taking it out.

11 As the screenplay continues, Frankie again runs into the blind
12 street performer, but this time the street performer has been shot.
13 After Frankie assists the blind man, the blind man turns into Angel
14 Man. Angel Man assures Frankie that he is on the right path, and tells
15 Frankie that "God believes he can resurrect all of his sons who have
16 fallen." Angel Man tells Frankie that wealth will still follow.

17 In another scene, it appears that Angel Man is watching Frankie's
18 progress. Frankie is walking down a deserted alley at night and hears
19 a cat's meow coming from a row of trash cans. Frankie searches through
20 the cans and finds an abandoned kitten. He rescues the kitten and
21 takes it home to his friend, Tori Ann. Angel Man watches the entire
22 scene, smiling.

23 Throughout this period, Frankie is staying with Toni Ann, a drug-
24 using struggling model. Tori Ann is 13-years younger than Frankie and
25 becomes his love interest. Tori Ann observes the changes that Frankie

26
27 ¹The lottery ticket is of the kind where the customer picks numbers, and
28 then the winning numbers are called later that night. The scratcher is
a ticket where the customer takes a coin and scratches off a covering to
reveal whether money is won.

1 is making in his life, and eventually, she decides to turn her life
2 around too. She tells Frankie that she is going to clean up her act,
3 stop selling drugs, get a job, and join a recovery program. Frankie
4 tells Tori Ann how proud he is of her, and they make love passionately.

5 Eventually, Frankie is approached by a drug dealer named James
6 Randson. James demands that Frankie act as a drug courier for one of
7 his shipments. Frankie takes this opportunity to redeem himself as a
8 police officer. Frankie visits his old lieutenant at the police
9 station, and offers to go undercover to clear his name by bringing in
10 the bust.

11 Before leaving for the drug deal, Frankie learns that he has won
12 two million dollars from the lottery. Undeterred, Frankie follows
13 through as an undercover officer. The drug deal does not go as
14 originally planned, but Frankie successfully arrests the drug dealers
15 by himself. Upon leaving the bust, Frankie visits his brother,
16 Augustus, a priest who had earlier told Frankie of an orphanage that
17 had burnt down. Frankie offers to give one million dollars to rebuild
18 the orphanage.

19 Frankie returns to Toni Ann's apartment and is immediately
20 attacked by James and his bodyguards. James enters the apartment and
21 shoots Frankie three times. Toni Ann bursts from the closet shooting
22 back at the intruders. As James gets a straight shot at Toni Ann,
23 Angel Man appears and wraps his wings around her, blocking all the
24 bullets. Toni Ann then fires her gun and kills James.
25 Toni Ann rushes to Frankie, but is too late. Frankie tells Tori Ann
26 that he will always love her, and the scene fades to black. Then,
27 Frankie appears with white wings and clothed like Angel Man. Angel Man
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1 tells Frankie that he's earned his wings back and that it is time to
2 "cross over." The screenplay concludes with Frankie as an angel
3 standing watch over Toni Ann as she sleeps.

4 **C. Overview of Earl**

5 The pilot episode of Earl begins with a family pulling up to a
6 convenience store as the main character, Earl Hickey ("Earl"), enters
7 the store. The family waits until Earl leaves the convenience store
8 for fear of going in at the same time as Earl. When Earl exits, the
9 family enters, only to have Earl break into the family's car.
10 Throughout this whole opening, Earl narrates that he is the type of guy
11 who will pretty much steal anything that is not nailed down.

12 Earl then goes on to narrate his relationship with the other
13 characters in the show. As he introduces the characters, we see
14 flashbacks of the instances he is narrating. First, Earl introduces
15 Joy, who Earl drunkenly married during a one night stand in Las Vegas.
16 Earl describes himself as being so drunk that he did not notice that
17 Joy was actually six months pregnant when they were married. Earl
18 explains that a few years later, Joy became pregnant again. Initially,
19 Earl believed Joy was carrying his child; however, when the child is
20 born, Earl sees that the child is partially African American. As Earl
21 and Joy are both white, Earl realizes that the child, named Earl Jr.,
22 is not his own. Earl also introduces Randy, his dimwitted brother.
23 Joy, Randy and Earl all hang out at Ernie's crab shack. At the crab
24 shack, they are served by Darnell, who Earl calls "Crabman."

25 Earl narrates that three weeks prior, he bought a scratcher
26 lottery ticket, and won \$100,000. The audience sees a flashback of
27 Earl celebrating his win, and then immediately getting hit by a car.
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1 Lying on the asphalt, Earl sees his lottery ticket fly away. While
2 recuperating in the hospital, Joy divorces Earl and announces that
3 Darnell, "Crabman," is actually Earl Jr.'s father.

4 Lying alone in the hospital, Earl watches the Carson Daly Show.
5 On the show, the guest asks Daly how he has such a good life. Daly
6 responds: "What goes around comes around, and that's how I try to live
7 my life. You do good things and good things happen to you, you do bad
8 things and it'll come back to harm you. It's karma."

9 Once Earl is out of the hospital, Earl and Randy check into a
10 motel, where they make friends with the maid, Catalina. Earl adopts
11 Daly's theory of karma, and puts it into action. Earl explains: "If I
12 want a better life, I need to be a better person." Accordingly, Earl
13 makes a list of everything bad he has ever done. He explains that "I
14 just won a hundred thousand dollars in the lottery and was immediately
15 hit by a car. I almost died because something good happened to me that
16 I didn't deserve. That karma stuff is going to kill me, unless I make
17 up for everything on that list."

18 On the list are specific acts, such as "peed in the back of a cop
19 car," as well as general bad habits, such as "harmed and killed
20 innocent people with second hand smoke." Earl decides that the first
21 wrong he is going to make amends for is his picking on Kenny James in
22 elementary school. Earl's idea is to find Kenny, do something nice for
23 him, and then cross him off the list.

24 As Earl describes his new theory of life, the very \$100,000
25 scratcher that flew away from Earl when he was hit by the car flies
26 back to him. Earl responds: "Son of a bitch- it's working."
27
28

1 Earl and Randy then turn to finding Kenny. As Earl reminisces
2 about tormenting Kenny, we see flashbacks of Earl bullying Kenny by
3 kicking Kenny in the groin on a kickball field. Back in the present,
4 Earl decides to watch Kenny for a few days. Earl concludes that Kenny
5 is lonely, and that Earl will help Kenny by finding him a companion.
6 Eventually, Earl and Randy find out that Kenny is gay. In response,
7 Earl and Randy run from Kenny, and Earl states that he does not have to
8 help Kenny because he is homosexual. However, when they reach their
9 hotel room, they find Joy. Joy has ransacked the room looking for the
10 lottery money. As Earl and Randy enter the room, Joy hits them on the
11 head with a telephone.

12 Earl interprets Joy's breaking into his room as a sign from karma
13 that he cannot give up on Kenny just because he is gay. Earl
14 eventually helps Kenny find companionship by taking Kenny to a gay bar
15 in the city. At the end of the episode, Kenny tells Earl that he was
16 scared to be who he really was, but that he no longer is scared because
17 of Earl's kindness. Kenny states: "When we were kids, you took away my
18 confidence, but today you gave it back . . . You can cross me off your
19 list."

20 Thereafter, each episode follows a similar formula with Earl
21 choosing one item off his list, and setting out to amend for his
22 actions. Each episode starts out with the same narration:

23 You know the kind of guy who does nothing but bad things, and then
24 wonders why his life sucks. Well, that was me. Every time
25 something good happened to me, something bad was always waiting
26 around the corner. Karma. That's when I realized I had to
27 change. So I made a list of everything bad I've ever done. And
28 one by one I'm going to make up for all my mistakes. I'm just
trying to be a better person. My name is Earl.

1 Episodes in the first season include: Earl making amends for
2 faking his own death to get out of a relationship by telling the woman
3 that he is still alive; Earl making up for teasing people with accents
4 by teaching English to immigrants; Earl redeeming himself for burning
5 down a barn at a local camp for wayward boys; and Earl helping Joy win
6 a beauty pageant in order to make up for an award Earl once broke. As
7 Earl works through the items on his list, he often commits additional
8 wrongs, adding them to his seemingly never-ending tally.

9 **III. ANALYSIS**

10 **A. Legal Standard**

11 Rule 56(c) requires summary judgment for the moving party when the
12 evidence, viewed in the light most favorable to the nonmoving party,
13 shows that there is no genuine issue as to any material fact, and that
14 the moving party is entitled to judgment as a matter of law. See Fed.
15 R. Civ. P. 56(c); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263
16 (9th Cir. 1997).

17 The moving party bears the initial burden of establishing the
18 absence of a genuine issue of material fact. See *Celotex Corp v.*
19 *Catrett*, 477 U.S. 317, 323-24 (1986). That burden may be met by
20 "'showing' - that is, pointing out to the district court - that there
21 is an absence of evidence to support the nonmoving party's case." Id.
22 at 325. Once the moving party has met its initial burden, Rule 56(e)
23 requires the nonmoving party to go beyond the pleadings and identify
24 specific facts that show a genuine issue for trial. See *id.* at 323-34;
25 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1968). "A
26 scintilla of evidence or evidence that is merely colorable or not
27 significantly probative does not present a genuine issue of material
28

1 fact." Addisu v. Fred Meyer, 198 F.3d 1130, 1134 (9th Cir. 2000).
2 Only genuine disputes - where the evidence is such that a reasonable
3 jury could return a verdict for the nonmoving party - over facts that
4 might affect the outcome of the suit under the governing law will
5 properly preclude the entry of summary judgment. See Anderson, 477
6 U.S. at 248; see also Aprin v. Santa Clara Valley Transp. Agency, 261
7 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must identify
8 specific evidence from which a reasonable jury could return a verdict
9 in its favor).

10 **B. Copyright Infringement**

11 To establish copyright infringement, Plaintiff must show that he
12 owns a valid copyright in Karma!, and that Defendants copied protected
13 expressions from it. See Kouf v. Walt Disney Pictures & Television, 16
14 F.3d 1042, 1044 n.2 (9th Cir. 1994). For the purposes of summary
15 judgment, Defendants do not dispute that Plaintiff owns a copyright in
16 Karma! Thus, the only question before the Court is whether Defendants
17 copied protected expressions from the work.

18 To prove copyright infringement, Plaintiff must show that
19 Defendants copied protected elements of Karma! either through evidence
20 of direct copying or through a showing that Defendants had "access" to
21 Plaintiff's copyrighted material and that the two works at issue are
22 "substantially similar." See Funky Films, Inc. v. Time Warner
23 Entertainment Co., L.P., 462 F.3d 1072, 1076 (9th Cir. 2006); Three
24 Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000). Here,
25 Plaintiff does not allege direct copying by Defendants; rather
26 Plaintiff contends that Garcia had access to Karma! through TGA, and
27 that the works are substantially similar.

1 The required elements of access and substantial similarity are
2 related - that is, the plaintiff's burden of proof on each element
3 rests partly on the strength of his showing on the other element.
4 Thus, in rare cases, a plaintiff can prove copying even without proof
5 of access "if he can show that the two works are not only substantially
6 similar, but are so strikingly similar as to preclude the possibility
7 of independent creation." Meta-Films Assoc., Inc. v. MCA Inc., 586 F.
8 Supp. 1346, 1355 (C.D. Cal. 1984) (citing 3 Nimmer on Copyright §
9 13.01[B] and Ferguson v. Nat'l Broadcasting Co., Inc., 584 F.2d 111,
10 113 (5th Cir. 1978)). In such instances, access will be inferred from
11 the "striking" similarities between the works. Id. This rule only
12 applies, however, where "as a matter of logic, the only explanation
13 [for the similarities] between the two works must be 'copying rather
14 than . . . coincidence, independent creation, or prior common source.'" "
15 4-13 Nimmer on Copyright § 13.02[B] (2009) (citations omitted).

16 Conversely, under the "inverse ratio rule" recognized by the Ninth
17 Circuit, courts "require a lower standard of proof of substantial
18 similarity when a high degree of access is shown." Three Boys Music,
19 212 F.3d at 485.² To benefit from this rule, Plaintiff must offer proof
20 of access which is greater than or "more compelling than that which is
21 offered in the usual copyright case." Idema v. Dreamworks, Inc., 162
22 F. Supp. 2d 1129, 1176 (C.D. Cal. 2001) (holding that the inverse ratio
23 rule did not apply because "the general unavailability of plaintiffs'
24 works, especially those that were unpublished, other than by way of

25
26 ² It should be noted that the inverse ratio rule only works in one direction - that
27 is, while a strong showing of access will result in a lower threshold showing of
28 substantial similarity, a weak showing of access does not require a greater showing
of similarities between the plaintiff's and defendant's works. Three Boys Music,
212 F.3d at 486 ("We have never held, however, that the inverse ratio rule says a
weak showing of access requires a stronger showing of substantial similarity.")

1 their alleged 1994 and 1995 submissions to [defendants] makes 'access'
 2 to plaintiffs' copyrighted works somewhat less than might be available
 3 in a large number of cases.") (emphasis in original). Conversely,
 4 where plaintiff's theory of access is based solely on "speculation,
 5 conjecture or inference," plaintiff cannot demonstrate the high degree
 6 of access necessary to invoke the inverse ratio rule. Rice v. Fox
 7 Broadcasting Co., 330 F.3d 1170, 1178 (9th Cir. 2002); see id.
 8 Finally, in Ninth Circuit cases applying the inverse ratio rule,
 9 generally the defendant concedes that he or she had access to
 10 plaintiff's copyrighted work; and this "concession of access . . . [is]
 11 a prominent factor in [the court's analysis]." Rice, 330 F.3d at 1178
 12 (citing to Shaw v. Lindheim, 919 F.2d 1353, 1361-62 (9th Cir. 1990) and
 13 Metcalf v. Bochco, 294 F.3d 1069, 1075 (9th Cir. 2002)).³

14 1. Access⁴

15 To prove access, Plaintiff must show that the Defendants had a
 16 "reasonable opportunity" or "reasonable possibility" of viewing
 17

18 ³ Even in cases in which the inverse ratio rule applies, it is not clear just how
 19 much less the showing of substantial similarity need be, given the high degree of
 20 access shown. In Shaw, the Ninth Circuit applied the inverse ratio rule where
 21 defendants conceded access to plaintiff's script. 919 F.2d at 1361-62. However,
 22 the court merely held that the high degree of access was "a factor to be considered
 23 in favor of [plaintiff]." Id. at 1362. In contrast, Metcalf v. Bochco, 294 F.3d
 24 1069 (9th Cir. 2002), suggests that the plaintiff receives a greater benefit from
 25 the inverse ratio rule. In Metcalf, where the writer of the infringing work
 26 admitted that he received and read three versions of plaintiff's work and passed it
 27 on to the star actor in the infringing work, the court found that "[plaintiffs']
 28 case is strengthened considerably by [defendant's] concession of access to their
 works." 294 F.3d at 1075. The court stated that if the trier of fact were to
 believe that the defendants read the scripts, "it could easily infer that the many
 similarities between plaintiffs' script and defendants' work were the result of
 copying, not mere coincidence." Id.

Although the exact effect of the inverse ratio rule is unclear, in this case,
 plaintiff has not introduced sufficient evidence of access to invoke the inverse
 ratio rule (see *infra* section III.B.1); thus, the Court need not resolve this
 issue.

⁴ Plaintiff does not argue that Earl and Karma! are so strikingly similar so as to
 allow plaintiff to prevail without a showing of access. Indeed, for the reasons
 discussed *infra* section III.B.2, the Court holds that the works are not strikingly
 similar.

1 Plaintiff's work prior to the creation of the infringing work. Three
2 Boys Music, 212 F.3d at 482; Baxter v. MCA, Inc., 812 F.2d 421, 423
3 (9th Cir. 1987). Reasonable access requires more than a "bare
4 possibility," and "may not be inferred through mere speculation or
5 conjecture." Three Boys Music, 212 F.3d at 482. "In order to support
6 a claim of access, a plaintiff must offer 'significant, affirmative and
7 probative evidence.'" Jorgensen v. Epic/Sony Records, 351 F.3d 46, 51
8 (2d Cir. 2003) (affirming summary judgment against the plaintiff on the
9 issue of access where the plaintiff produced "no reasonable
10 documentation that he actually mailed [tapes of the allegedly infringed
11 work]") (citing Scott v. Paramount Pictures Corp., 449 F. Supp. 518,
12 520 (D.D.C. 1978)).

13 Access is often proven through circumstantial evidence in one of
14 two ways: "(1) a particular chain of events is established between the
15 plaintiff's work and the defendant's access to that work . . . or (2)
16 the plaintiff's work has been widely disseminated." Idema, 162 F.
17 Supp. 2d at 1175 (citing to Three Boys Music, 212 F.3d at 482). Here,
18 Plaintiff does not contend that his screenplay was widely distributed;
19 instead, Plaintiff attempts to prove access by establishing a chain of
20 events linking Plaintiff's screenplay with Defendants' work.

21 Specifically, Plaintiff argues that the creator of Earl, Garcia,
22 had access to Karma! through Plaintiff's submission of the screenplay
23 to TGA in mid-1995.⁵ Plaintiff offers his own declaration and that of
24 his girlfriend Cindy Cramer, who assisted him with the mailing, as
25 evidence that Plaintiff mailed Karma! to Gersh at TGA in the spring of

26 ⁵ Plaintiff also stated in his declaration that he sent Karma! to Creative Artists
27 Agency ("CAA") in 1995, but he did not state who it was sent to. (Gable Decl. ¶
28 13.) Although Garcia became a client of CAA in 2000, Plaintiff does not argue that
Garcia received access to Karma! through CAA, and has offered no evidence to
support such a theory.

1 1995. However, Plaintiff has produced no documentary evidence of the
2 mailing. Further, there is no evidence that Plaintiff received any
3 response from TGA or that Gersh or anyone at TGA otherwise acknowledged
4 receipt. This lack of documentation regarding the mailing weighs in
5 favor of granting summary judgment. See Jorgensen, 351 F.3d at 52
6 (affirming summary judgment where the plaintiff "did not maintain a log
7 of where and when he sent his work, or keep receipts from certified
8 mailings to establish a chain of access") (internal citations omitted);
9 see also Rice, 330 F.3d at 1178. Both Gersh and Neisser deny ever
10 receiving or reading any submission from Plaintiff, including Karma!
11 (Gersh Decl. ¶ 5; Neisser Decl. ¶ 5.)

12 Assuming, however, that TGA received the screenplay, Plaintiff
13 argues that once Gersh received Karma!, it is reasonable that Garcia,
14 as a client of TGA, would have access to it. Plaintiff offers two
15 theories in support of this proposition. First, Plaintiff argues that
16 Gersh may have given Garcia access to the screenplay directly, as
17 Gersh's name was listed on Garcia's contract with TGA as one of
18 Garcia's key contacts. Second, Plaintiff argues that there is a
19 reasonable possibility that Gersh or someone else at TGA gave
20 Plaintiff's screenplay to Neisser, another agent at TGA and the
21 literary agent for Garcia, who then could have passed it on to Garcia.
22 Plaintiff does not present any evidence that Gersh or Neisser had any
23 contact with Garcia after Garcia left TGA in 2000; thus, Plaintiff's
24 theory of access assumes that Garcia must have been given access to
25 Karma! several years before Garcia claims to have created Earl.⁶

26
27 ⁶ While Plaintiff presents evidence of Garcia's different explanations as to how he
28 came up with the idea for Earl, Plaintiff does not appear to dispute *when* Garcia
created Earl - i.e., sometime in 2003. In short, there is no evidence to refute
Garcia's testimony that he created Earl in 2003.

1 The Court holds that Plaintiff's evidence of access is far too
2 weak to trigger the inverse ratio rule.⁷ In Rice v. Fox Broadcasting
3 Company, the Ninth Circuit rejected application of the inverse ratio
4 rule under analogous facts. 330 F.3d 1170 (9th Cir. 2003). In Rice,
5 Robert Rice claimed that Fox Broadcasting Company had infringed on
6 Rice's work, The Mystery Magician, when Fox developed a series of
7 television specials about magic ("Specials"). Id. at 1173. Rice
8 claimed that he sent two copies of his work and a pitch sheet for a
9 proposed programming idea to Fox's Senior Vice President of Specials
10 and Alternative Programming, Michael Darnell, who was an active
11 participant in developing the infringing work. Id. at 1178. Rice also
12 claimed that the defendants were aware of The Mystery Magician because
13 Rice gave copies of the work to his agent at ICM, who in turn sent a
14 copy of the video to Fox. Id. Lastly, Rice claimed that when he would
15 visit his own agent at ICM, he "would often chat with Steve Wohl, a
16 fellow agent at ICM, and that Wohl repeatedly told Rice that he 'loved'
17 the idea behind the Mystery Magician and that it would be a 'smash
18 hit.'" Id. Rice reasoned that "[b]ecause Wohl was Bruce Nash's agent,
19 . . . [and] Nash . . . was an active participant along with Darnell in
20 developing the Specials," Nash had access to The Mystery Magician. Id.

21 The Ninth Circuit rejected Rice's claims. First, regarding the
22 alleged transmission to Michael Darnell, the Court discounted this
23 evidence because there was "no copy of the purported pitch and
24 [plaintiff] never received a response from Fox." Id. Second, as to
25 "the complicated thread involving Marks, Wohl, Nash and Darnell," the
26 court noted that Rice had no evidence that Wohl "provided The Mystery
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28 ⁷ Plaintiff does not argue that the inverse ratio rule applies.

1 Magician to Nash, Darnell or anyone else at either Nash Entertainment
2 or Fox." Id. As such, the Ninth Circuit found that Rice's claims were
3 "based on speculation, conjecture, and inference which are far less
4 than the 'high degree of access' required for application of the
5 inverse ratio rule." Id.

6 Similarly, here, there is no evidence that: (1) Plaintiff ever
7 received a response from Gersh or anyone at TGA; (2) that Neisser had
8 access to the script himself (either through Gersh or otherwise), or
9 (3) that anyone at TGA transferred the script to Garcia. Finally,
10 there is no concession of access here by Defendants. As such,
11 Plaintiff's chain of events is too speculative to trigger the inverse
12 ratio rule.

13 Further, Plaintiff cannot create a triable issue of access merely
14 by showing "bare corporate receipt" of his work by an individual who
15 shares a common employer with the alleged copier. Jorgensen, 351 F.3d
16 at 52-53; Meta-Film, 586 F. Supp. at 1358. Instead, to avoid summary
17 judgment, a plaintiff must show that he submitted his work to an
18 intermediary *who is in a position to transmit the plaintiff's work to*
19 *the creators of the infringing work.* Meta-Film, 586 F. Supp. at 1355-
20 56. The intermediary can be a person who (1) has supervisory
21 responsibility for the allegedly infringing project, (2) contributed
22 ideas and materials to it, or (3) worked in the same unit as the
23 creators. Id.; see, e.g., De Acosta v. Brown, 146 F.2d 408, 410 (2d
24 Cir. 1944) (sufficient evidence of access presented where plaintiff
25 submitted her work to a literary agent who thereafter was consulted by
26 the defendant as to research details regarding the infringing work).
27 At a minimum, however, "the dealings between the plaintiff and the
28

1 intermediary and between the intermediary and the alleged copier must
2 involve some overlap in subject matter to permit an inference of
3 access." Meta-Film, 586 F. Supp. at 1358 (citing Kamar Int'l Inc. v.
4 Russ Berrie and Co., 657 F.2d 1059 (9th Cir. 1981) and Russ Berrie &
5 Co. v. Jerry Elsner Co., Inc., 482 F. Supp. 980, 989 n.7 (S.D.N.Y.
6 1980)). In sum, the plaintiff must show a sufficient nexus between
7 "the individual who possesses knowledge of a plaintiff's work and the
8 creator of the allegedly infringing work." Id. at 1357.

9 For example, in Jorgensen, the Second Circuit affirmed summary
10 judgment as to some defendants on the issue of access where the
11 plaintiff could not produce documentary evidence to show that he mailed
12 out his work, and presented no evidence that those who did receive his
13 work had any relationship with the creators of the allegedly infringing
14 work. 351 F.3d at 52-53. Similarly, in Meta-Film, the court granted
15 summary judgment on access where the plaintiff showed his work to a
16 director who was under contract with the defendant studio and worked on
17 the studio lot, but could not demonstrate any connection between the
18 director and the studio's allegedly infringing project. 586 F. Supp.
19 1356-59. As the court explained, "countless unsolicited scripts are
20 submitted to numbers of individuals on studio lots everyday." Id. at
21 1357-58. "Under these circumstances, it is clearly unreasonable to
22 attribute the knowledge of any one individual-especially a non-
23 employee- to every other individual just because they occupy offices on
24 the same studio lot." Id. The court in Meta-Film also rejected
25 plaintiff's theory that access was shown by the fact that the director
26 to whom she submitted her work had dealings with an executive involved
27 in producing the infringing work. Id. at 1358. The court found that
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1 the executive did not make any creative contributions to the infringing
2 work and the meetings between the two men had nothing to do with either
3 plaintiff's work or the infringing work. Id. Thus, access could not
4 be inferred from those meetings.

5 Finally, in Jones v. Blige, the Sixth Circuit affirmed summary
6 judgment on the issue of access where plaintiff demonstrated that she
7 had sent her work to Andy McKaie, a Senior Vice President at Universal,
8 and the allegedly infringing artists, Mary J. Blige and Andre Young,
9 had a recording contract and a distribution joint venture,
10 respectively, with Universal. 558 F.3d 485, 491-92 (6th Cir. 2009).
11 The court held: "While it is true that both Young and Blige dealt with
12 Universal in certain respects, there is no evidence that either they or
13 anyone else involved in the creation of [the allegedly infringing work]
14 had any contact with McKaie or his division . . ." Id. at 492.

15 Here, Plaintiff cannot establish more than bare corporate receipt.
16 As noted above, Plaintiff has not introduced any documentary evidence
17 to support the claim that Plaintiff sent Karma! to Gersh at TGA, or
18 that the screenplay ever actually reached Gersh. However, even
19 generously assuming that Plaintiff's submission reached Gersh, there is
20 no evidence that Gersh had any contact with Garcia. It was Neisser,
21 not Gersh, who represented Garcia at TGA. (PSGI 28; Neisser Decl. ¶ 2;
22 Garcia Decl. ¶ 6.) Although Gersh's name was listed on Garcia's
23 contract, Gersh testified that he did not have any dealings with
24 Garcia, and there is no evidence that the two ever spoke. (Gersh Decl.
25 ¶ 7.) Further, there is no evidence that Gersh had any supervisory
26 responsibility for Earl or any involvement in the creation of the
27 series. These facts clearly cut against a finding of access.
28

1 Nonetheless, Plaintiff argues that Gersh may have passed the
 2 script along to Neisser, who then may have passed it along to Garcia.⁸
 3 Neisser testified in his deposition that he spoke to Gersh on a regular
 4 basis and that "TGA was a relatively small . . . place." (PSGI 73
 5 [Neisser Depo. 50:22-25; 89:22-89:8].) The evidence demonstrates that
 6 20 to 25 agents worked at TGA in mid-1995. (PSGI 32.) However, there
 7 is no evidence that Gersh and Neisser ever worked on any projects
 8 together. (See PSGI 32-35.) Neisser worked in the "television lit"
 9 department, which was relatively autonomous, and Gersh did not oversee
 10 that department or attend its regular meetings. (Pl. Compendium Exh. K
 11 [Neisser Depo., at 89:2-19], Exh. J [Gersh Depo., at 46:16-47:16,
 12 49:5-16].) Nonetheless, Neisser testified that TGA had weekly
 13 meetings of all the Los Angeles agents, which Gersh sometimes attended.
 14 (PSGI 35 [Neisser Depo. at 43:5-21, 89:2-90:2].) Finally, Neisser gave
 15 vague testimony that he had meetings with "all three Gershes⁹ about what
 16 was going on in the department, about the business" and that they
 17 "talked all the time." (PSGI 73.)¹⁰ In sum, viewing the record in the

18 ⁸ Alternatively, Plaintiff appears to argue (without citation to any relevant
 19 authority) that because TGA, the entity, received Plaintiff's screenplay, access
 20 can be shown by the fact that Garcia had an agency relationship with TGA. (Opp'n
 21 at 23.) Thus, Plaintiff argues that Garcia's access was not through an
 22 intermediary in this case because an entity, TGA, with legal authority to represent
 23 Garcia received the work. (Id.)

24 Plaintiff's argument makes little sense. TGA, as an entity, cannot give
 25 Garcia access to Karma!. The case law discussing access addresses whether actual
 26 persons are in a position vis-à-vis the creator to allow for reasonable access.
 27 Access is not a metaphysical concept, it requires a reasonable possibility that the
 28 actual creator(s) has seen (or heard or read) the work which is allegedly
 infringed. Thus, TGA cannot have access "on Garcia's behalf." Further,
 Plaintiff's argument is contradicted by the rule that bare corporate receipt does
 not impute knowledge of such receipt to all persons affiliated with the
 corporation.

⁹ The "three Gershes" refer to David Gersh, Bob Gersh, and Phil Gersh.
 Neisser considered all of them to be his bosses at TGA. (Pl. Compendium
 Exh. J [Gersh Depo. at 24:5-17].)

¹⁰ Gersh's deposition testimony, in some respects, differs with Neisser's
 testimony. Specifically, Gersh testified that TGA had weekly "staff
 meetings" of the agents, but he could not recall what year those staff
 meetings began. (Pl. Compendium Exh. K [Gersh Depo. at 44:5-13].) It is
 not clear whether these are the "all agent meetings" that Neisser was

1 light most favorable to Plaintiff, there is evidence that Gersh, the
2 person allegedly with knowledge of Plaintiff's script, had some
3 meetings or discussions with Neisser, who in turn had a connection with
4 Garcia.

5 The Court holds that this connection is far too attenuated and
6 speculative to support an inference of access. Although Gersh and
7 Neisser clearly spoke to one another, Plaintiff has not offered any
8 evidence that Gersh and Neisser ever had discussions about Karma! or
9 Earl or about any other projects that Garcia was working on. Further,
10 there is no showing that Neisser had any involvement or influence in
11 the creation of Earl. Thus, there is no evidence that discussions
12 between Gersh and Neisser involved any overlap in the subject matter of
13 discussions between Neisser and Garcia. See Meta-Film, 586 F. Supp. at
14 1358.

15 In some respects, Plaintiff's theory of access is even more
16 attenuated than that offered in Meta-Film. In Meta-Film, the
17 plaintiff submitted a script called "Frat Rats" to a movie director,
18 Badham, who specifically acknowledged receipt and admitted to reading
19 the script. Id. at 1352. Badham had several meetings with an
20 executive at Universal named Ned Tanen about an unrelated project. Id.
21 at 1353. Plaintiff speculated that during these meetings, Badham may
22 have given "Frat Rats" to Tanen or told him about it. See id. Tanen,

23 referring to. Gersh also testified that all meetings in the mid-1990s were
24 informal, and that he met with Neisser "very rarely" - generally, once
25 every 3 or 4 months - during that time period. (Id. at 46:6-13.) Finally,
26 Gersh testified that he had little, if any, connection with the department
27 Neisser worked in, and "wouldn't really have any reason to have any
28 discussion with him other than a social how are you kind of thing." (Id.
at 46:10-24.)

For purposes of summary judgment, the Court must view the evidence in
the light most favorable to the non-moving party, Plaintiff, in this case.
Thus, while the Court does not find Neisser and Gersh's testimony to be
flatly inconsistent, as Plaintiff contends, the Court accepts Neisser's
testimony for the purposes of this motion.

1 in turn, was instrumental in bringing the allegedly infringing work,
2 "Animal House" to Universal, but there was no evidence that Tanen had
3 creative input in Animal House. Id. at 1353. The Court found that
4 Plaintiff's submission to Badham, "as a matter of law, cannot sustain a
5 finding of access." Id. at 1359.

6 Here, unlike the director in Meta-Film, Gersh did not acknowledge
7 receipt of Karma!. Even assuming he had, however, all Plaintiff can
8 show is that, like Badham and Tanen, Gersh and Neisser had meetings
9 about certain projects and discussed unspecified "business." There is
10 no evidence that they ever discussed Plaintiff's screenplay or any of
11 Garcia's work, and there is nothing in the record indicating that Gersh
12 or Neisser had creative influence in any of Garcia's projects, much
13 less Earl.¹¹ (See Garcia Decl. ¶ 2.) Thus, Plaintiff's theory of
14 access fails as a matter of law.

15 Before addressing substantial similarity, the Court will address
16 one further argument regarding access. Here, the parties vigorously
17 dispute whether TGA had any formal policy regarding the submission of
18 unsolicited scripts in 1995, when Plaintiff allegedly submitted Karma!
19 to Gersh. Gersh and Neisser both declared that, in 1995, TGA had a
20 policy of not considering unsolicited screenplays; instead, such
21 screenplays would be returned to the sender or discarded. (Neisser
22 Decl. ¶ 3; Gersh Decl. ¶ 2.) They also declared that their personal
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24 ¹¹ The timing of events also casts doubt on the element of access. Although
25 Plaintiff transmitted his screenplay to TGA before Earl was created, eight years
26 passed between Plaintiff's submission and the time Garcia claims to have created
27 Earl. Further, there is no evidence that Garcia had any continuing contact with
28 Neisser (or Gersh) after he left TGA in 2000. Thus, in order for Plaintiff's
theory of access to be possible, either Gersh or Neisser must have given Garcia
access to Karma! before Garcia left TGA in 2000, and several years before the
creation of Earl. While this is certainly not fatal to Plaintiff's claim, see
Three Boys Music, 212 F.3d 477 (9th Cir. 2000), it weighs against the plausibility
of Plaintiff's alleged chain of connections.

1 practices were not to consider unsolicited screenplays, but to return
2 or discard them. (Neisser Decl. ¶ 4; Gersh Decl. ¶ 4.) Plaintiff
3 launched several objections to these declarations, and noted that no
4 written TGA policy about unsolicited materials had been produced.
5 (PSGI 42; Pl. Evidentiary Objections [Docket 53].) Finally, Plaintiff
6 also submitted the declaration of expert witness Eric Sherman
7 ("Sherman") regarding the custom and practice of agencies in the mid-
8 1990s relating to unsolicited submissions. Plaintiff argued that,
9 given industry practice, it was highly likely that someone at Gersh
10 read Karma! (Opp'n at 28; Sherman Decl. ¶ 8.)

11 Plaintiff's argument fails for several reasons. First, regardless
12 of whether TGA had an agency-wide policy relating to unsolicited
13 scripts, Neisser and Gersh both clearly testified that it was their
14 personal practice not to consider unsolicited scripts. (Pl. Compendium
15 Exh. K [Neisser Depo. at 52:10-24, 54:1-11, 90:17-92:9]; Suppl. Rubin
16 Decl. Exh. 3 [Neisser Depo. at 96:4-24, 98:8-19]; Pl. Compendium Exh. J
17 [Gersh Depo. at 26:11-27:24]; Suppl. Rubin Decl. Exh. 4 [Gersh Depo. at
18 20:24-24, 29:25-30:21].) Further, the undisputed evidence demonstrates
19 that Neisser and Gersh instructed their assistants not to accept
20 unsolicited scripts. (Id.) Plaintiff has presented no evidence that
21 Gersh or Neisser ever read an unsolicited script.

22 Second, the Court rejects the declaration of Plaintiff's expert,
23 Sherman, as it does not meet the requirements of Federal Rule of
24 Evidence 702. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509
25 U.S. 579, 597 (1993). Sherman declares that he has worked in the
26 entertainment industry for 40 years. (Sherman Decl. ¶ 2.) He has
27 taught classes on, and authored books on, the television and film
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1 business. (Id.; see Pl. Compendium Exh. L [Sherman's Curriculum
2 Vitae].) Finally, Sherman has acted as a consultant to "clients in the
3 entertainment industry," and in that capacity, has contacted different
4 Los Angeles talent agencies on "hundreds" of occasions regarding
5 submitting scripts to persons represented by those agencies. (Sherman
6 Decl. ¶ 3.) Based on this experience, Sherman offers testimony as to
7 the custom of talent agencies regarding unsolicited submissions in the
8 mid-1990s. Sherman opines that, in 1995, the agencies had "widely
9 divergent policies concerning 'unsolicited submissions.'" (Id. ¶ 4.)
10 Further, "these policies were far from uniform and by no means
11 rigorously applied in 1995." (Id.) Sherman also opines, however, that
12 "the custom and practice in the entertainment industry (circa mid-
13 90's)" is that agents would read unsolicited submissions if the
14 following criteria were met: "(a) when it has a provocative or catchy
15 title; (b) the appearance and/or packaging of the submission is
16 appealing; (c) the name of the author is a familiar name in the
17 industry; (d) the first ten pages are compelling; or (e) the genre is
18 one in which there is a particular need at the time." (Id. ¶ 5.)
19 Sherman states that, in his opinion, Karma! met four of these five
20 criteria, and therefore likely was read by someone at the Gersh agency.
21 (Id. ¶ 8.)

22 Sherman's expert testimony is not reliable. Sherman first tells
23 the Court that there was no standard practice in the industry regarding
24 unsolicited scripts - i.e., the agency policies were "widely divergent"
25 - but then declares that agents generally read unsolicited scripts when
26 some combination of 5 criteria were met. Sherman cannot purport to
27 testify as to a custom and practice without first establishing that
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1 such a practice existed. See United States v. Fredette, 315 F.3d 1235,
2 1239-40 (10th Cir. 2003) (expert's experience regarding the industry
3 standard for rebate programs gave him "no special insight" into
4 defendant's rebate program where the expert admitted that defendant's
5 program was different than any he had encountered before), Louie v.
6 British Airways, Ltd., Case No. A01-0329, 2003 WL 22769110, at * 10-11
7 (D. Alaska 2003) (expert affidavit could not establish that defendants'
8 failure to warn violated industry standards where there was no evidence
9 that such a standard existed at the relevant time period); see also, 25
10 C.J.S. Customs and Usages § 45 ("Proof of matters pertaining to custom
11 is not admissible before the existence of the custom has been
12 established by the evidence."). Here, Sherman has completely
13 undermined his own conclusion regarding industry practice.

14 Further, Sherman offers no support for the 5 criteria he provided;
15 he never explains where such criteria come from or why he believes that
16 talent agents used those criteria in the mid-1990s. Sherman does not
17 identify a single agency he dealt with in the relevant time period, and
18 he offers no testimony related to TGA's practices.¹² Thus, Sherman has
19 not identified the principles and methods that he used to form his
20 opinion, making it impossible for the Court to evaluate whether such
21 methods are reliable. See Fed. R. Evid. 702; In re Canvas Specialty,
22 Inc., 261 B.R. 12 (C.D. Cal. 2001). Finally, Sherman's opinion that
23 Karma! met four of the five criteria he proposed is entirely
24 unsupported and conclusory. He has not offered any evidence regarding

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26 ¹² Sherman's testimony about the practices of agents at Creative Artists' Agency
27 (CAA) is irrelevant. Plaintiff has not argued that Garcia received access to
28 Plaintiff's script through CAA. Thus, the policies of other agencies are only
relevant to the extent that they indicate a standard in the industry and therefore
can support a conclusion about TGA. However, Sherman admitted there was no
standard industry practice regarding unsolicited scripts among the Los Angeles
talent agencies in the mid-1990s.

1 how a literary agent would apply these criteria, nor has he offered any
2 examples of instances where his clients' unsolicited scripts were
3 reviewed for these reasons. Sherman's personal opinion that the title
4 of Plaintiff's work is "catchy," that the first 10 pages are
5 compelling, and so on, is not based on specialized knowledge and does
6 not assist the trier of fact. Fed. R. Evid. 702, advisory committee
7 notes (an expert relying primarily on experience must "explain how that
8 experience leads to the conclusion reached . . . and how that
9 experience is reliably applied to the facts"); Fredette, 315 F.3d at
10 1240. The Court therefore disregards Sherman's testimony.¹³ Claar v.
11 Burlington Northern R.R., 29 F.3d 499, 502-503 (9th Cir. 1994) (trial
12 court may exclude from its summary judgment consideration proffered
13 expert testimony that is not reliable).

14 In sum, even generously assuming that Plaintiff's submission of
15 Karma! actually reached Gersh, the record is insufficient to allow a
16 reasonable jury to infer that Garcia had access to Karma. Thus,
17 summary judgment for Defendants is appropriate.

18 Finally, even if the weak evidence of access were sufficient to
19 create a triable issue of fact, Plaintiff would still have to present
20 evidence allowing reasonable minds to conclude that Karma! and Earl are
21 substantially similar. As discussed below, Plaintiff has failed to
22 meet this burden.

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¹³ It is important to note, however, that even had the Court accepted Sherman's opinion, it would not change the outcome. At best, Sherman's opinion merely supports a finding that it was likely that "someone" at TGA, likely Gersh, read Karma!. Nonetheless, for the reasons stated above, Plaintiff has not established that this "someone" was an intermediary under Meta-Film.

2. Substantial Similarity

In addition to access, the issue of substantial similarity provides an independent ground for granting summary judgment. To determine whether two works are substantially similar, the Ninth Circuit applies a two-part test consisting of extrinsic and intrinsic components. Rice, 330 F.3d at 1174. The extrinsic test involves an objective comparison of the two works. The Court must consider "whether [the works] share a similarity of ideas and expression as measured by external, objective criteria." Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004). The extrinsic test requires an "analytic dissection" of the works, and is often aided by expert testimony. Id.

The intrinsic component of the substantial similarity test is subjective and depends solely on the response of the ordinary lay observer. Berkic v. Crichton, 761 F. 2d 1289, 1292 (9th Cir. 1985). "To that extent, expert testimony or the comparison of the individual features of the works is inappropriate in applying the intrinsic test." Id. Instead, the trier of fact "ordinarily decides whether the 'total concept and feel' of the two works is substantially similar." Id.; Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994).

"For summary judgment, only the extrinsic test is important." Kouf, 16 F.3d at 1045. "A plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment, because a jury cannot find substantial similarity without evidence on both the extrinsic and intrinsic tests." Id. Further, because the intrinsic test relies on the subjective judgment of the ordinary person, it must be left to the jury. Swirsky, 376 F.3d at 845. Thus, the Court's analysis on summary

1 judgment is limited to the extrinsic test.

2 Where literary works (films, screenplays, television series, etc.)
3 are at issue, the extrinsic test is an objective evaluation of "the
4 articulable similarities between the plot, themes, dialogue, mood,
5 setting, pace, characters, and sequence of events." Id. In applying
6 the test, the Court must distinguish between protectable and
7 unprotectable material, because a party claiming infringement may not
8 rely on expressions from unprotected elements. Rice, 330 F.3d at 1174.
9 For example, general plot ideas are not protectable and cannot give
10 rise to a copyright infringement claim. See Berkic, 761 F.2d at 1293
11 ("General plot ideas are not protected by copyright law; they remain
12 forever the common property of artistic mankind."). Further, the
13 doctrine of *scenes a faire* "holds that expressions indispensable and
14 naturally associated with the treatment of a given idea 'are treated
15 like ideas and are therefore not protected by copyright.'" Rice, 330
16 F.3d at 1175 (quoting Apple Comp. Inc. v. Microsoft Corp., 35 F. 3d
17 1435, 1444 (9th Cir. 1994)). Accordingly, the extrinsic test examines
18 "not the basic plot ideas for stories, but the actual concrete elements
19 that make up the total sequence of events and the relationships between
20 the major characters." Berkic, 761 F.2d at 1293.

21 Summary judgment on the issue of substantial similarity is
22 appropriate "if no reasonable juror could find substantial similarity
23 of ideas and expression." Funky Films, 462 F.3d at 1077 (quoting Kouf,
24 16 F.3d at 1045). Although summary judgment is not highly favored on
25 the issue of substantial similarity in copyright cases, "substantial
26 similarity may often be decided as a matter of law." Id. (quoting Sid
27 & Marty Krofft Television Prods. Inc. v. McDonald's Corp., 562 F.2d
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1 1157, 1164 (9th Cir. 1977)). Indeed, the Ninth Circuit "ha[s]
2 frequently affirmed summary judgment on the issue of substantial
3 similarity." Shaw v. Lindheim, 919 F.2d 1353, 1355 (9th Cir. 1990).

4 As discussed below, the Court concludes that no reasonable jury
5 could find Earl and Karma! to be substantially similar.

6 **I. Evidence Considered**

7 The Court engaged in detailed review of the works at issue.
8 Specifically, the Court read the Karma! screenplay by Mark Gable
9 (Docket No. 21-6), watched the pilot episode for Earl, and watched all
10 24 episodes of the first season of Earl. The Court also watched 5
11 select episodes of the second season of Earl. Notably, Plaintiff (and
12 Plaintiff's expert) only compared Karma! with episodes from the first
13 and second seasons of Earl when analyzing the alleged similarities
14 between the works. Thus, the Court focused on those episodes of Earl
15 which Plaintiff contends demonstrate a substantial similarity with
16 Karma! See Sony Pictures Entertainment, Inc. v. Fireworks
17 Entertainment Group, Inc., 156 F. Supp. 2d 1148, 1157 (C.D. Cal. 2001)
18 ("It is the copyright plaintiff's burden to identify the elements for
19 [the extrinsic test] comparison.") The Court also considered a chart
20 that Plaintiff created, which presents a side-by-side comparison of
21 those portions of the two works that Plaintiff contends are similar.
22 (Gable Decl., Exh. G [hereinafter "Plaintiff's Comparison Chart"];
23 Suppl. Gable Decl., Exh. A.)

24 **a. Expert Testimony**

25 In addition to the works themselves, Plaintiff relies on the
26 expert report of David Nimmer ("Nimmer") to establish substantial
27 similarity. Nimmer's expert report contains approximately 20
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1 paragraphs of comparisons between the objective elements of Karma! and
2 Earl. The report also contains a lengthy legal analysis of Ninth
3 Circuit case law, and concludes by responding to the expert report
4 offered by Defendants' expert, Jeff Rovin. Nimmer ultimately opines
5 that: "Based on my review of Ninth Circuit case law, the facts at bar
6 present a situation in which substantial similarity presents a triable
7 issue of fact - a reasonable factfinder could conclude, based on all
8 the circumstances, that defendants actionably copied from plaintiff's
9 screenplay." (Nimmer Decl. ¶ 27.)

10 Defendants object to the testimony offered by Nimmer on several
11 grounds. First, Defendants argue that Nimmer, while certainly an
12 expert in the field of copyright law, is not qualified to offer a
13 literary analysis in this case. Further, Defendants object that
14 Nimmer's report contains inadmissible legal conclusions, and challenge
15 Nimmer's methodology.

16 The Court agrees that Nimmer's expert report is not admissible.
17 Pursuant to Federal Rule of Evidence 702, a witness may offer an expert
18 opinion only if he or she draws on some special "knowledge, skill,
19 experience, training or education to formulate that opinion." Fed. R.
20 Evid. 702. However, "the opinion must be an expert opinion (that is,
21 an *opinion informed by the witness' expertise*) rather than simply an
22 opinion broached by a purported expert." Jones v. Lincoln Elec. Co.,
23 188 F.3d 709, 723 (7th Cir. 1999) (citing to United States v. Benson,
24 941 F.2d 598, 604 (7th Cir. 1991)) (emphasis added). Thus, to
25 determine whether a proposed expert is qualified, the court must
26 examine whether the witness's qualifying training, experience, or
27 specialized knowledge is sufficiently related to the subject matter
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1 upon which the witness offers an opinion. See United States v. Chang,
2 207 F.3d 1169, 1172 (9th Cir. 2000) ("To qualify as an expert, a
3 witness must have knowledge, skill, experience, training or education,
4 relevant to such evidence or fact in issue."); In re Canvas Specialty
5 Inc., 261 B.R. 12, 19 (C.D. Cal. 2001) ("It is not enough that the
6 proposed expert have expertise in an area of knowledge. The expertise
7 must be relevant to the determination of the facts in issue."); Jones,
8 188 F.3d at 723 ("Whether a witness is qualified as an expert can only
9 be determined by comparing the area in which the witness has superior
10 knowledge, skill, experience, or education with the subject matter of
11 the witness's testimony."). The proponent of the expert bears the
12 burden of demonstrating that the expert is qualified. United States v.
13 87.98 Acres of Land More or Less in the County of Merced, 530 F.3d 899,
14 904-05 (9th Cir. 2008); Baker v. Urban Outfitters, Inc., 254 F. Supp.
15 2d 346, 353 (S.D.N.Y. 2003).

16 Here, Plaintiff has not demonstrated that Nimmer is qualified to
17 render an expert opinion on the issue of substantial similarity between
18 two literary works. Nimmer's experience, training, and education
19 establish that Nimmer undoubtedly is an expert in the field of
20 copyright law. He is a graduate of Yale Law School, and a partner at
21 the Los Angeles-based firm of Irell & Manella. He specializes in and
22 teaches copyright law and is the current author of the preeminent
23 copyright treatise *Nimmer on Copyright*, which is often cited by
24 appellate courts, including the Supreme Court. Over the past three
25 decades, Nimmer has published numerous books and dozens of articles on
26 copyright law, spoken at many copyright law conferences, and taught
27 seminars to federal judges on the issue of substantial similarity in
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1 copyright law. Given this extensive background, there can be no
2 question that Nimmer is well-qualified to perform a *legal analysis*
3 regarding copyright claims. However, as discussed below, an expert
4 cannot offer his legal opinion as to whether a triable issue of fact
5 exists regarding copyright infringement; such an analysis is the
6 exclusive province of the Court.

7 Instead, the relevant issue on summary judgment, and indeed the
8 subject matter upon which Nimmer seeks to opine, is whether there is
9 substantial similarity in the objective elements of theme, plot,
10 dialogue, characters, sequence of events, mood, pace, and setting
11 between Karma! and Earl. In short, Nimmer was tasked with performing a
12 literary analysis of two fiction works. However, Nimmer offers little
13 explanation as to how his legal expertise qualifies him to compare a
14 screenplay and a television series on the eight criteria mentioned.
15 Notably absent from Nimmer's report and declarations is any indication
16 that Nimmer has experience, knowledge, training, or education in the
17 literary field - for example, there is no evidence that Nimmer has ever
18 worked as a film critic, a publisher, an English professor, an editor
19 or director, that Nimmer writes fiction works, or even that Nimmer is
20 an avid movie buff or television-watcher. While the Court recognizes
21 that the task of comparing two fiction works is not highly technical,
22 and indeed requires no specific training, to offer an *expert literary*
23 *analysis* there must be some indication that Nimmer has, in one capacity
24 or another, watched, read, written, compared and/or analyzed literary
25 works.¹⁴ See e.g., Stewart v. Wachowski, 574 F. Supp. 2d 1074, 1106

26 ¹⁴ The Court is using the term "literary works" loosely to relate to the type of
27 works at issue in this case - a screen play and a television series - and their
28 analogs such as motion pictures and books. In other words, the Court uses the term
to refer to those works in which substantial similarity analysis would be based on
the elements of theme, plot, characters, sequence of events, dialogue, mood,

1 n.130 (C.D. Cal. 2005) (expert was an English professor who had
2 previously testified in several matters regarding substantial
3 similarity); West v. Perry, No. 2:07CV200, 2009 WL 2225569, at *5 (E.D.
4 Tex. 2009) (among other qualifications, expert had a film degree, was
5 an accomplished screenwriter, and had worked as a screen credit
6 arbitrator for the Writer's Guild of America); A Slice of Pie
7 Productions, LLC v. Wayans Bros. Entertainment, 487 F. Supp. 2d 33, 41
8 (D. Conn. 2007) (expert had extensive experience teaching, evaluating,
9 studying, and writing about screen writing). No such evidence exists
10 here.

11 Further, Nimmer's prior experience as an expert witness or
12 consultant, with perhaps one or two exceptions, is not relevant to the
13 literary analysis offered in this case. Nimmer lists several cases in
14 which he previously offered expert testimony regarding the substantial
15 similarity of works such as technical drawings, architectural plans,
16 bingo cards, instructions for the use of pesticides, and computer
17 software. (Supp. Nimmer Decl. ¶¶ 7-10.) Nimmer does not explain the
18 specific analysis he performed; however, his assignments in those cases
19 did not involve fiction works such as television shows, plays, movies,
20 or books. Thus, this prior experience does not inform the literary
21 analysis offered here.¹⁵ There are two instances in which Nimmer may

22 setting, and pace. The Court recognizes that, under the Copyright Act, a movie or
23 television series would fall into the category of an audiovisual work, whereas a
24 book or screenplay would be categorized as a literary work. 17 U.S.C. § 102(a)(1),
(a)(6).

25 ¹⁵ Nimmer argues in his report that he has "long championed the view that the same
26 tools to address substantial similarity in traditional domains, such as plays,
27 should be deployed to perform the comparable substantial similarity analysis in the
28 newer domain of computer software." (Supp. Nimmer Decl. ¶ 10 [citing to 4 Nimmer
on Copyright § 13.03[F]].) Nimmer may very well be correct that a general
approach in which the court first excludes non-protectable elements (such as stock
elements or elements dictated by function or genre) and then analyzes the remaining
objective elements of a work is a useful framework for both traditional works as
well as computer software. However, this does not change the fact that the
specific eight criteria used to analyze the objective elements of traditional

1 have performed a similar analysis as that offered here, although given
2 the vague descriptions of these assignments, it is difficult to know
3 for certain. First, Nimmer declares that he assisted a publisher in
4 overturning an injunction in a copyright case involving a comparison
5 between Margaret Mitchell's *Gone with the Wind* and Alice Randall's *The*
6 *Wind Done Gone*. But Nimmer fails to describe the issue that he was
7 asked to analyze or the opinion he ultimately rendered in that case.¹⁶
8 (*Id.* ¶ 11.) Nimmer also notes one assignment, in Time Warner
9 Entertainment Co. v. Continental Casualty Co., Case No. 02-01885 R
10 (C.D. Cal.), where he was asked to compare a revised screenplay with
11 the motion picture *Contact* and concluded that the unlicensed,
12 protectable expression from the screenplay that was used in the film
13 gave rise to a valid copyright claim. (*Id.* ¶ 6.) While this prior
14 experience appears relevant, the fact that Nimmer testified as an
15 expert once before in a case involving literary works is not a
16 sufficient basis, without more, to accept his testimony here.¹⁷

17 In sum, Nimmer's specialized knowledge of copyright law and his
18 legal expertise does not qualify him as a literary expert. See, e.g.,
19 Gen. Battery Corp. v. Gould, Inc., 545 F. Supp. 731, 750 n.24, 759 n.30
20 (D. Delaware 1982) (patent lawyer, although knowledgeable about the

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22 works, like plays - plot, theme, characters, etc. - are simply not applicable to
23 works such as computer software or technical drawings. Thus, to the extent that
24 Nimmer is suggesting that a witness qualified to compare the objective components
25 of two computer software programs for substantial similarity would, by virtue of
26 that expertise, be qualified to analyze the similarities between a novel and film,
27 the Court flatly disagrees.

28 ¹⁶ The Court is familiar with the Eleventh Circuit's opinion overturning the
injunction in Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir.
2001), and notes that there were critical copyright issues in Suntrust Bank that
are not relevant to the present case - for example, whether the allegedly
infringing work was entitled to fair use protection as a parody.

¹⁷ Having reviewed the docket in Time Warner Entertainment Co., of which the
Court takes judicial notice, it appears that the opposing party did not
object to Nimmer's qualifications as an expert; thus, the issue of Nimmer's
literary expertise (or lack thereof) was not addressed.

1 patent office procedure, was not qualified to give an expert opinion on
2 infringement where he was not skilled in the relevant art of the
3 patented products); United States v. Chang, 207 F.3d 1169, 1172-73 (9th
4 Cir. 2000) (witness who was "extremely qualified" in international
5 finance was not qualified to render an opinion on the authenticity of a
6 securities certificate where he had no training in identification of
7 counterfeit securities); In re Canvas Specialty, Inc., 261 B.R. 12,
8 (C.D. Cal. 2001) (witness not qualified where witness was an architect
9 but had not demonstrated how his training as an architect gave him the
10 necessary expertise to determine whether metal cabanas met contract
11 requirements or had structural defects). As such, Nimmer's opinions as
12 to the points of similarity between Karma! and Earl are not admissible.

13 Finally, the remaining portion of Nimmer's report, in which Nimmer
14 instructs the Court as to Ninth Circuit law and concludes that "a
15 triable issue of fact exists" is not admissible. (Nimmer Decl. ¶¶ 26-
16 38.) It is well established that, "an expert may not state his or her
17 opinion as to legal standards, nor may he or she state legal
18 conclusions drawn by applying the law to the facts." 33A Fed. Proc.,
19 L. Ed. § 80:283 (West 2009); Aguilar v. Int'l Longshoremen's Union
20 Local No. 10, 966 F.2d 443, 447 (9th Cir. 1992); Nationwide Transport
21 Finance v. Cass Information Systems, Inc., 523 F.3d 1051, 1059-60 (9th
22 Cir. 2008); McHugh v. United Serv. Auto. Ass'n, 164 F.3d 451, 454 (9th
23 Cir. 1999); see also, Joseph M. McLaughlin, et al., Weinstein's Federal
24 Evidence § 702.03[3] (2d ed. 2009). Such opinions invade on the
25 province of the judge. See Burkhardt v. Washington Metro. Area Transit
26 Auth., 112 F.3d 1207, 1213 (D.C. Cir. 1997). Here, portions of
27 Nimmer's report read much like a third legal brief. Nimmer analyzes
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1 five Ninth Circuit copyright cases, "weigh[s] [the two works] against
2 [his] comprehensive review of Ninth Circuit jurisprudence," and
3 concludes that a triable issue of fact exists. (Nimmer Decl. ¶ 38.)
4 This opinion constitutes a legal conclusion and is not admissible.

5 For these reasons, the Court excludes Nimmer's expert report.
6 Nonetheless, even had the Court considered the report, it would not
7 have altered the substantial similarity analysis below. To the extent
8 that Nimmer's report offers objective points of comparison between the
9 two works, most (if not all) of those comparisons were also noted in
10 Plaintiff's Comparison Chart, which the Court has considered.
11 Further, although expert testimony comparing literary works is
12 generally accepted in the Ninth Circuit, the Court finds that such
13 testimony is only marginally helpful in cases such as this, where the
14 works are targeted at a general audience and deal with subject matter
15 readily understandable by ordinary persons.¹⁸ Thus, the Court's

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17 ¹⁸ Expert testimony is far less critical in a case like this than it is in a case
18 where specialized knowledge is required to dissect the objective components of the
19 copyrighted work. See, e.g., Brown Bag Software, 960 F.2d at 1473-74 (relying on
20 expert testimony to identify the objective points of comparison among different
21 computer software programs); Swirsky v. Carey, 376 F.3d 841, 847-48 (9th Cir. 2004)
22 (relying on expert testimony comparing the objective elements - of pitch, melodies,
23 baselines, tempo, chords, structure, and harmonic rhythm - of musical works);
24 Chiate v. Morris, Case No. 90-55428, 1992 WL 197591, *5 (9th Cir., Aug. 17, 1992)
25 (finding that expert testimony by a musicologist is crucial to proving objective
26 similarity of songs); see also DOWD, COPYRIGHT LITIGATION HANDBOOK § 15:27 (2d ed. 2009)
27 (noting that expert testimony is often helpful in cases involving computer programs
28 and functional objects, but will "seldom be necessary" to determine substantial
similarity between literary works). Indeed, several other courts have cast doubt
on whether expert testimony regarding substantial similarity is ever helpful in a
case involving the comparison of two literary works. See e.g., Nicolas v.
Universal Pictures Corp., 45 F.2d 119, 123 (2d. Cir. 1930); Stromback v. New Line
Cinema, 384 F.3d 283, 295 (6th Cir. 2004); Kindergartners Count Inc. v. Demoulin,
249 F. Supp. 2d 1214, 1232 (D. Kan. 2003). As stated above, the Ninth Circuit
generally takes a broader view, and often finds that expert testimony is
appropriate regarding the objective substantial similarity of literary works. See
Olson, 855 F.2d at 1449; Sid & Marty Krofft Television Productions, Inc., 562 F.2d
1157, 1164 (9th Cir. 1977). Nonetheless, several Ninth Circuit cases have
recognized the limitations of expert testimony in this area. See Rice v. Fox
Broadcasting Co., 330 F.3d 1170, 1179 (9th Cir. 2003) (upholding the district
court's decision to disregard the parties' expert reports where the court engaged
in an extensive analysis of the alleged similarities in expressive elements of the
works and "neither expert opinion [was] very relevant to the conclusions drawn by

1 analysis is largely based on the Court's own extensive review of the
2 works. Finally, contrary to Plaintiff's arguments otherwise,¹⁹ the mere
3 existence of dueling expert reports does not necessarily create a
4 triable issue of fact. Numerous cases have found in favor of
5 defendants on the issue of substantial similarity despite the existence
6 of expert testimony offered by plaintiffs. See, e.g., Rice, 330 F.3d
7 at 1180 (affirming summary judgment for defendants where the parties'
8 each submitted expert reports); Olson v. Nat'l Broadcasting Co., Inc.,
9 855 F.2d 1446, 1451, 1453 (9th Cir. 1988) (affirming the district
10 court's grant of judgment notwithstanding the verdict after Plaintiff
11 offered expert testimony at trial that sought to demonstrate similarity
12 between the works); Brown Bag Software v. Symantec Corp., 960 F.2d 1465
13 (9th Cir. 1992) (affirming summary judgment for defendants where
14 plaintiff presented expert testimony on the issue of substantial
15 similarity).

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18 the court"); Olson, 855 F. 2d 1450-51 (holding that the district court's decision
19 to discount expert testimony was appropriate where the expert deemphasized
20 dissimilarities between the works and compared *scenes a faire*); Shaw v. Lindheim,
21 919 F.2d 1353, 1357 (9th Cir. 1990) (viewing the expert report with caution where
22 it focused on random similarities in the works).

23 ¹⁹ At the summary judgment hearing, Plaintiff's counsel argued that Swirsky v.
24 Carey, 376 F.3d 841 (9th Cir. 2004), held that if experts from both parties
25 disagree on the issue of substantial similarity, the case should be submitted to
26 the jury. This is a misreading of Swirsky. In Swirsky, the Ninth Circuit was
27 discussing the general summary judgment standard, not the testimony of experts,
28 when it noted that if plaintiff "presented indicia of a sufficient disagreement
concerning the substantial similarity of [the] two works, then the case must be
submitted to a trier of fact." Id. at 844. Swirsky was quoting Brown Bag Software
v. Symantec Corp., 960 F.2d 1465, 1472 (9th Cir. 1992), which in turn quoted from
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986), a seminal Supreme
Court case setting out the standard for ruling on summary judgment motions
generally. Thus, when read in context, the portion of Swirsky quoted above simply
restates the standard for evaluating a summary judgment motion - that is, if the
evidence presented indicates that reasonable minds could differ as to which party
should prevail, the case must go to the jury. However, where no reasonable jury
could conclude that the two works are substantially similar, summary judgment on
the issue of substantial similarity is appropriate, notwithstanding dueling expert
reports. See Flynn v. Surnow, No. CV 02-9058-JFW (PLAx), 2003 WL 23411877, *4
(C.D. Cal., Dec. 9, 2003) (citing to Narell v. Freeman, 872 F.2d 907, 910 (9th Cir.
1989)).

1 Defendants also submitted an expert report in this case.
2 Defendants' expert, Jeff Rovin, has spent his entire adult life as a
3 professional writer. (Rovin Decl. ¶ 3, pg. 5, Appx. 4.) He has
4 authored 124 books, both fiction and non-fiction, including several
5 books analyzing films and television series - e.g., *The Films of*
6 *Charleston Heston*, *The Fabulous Fantasy Films*, *The Great Television*
7 *Series*. (Id., Appx. 4.) Among other relevant experience, Rovin was a
8 writer on two television series and a consultant on three others,
9 provided DVD commentary on three recent films, and has written monthly
10 film columns in several magazines for years. (Id.) His magazine
11 publications include *Fascinating Facts from the Bible* (1995-2001) and
12 *The Weekly Worlds News* (2005-2007) which regularly published stories
13 about angels, fate, and other aspects of religious phenomenon. Rovin's
14 expert report establishes that he has extensive knowledge of films and
15 books related to karma, fate, and related topics. Based on this
16 experience, the Court concludes that Rovin has significant knowledge
17 and experience in the literary field to render an opinion on whether
18 the expressive elements of Karma! and Earl are substantially similar.
19 Indeed, Plaintiff has not challenged Rovin's qualifications as an
20 expert.

21 While Rovin's expert report is admissible, the Court did not rely
22 on it to conclude that no reasonable jury could find the works to be
23 substantially similar. Many of the dissimilarities between Karma! and
24 Earl that Rovin addresses are apparent from a review of the works
25 themselves, and do not require a trained literary eye. Thus, as stated
26 above, the Court relied primarily on its own review of the works in
27 coming to the conclusion that no triable issue of fact exists as to
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1 substantial similarity. Furthermore, while expert testimony can be
2 useful when examining whether the alleged similarities between two
3 works constitute *scenes-a-faire*, see GOLDSTEIN ON COPYRIGHT § 16.4.2 (3d
4 ed. 2006), the Court notes that comparisons to prior art are only
5 helpful to the extent that they are genre-specific. That is, an
6 unprotectable *scenes-a-faire* is an element of a story that is standard
7 in a particular genre or that derives from the basic plot idea - e.g.,
8 a saloon shoot-out might be a standard element in an action film set in
9 the old west. Rice, 330 F.3d at 1175. Here, it is not helpful to
10 simply point out that certain past works also included a particular
11 element; rather, to demonstrate that the element is not protectable, it
12 must be shown that such an element is standard or indispensable in
13 literary works centered around the themes of karma or redemption. See
14 Fleener v. Trinity Broadcasting Co., 203 F. Supp. 2d 1142, 1150-51
15 (C.D. Cal. 2001). Thus, to the extent that Rovin's comparisons to
16 prior art are not genre-or-theme-specific, the Court has discounted
17 those instances in its analysis.

18 With those considerations in mind, the Court turns to the
19 objective analysis of Karma! and Earl.

20 **ii. Objective Analysis**

21 **a. Theme**

22 At an abstract level, both Karma! and Earl involve the central
23 themes of karma and redemption. The ideas of righting past wrongs and
24 good things happening to good people are general storylines that have
25 been around for thousands of years. These ideas, standing alone, are
26 not protectable. See Olson v. Nat'l Broadcasting Co., 855 F.2d 1446,
27 1450 (9th Cir. 1988) (the general idea of a group action-adventure
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1 series in which Vietnam veterans do good deeds and are portrayed in a
2 positive light is not protectable); Berkic v. Crichton, 761 F.2d 1289,
3 1293 (9th Cir. 1985) (finding that the basic plot idea of a young
4 professional who courageously investigates and exposes a criminal
5 organization that kills persons to sell their vital organs is not
6 protectable).²⁰

7 Moreover, the manner in which the themes of karma and redemption
8 are expressed in each work is different. In Plaintiff's screenplay,
9 the notion of karma has an obvious religious underpinning. At the
10 beginning of the screenplay, Frankie's brother, who is a priest, tells
11 Frankie: "you look like you've been out in the desert for forty days
12 and forty nights! And the devils [sic] got the best of you." (Rubin
13 Decl., Exh. D, at 85.) Frankie is then visited by an angel, who meets
14 him at the Cemetery of the Blessed Virgin. The angel has divine
15 powers; he stops the rain from falling and brings dying flowers back to
16 life. The angel also can fly, and transforms himself into other
17 beings, such as the blind homeless person and a white dove. The angel
18 tells Frankie that he must take certain steps to save the soul of his
19 unborn son, and when Frankie attempts to bargain with the angel, the
20 angel tells him "it's not up to me anyway." (Id. at 91.) Later in
21 the screenplay, Frankie asks the angel why he has chosen to guide
22 Frankie, and the angel responds, "God believes he can resurrect all of
23 his sons who have fallen." (Id. at 125.) As the screenplay
24 progresses, Frankie turns his life around and begins to have faith in
25 the power of God. For example, at the pivotal moment in the screenplay

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²⁰ While the Court has rejected the report of Plaintiff's expert, David Nimmer, the Court notes in passing that Nimmer agreed that the theme of turning bad karma into good karma and the concept of making amends were not protectable. (Supp. Rubin Decl., Exh. 1 [Nimmer Depo. at 97:24-98:21, 120:5-7].)

1 where Frankie goes undercover and successfully foils a major drug deal,
2 his former Lieutenant tells Frankie that he did "real good." Frankie
3 responds, "Yea, by the good grace of God." (Id. at 179.) (emphasis in
4 the original). When the Lieutenant incredulously respond, ". . . God?
5 As I recall, you never really believed in that sort of thing," Frankie
6 responds, "Yea, well you could say I was baptized in that river."
7 (Id.) (emphasis in the original). At the end of the screenplay, when
8 Frankie dies, he turns into an angel. Frankie asks Angel Man about his
9 wings, and Angel Man tells him, "You fell from grace, but you've earned
10 them back." (Id. at 186.) The screenplay concludes with Frankie, now
11 an angel, watching over Tori Ann. (Id. at 187-88).

12 In sum, the religious overtone in Karma! is seen throughout the
13 screenplay. Frankie's fall is "a fall from grace," and it is through
14 his good works and his eventual acceptance of God that Frankie is
15 redeemed. Frankie lives on after death, as an angel who watches over
16 those he loves.

17 In Earl, karma is not a religious concept, nor does Earl go
18 through any type of faith-based transformation. Earl learns about
19 Karma from Carson Daly, a Hollywood celebrity, during a televised
20 interview. Daly is not a celestial being, he does not direct Earl to
21 take any actions; indeed, he is not even speaking specifically to Earl.
22 Daly never again appears in Earl, and does not "guide" or watch over
23 Earl. Instead, Earl decides on his own to adopt Daly's karmic
24 philosophy. In Earl, like in Karma!, the notion of karma is
25 personified - Earl talks to "karma" in several episodes as though he
26 were speaking to a person and implores karma to help him out of certain
27 situations. However, the force of karma is not embodied in a celestial
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1 being, nor does it have a religious undertone. Unlike in Karma!, Earl
2 is not saved "by the grace of God," he does not adopt any religious
3 convictions, and he does not experience a religious rebirth.

4 Thus, while both works share similar unprotectable themes, the
5 expression of those themes is markedly different.

6 **b. Plot**

7 The story of redemption naturally begins with someone who needs to
8 be redeemed, and ends with that same person doing good acts and making
9 up for past wrongs. In this manner, both Earl and Frankie can quite
10 easily be compared to Scrooge in Charles Dickens's A Christmas Carol.
11 All three characters start as bad people, have a realization that their
12 actions affect their future, and subsequently decide to lead better
13 lives by making up for past wrongs. Again, this basic plot idea is not
14 copyrightable. Berkic, 761 F.2d at 1293.

15 Beyond these general plot ideas, and the fact that in both works
16 the main character wins the lottery (discussed below), there is little
17 in common between Earl and Karma! Earl is a small town low-life who
18 steals, lies and bullies people on a regular basis. Although Frankie
19 also steals once he is out of prison, Frankie is not just a low-life,
20 but a disgraced detective who took bribes from criminals and associates
21 with dangerous drug dealers.

22 Further, the incarnation of each character's bad karma is markedly
23 different. In Earl, karma retaliates for Earl's bad acts in random
24 ways. For instance, when Earl undeservedly wins the lottery, he is hit
25 by a car. Earl is motivated to do good deeds primarily to avoid
26 karma's retribution against him. In Karma!, on the other hand, Angel
27 Man tells Frankie that his bad karma will affect the life of his unborn
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1 son. Thus, Frankie is motivated to improve his own life, as well of
2 the lives of others, including his son.

3 Each character has a vastly different karmic realization. Earl
4 begins to believe in karma when, upon having a good thing happen to
5 him, winning the lottery, he is immediately hit by a car. The accident
6 not only leaves Earl in the hospital with nearly his whole body in a
7 cast, but also makes Earl lose the lottery ticket. Upon hearing Carson
8 Daly's speech about karma, Earl decides that he is being punished for
9 all of his bad deeds and decides to right his life. In contrast,
10 Frankie's karmic realization revolves completely around Angel Man.
11 Angel Man shows Frankie an image of Frankie's unborn son, and convinces
12 Frankie that he must amend his past wrongs and straighten out his life
13 in order to save the soul of his unborn child. As such, Frankie's
14 revelation is starkly different from that of Earl.

15 After these markedly different realizations, both characters turn
16 to making amends for their past deeds. Earl creates a list of
17 everything he has ever done wrong, and begins to work at crossing each
18 and every mistake off the list. Just by starting, Earl's lottery
19 ticket is carried back to him by the wind. Thus, Earl becomes
20 convinced of karma's power. In each episode, Earl aims to amend a
21 specific past wrong with the goal of crossing it off his list. In
22 contrast, Frankie never creates any list of the bad things he done.²¹

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24 ²¹ Plaintiff argues that, like Earl, Frankie does have a list. Plaintiff refers to
25 the "list" of the three things Angel Man told Frankie to do - (1) make amends for
26 past wrongs; (2) clean up your life; and (3) use the money you come into wisely.
27 This is not a point of similarity. First, Angel Man does not give Frankie a
28 physical list. In Earl, the physical list - i.e. the piece of paper that Earl
wrote his misdeeds on - is central to the show. Other characters refer to it, Earl
is constantly taking the list out of his pocket to add or delete items, and it is
the barometer of how well Earl is doing in his life. Thus, the fact that there is
no physical list in Karma! is an important difference. Further, even if Angel
Man's three-part agenda could be characterized as a "list", it is not a list of
wrongs for which Frankie needs to amend. Indeed, only one item on Angel Man's

1 Instead, Frankie seemingly amends his wrongs as opportunities arise -
2 for example, when Frankie sees a man drop his wallet, he returns it.
3 Frankie's efforts to turn his life around culminate in his valiant
4 attempt to clear his name as a police officer by going undercover and
5 busting a large drug deal. When Frankie is successful, the newspaper
6 runs a front-page story heralding Frankie's transformation with the
7 headline: "X-bad cop, makes good." (Rubin Decl., Exh. D, pg. 183.)
8 There is no counterpart to this plot point in Earl. Instead, Earl's
9 journey toward redemption is seemingly never-ending; although he makes
10 up for a specific wrong in each episode, he often makes mistakes and
11 has to add new items to the list.

12 Plaintiff stresses that both works have the main character win a
13 lottery ticket, and both characters use the lottery winnings to remedy
14 past misdeeds. However, the lottery winnings are different amounts of
15 money and play different roles in each work. Most notably, Earl's
16 winning the lottery *leads* to Earl's karmic realization. In winning the
17 lottery, Earl enthusiastically celebrates his winnings and gets hit by
18 a car. When he loses the lottery ticket in the accident, this triggers
19 Earl's realization that bad things happen to him because he is a bad
20 person. In short, it is the *loss of the lottery ticket* that sets
21 Earl's redemption in motion. Once Earl begins do good deeds, the
22 lottery ticket immediately returns to him and convinces Earl of karma's
23 power. Further, Earl's lottery winnings are only \$100,000, not enough
24 to change Earl's life significantly, but enough to enable Earl to spend
25 his days crossing wrongs of his list, instead of getting a job.

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"list" relates to righting past wrongs, and it does not delineate the specific wrongs Frankie must correct.

1 In Karma!, Frankie has his karmic realization before he comes into
2 any money. In fact, it is Angel Man's *promise of money in the future*
3 that motivates Frankie to do good deeds. Frankie initially wins \$300
4 from a scratcher and uses that money to pay the blind man, buy candy
5 for teenagers, and pay back-owed rent. Even after the initial win,
6 however, Frankie asks Angel Man if he is going to come into wealth.
7 Thus, Frankie is always looking forward to the reward of money, which
8 entices him to stay on the straight and narrow. Unlike Earl, Frankie
9 does not win any substantial amount of money until the end of the
10 screenplay, when he wins two million dollars. Further, while Earl uses
11 his lottery winnings to redeem his own past wrongs, Frankie uses the
12 bulk of his winnings - a million dollars - to rebuild an orphanage that
13 has no relationship to Frankie's past misdeeds.

14 Beyond the karmic arc and the lottery tickets, Plaintiff lists
15 roughly a dozen other plot points that Plaintiff contends make the
16 works substantially similar. Much of this list is made up of random
17 similarities that have no qualitative significance to the works - for
18 example, Plaintiff argues that in both works there is an "old oriental
19 bum," and that in both works, the main character expresses appreciation
20 for his brother. The Ninth Circuit has repeatedly held that "such
21 lists of similarities . . . are inherently subjective and unreliable,"
22 and a court should be "particularly cautious where, as here, the list
23 emphasizes random similarities scattered throughout the works."
24 Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984) (summary
25 judgment granted where there was no substantial similarity in the
26 sequence of events, mood, dialogue or characters, and plot similarities
27 existed "only at the general level for which plaintiff cannot claim
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1 copyright protection"); see also, Olson, 855 F.2d at 1450 n.3; Kouf, 16
2 F.3d at 1046-47; Shaw, 919 F.2d at 1362. These minor elements,
3 scattered throughout the works, are not probative of similarity.

4 Other instances that Plaintiff relies on simply are not similar.
5 For example, Plaintiff notes that in Karma!, Tori Ann wants to have sex
6 with Frankie, but he tells her she will regret it, while in Earl, Earl
7 and Joy have sex and Earl states that it was a big mistake. In the
8 abstract, these events sound similar, but in context, the differences
9 between these two scenes are overwhelming. In Karma!, Frankie tells
10 Tori Ann that they should not have sex because Tori Ann is high on
11 drugs. Up until that point in the story, Frankie and Tori Ann have had
12 a completely plutonic relationship. Frankie wants to sleep with Tori
13 Ann, but not when Tori Ann is out of control and not thinking clearly.
14 Thus, Frankie resists her in that moment, making it all the more
15 special when the two make love later in the screenplay. In Earl, Earl
16 and Joy were previously married. After their divorce, Earl gives into
17 temptation and has sex with Joy while helping her plan her wedding to
18 Crabman. Earl feels guilty for betraying his friend Crabman, and
19 confesses to him, telling Crabman that it was a big mistake. Crabman
20 forgives Earl and Joy and goes through with the wedding. These
21 storylines are not similar: In Karma!, Frankie does the right thing,
22 resists temptation, and later falls in deeply in love with Tori Ann,
23 whereas in Earl, Earl does the wrong thing, gives into temptation and
24 betrays a friend, later having to apologize.

25 As another example, Plaintiff points out that both Earl and
26 Frankie return a man's wallet as an act of good karma. But the idea of
27 a low-life thief stealing a wallet is hardly protectable, and the
28

1 concrete expression of making amends for the theft is different in each
2 work. Earl finds the specific person from whom he stole the wallet,
3 whereas when Frankie sees that he has the opportunity to steal another
4 man's wallet, he decides to do the right thing and return the wallet to
5 the owner. Thus, Earl is making amends against the original person he
6 hurt, whereas Frankie is simply deciding not to steal again.

7 Finally, Plaintiff's list focuses on several unprotectable stock
8 elements or *scenes-a-faire* that are scattered throughout the works.
9 For example, Plaintiff notes that both Earl and Frankie spend time in
10 prison, and after turning their lives around, both characters repay
11 money to those from whom they stole, and at some point, both men get a
12 job. These storylines are driven by the basic plot idea of turning
13 one's life around. The concept of a bad person spending time in
14 prison, and then trying to clean up their act by making restitution and
15 getting a job are unprotectable *scenes-a-faire* in a story about
16 redemption. See, e.g., Walker v. Time Life Films, Inc., 784 F.2d 44,
17 50 (2d Cir. 1986) (In two works depicting the experience of policemen
18 in New York's crime-laden 41st Precinct, scenes of a policeman murdered
19 at close range, cockfights, drunks, stripped cars, prostitute, rats,
20 unsuccessful foot chases of fleeing criminals, and demoralized officers
21 were stock scenes commonly linked to the genre of the works); Berkic,
22 761 F.2d at 1293 (holding that no protection may be afforded to
23 "situations and incidents which flow naturally from a basic plot
24 premise"). Similarly, Plaintiff points out that in both works, a piece
25 of paper floats back to the main character starting the idea of karma.
26 In Karma!, Frankie throws a picture of an angel into the wind, and it
27 mysteriously comes back to him. Similarly, the winning lottery ticket
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1 returns to Earl carried by the wind. However, the visual effect of a
2 piece of paper magically floating back to someone is not a protectable
3 expression. The effect is commonly used in works that involve themes
4 of serendipity and fate.²²

5 Although there are some general similarities between the works,
6 the similarities pale in comparison to the significant differences
7 between the works. In this way, the present case is similar to Funky
8 Films, Inc. v. Time Warner Cable, 462 F.3d 1072 (9th Cir. 2006). In
9 Funky Films, the plaintiff alleged that defendants' television series
10 infringed upon plaintiff's screenplay. Both works depicted family-run
11 funeral homes where the father died leaving the family's two sons to
12 run the funeral home. Id. at 1077. Both works included the return of
13 the prodigal son, a competitive bid by a rival business that does not
14 succeed, and one son changing his religious affiliation to get
15 business. Id. The Ninth Circuit found that "[a]t first blush, these
16 apparent similarities in plot appear significant; however, an actual
17 reading of the two works reveals greater, more significant differences
18 and few real similarities at the levels of plot, characters, themes,
19 mood pace, dialogue, or sequence of events." Id. at 1078. The court
20 noted that events in both works that appeared similar were, in context,
21 qualitatively different - e.g., in plaintiff's work, the father's
22 death sparked a series of murders, whereas the father's death in
23 defendants' work did not - and that while both works explored the same
24

25 ²² These two scenes are also contextually dissimilar. In Karma!, Frankie is trying
26 to get rid of the picture of the angel. He first tries to burn it, and then throws
27 it toward a river, but the wind immediately carries it back to him. This event
28 starts Frankie's karmic realization. In Earl, Earl loses a \$100,000 lottery
ticket - something he desperately would want to hold on to, not get rid of - when
he is struck by a car. It is not until several scenes later, when Earl has already
had his karmic epiphany and has started his journey toward redemption, that the
wind carries the ticket back to him.

1 themes, they did so in very different ways. Id. at 1078-80. The Ninth
2 Circuit concluded that:

3 At a very high level of generality, both works share certain
4 plot similarities: the family-run funeral home, the father's
5 death, and the return of the 'prodigal son,' who assists his
6 brother in maintaining the family business. But general plot
7 ideas are not protected by copyright law; they remain forever
8 the common property of artistic mankind. Beyond that, the
9 stories do not share any detailed sequence of events.

10 Id. at 1081 (internal citations and quotation marks omitted). Thus,
11 the Court affirmed summary judgment in favor of defendants on the issue
12 of substantial similarity. Id. at 1081; see also Walker v. Time Life
13 Films, Inc., 784 F.2d 44, 49-50 (2d Cir. 1986) (finding that "at the
14 most general level, the movie and the book tell the same story" - that
15 of policemen battling the hostile environment of New York's 41st
16 Precinct - however, "differences in plot and structure far outweigh
17 this general likeness.").

18 As in Funky Films, both Karma! and Earl! share the basic plot of a
19 low-life embracing karma, winning the lottery, and straightening out
20 his life. While the overarching theme of each story is similar, the
21 concrete expression of how karma is portrayed, the characters' karmic
22 realizations, the efforts taken to redeem past wrongs, and the end
23 results are wholly dissimilar. Notably, many of the most significant
24 elements of Karma!'s plot do not have any counterpart in Earl! - for
25 example, the guiding role of Angel Man, the unborn child who stands to
26 inherit Frankie's karma, the idea of a fallen cop getting back his
27 integrity and "clearing his name" through undercover police work, the
28 drug dealer antagonist, the love story with Toni Ann and her decision
to turn her life around, and most significantly, Frankie's death and
subsequent transformation into an angel. Moreover, as discussed

1 below, the sequence of events in the two works bears little
2 resemblance. As such, no reasonable jury could find that the plots of
3 the two works is substantially similar.

4 Plaintiff nonetheless urges the Court to adopt the analysis in
5 Metcalfe v. Bochco, 294 F.3d 1069 (9th Cir. 2002). In Metcalfe, the
6 Ninth Circuit held that although individual elements of a work may not
7 be protectable, "[t]he particular sequence in which an author strings a
8 *significant number of unprotectable elements* can itself be a
9 protectable element." 294 F.3d at 1074 (emphasis added). In Metcalfe,
10 however, the sequence of unprotectable elements went far beyond the
11 basic plot. The Ninth Circuit found the similarities between the works
12 "striking". Id. at 1073. The Ninth Circuit noted:

13 [Both works] are set in overburdened county hospitals in inner-
14 city Los Angeles with mostly black staffs. Both deal with issues
15 of poverty, race relations and urban blight. The works' main
16 characters are both young, good-looking, muscular black surgeons
17 who grew up in the neighborhood where the hospital is located.
18 Both surgeons struggle to choose between the financial benefits of
19 private practice and the emotional rewards of working in the inner
20 city. Both are romantically involved with young professional
21 women when they arrive at the hospital, but develop strong
22 attractions to hospital administrators. Both new relationships
23 flourish and culminate in a kiss, but are later strained when the
24 administrator observe a display of physical intimacy between the
25 main character and his original love interest. Both
26 administrators are in their thirties, were once married but are
27 now single, without children and devoted to their careers and to
28 the hospital. In both works, the hospital's bid for
reaccreditation is vehemently opposed by a Hispanic politician.

Id. at 1073-74. In sum, the works had "the same setting in the same
location and city . . . dealt with identical issues, had similar
looking characters in identical professions, facing identical
challenges" and had an "identical" sequence of events. Identity Arts
v. Best Buy Enterprise Servs., No., 05-4656 PJH, 2007 WL 1149155, at
*27 (N.D. Cal., Apr. 18, 2007) (summarizing the facts in Metcalfe). The

1 Ninth Circuit concluded that "the similarities proffered by the
2 [plaintiffs] are not protectable when considered individually; they are
3 either too generic or constitute 'scenes a faire,' [h]owever,
4 the presence of *so many generic similarities and the common patterns in*
5 *which they arise*" allowed the plaintiff to satisfy the extrinsic test
6 for purposes of summary judgment. *Id.* at 1074 (emphasis added).

7 Metcalfe does not apply to the present case. In Metcalfe, unlike
8 this case, the "generic similarities" were voluminous, nearly
9 identical, and occurred in the same pattern. Here, in contrast, many
10 of the elements Plaintiff points out are not similar when viewed in
11 context, and those that do bear some commonality - e.g., lottery
12 winnings, prison time, paying off debts - do not occur in the same
13 sequence. Plaintiff has not pointed to any common pattern of
14 unprotected elements in Karma that also appears in Earl in the sort of
15 magnitude contemplated by Metcalfe. See Zella v. Scripps Co., 529 F.
16 Supp. 2d 1124, 1073 (C.D. Cal. 2007) (noting that "many courts have
17 been reluctant to expand [the concept of finding copyright protection
18 for a pattern of unprotected elements in literary works] beyond the
19 clear-cut case in Metcalfe," and granting summary judgment for
20 defendants where plaintiff "cobbled together" a list of generic
21 elements that did not form a specific pattern); Flynn v. Surnow, No. CV
22 02-9058-JFW (PLAx), 2003 WL 23411877, *9 (C.D. Cal., Dec. 9, 2003)
23 (rejecting a Metcalfe argument where the similarities "are randomly
24 scattered throughout the works and have no concrete pattern . . . in
25 common"); Identity Arts, 2007 WL 1149155, at *28 (declining to apply
26 Metcalfe where the works shared only a few "striking similarities" and,
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28

1 broadly speaking, a similar sequence of events; "the cumulative weight"
2 of the alleged similarities paled in comparison to that in Metcalf).²³

3 c. Sequence of Events

4 Beyond the fact that both works contain a karmic realization,
5 followed by the main character making amends for previous bad acts, the
6 sequence of events in Karma! and Earl are considerably different.
7 Karma! starts with Frankie's arrest and imprisonment, and proceeds,
8 with guidance of Angel Man, to Frankie's redemption, his winning of the
9 lottery, the clearing of his name, and his eventual death. Earl, in
10 contrast, wins the lottery before his karmic realization. After
11 winning, Earl gets hit by a car and loses the lottery ticket, only to
12 have it come back to him once he begins amending his past wrongs.
13 Subsequently, each episode depicts Earl working through items on his
14 list.

15 For the most part, Karma! proceeds chronologically. Frankie has
16 one flashback when he wins the \$300 scratcher ticket in which he sees
17 Angel Man saying "use it wisely," and one flash-forward when Angel Man
18 shows Frankie the future image of his unborn son. In contrast, Earl
19 uses frequent flashbacks to depict the points in time when Earl
20 committed the initial wrong.

21
22 ²³ Metcalf is also distinguishable because in Metcalf the defendants conceded access
23 to plaintiffs' work; thus, the inverse ratio rule applied. 294 F.3d at 1075. The
24 Ninth Circuit held that this concession "strengthened considerably" plaintiffs'
25 case. Id. In Rice v. Fox Broadcasting Co., 330 F.3d 1170, 1179 (9th Cir. 2003),
26 the Ninth Circuit explicitly declined to apply Metcalf to a case in which no
27 concession of access was made. The court held: "[H]ere we are not presented with
28 the same pattern of generic similarities as in Metcalf. And even more important,
our decision in Metcalf was based on a form of inverse ratio rule analysis: the
plaintiff's case was 'strengthened considerably by [defendants'] concession of
access to their works'. . . . Here, there is no such concession of access as most
of [plaintiff's] claims are based purely on speculation and inference." Id. at
1179 (internal citations omitted). As in Rice, here, there is no concession of
access and the inverse ratio rule does not apply; thus, for this reason as well,
Metcalf is not applicable.

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1 As such, the Court concludes that the sequences of events are not
2 similar.

3 **d. Characters**

4 Both Karma! and Earl have leading male characters with flawed
5 moral characters. There are some similarities between Earl and Frankie
6 in that both start out as generally bad people and make attempts to
7 turn their lives around; however, these character traits derive
8 directly from the general themes of karma and redemption, which are not
9 protectable. Beyond those idea-driven characteristics, Earl and
10 Frankie are not similar.

11 Frankie is an Italian-American and in his forties. He is a gritty
12 character, filthy and prone to sarcasm. Before his redemption, Frankie
13 is a serious criminal. As a cop, Frankie took bribes from a young
14 African-American drug dealer. Frankie uses drugs, and knows several
15 habitual drug users and dealers.

16 Earl, on the other hand, is a white male in his thirties, but is a
17 redneck type of character. Although Earl is unseemly, he is upbeat and
18 friendly. He is generally well-liked by the other characters, and is
19 often portrayed as the leader of his rag-tag crew of his friends. Earl
20 is a petty thief, not a serious criminal. His prior bad acts range
21 from blundering crimes - such as robbing a bank with a squirt gun - to
22 petty mischiefs like making fun of persons with accents and rigging a
23 high school football game. Earl does not use drugs. Unlike Frankie,
24 Earl does not have a religious awakening.

25 Plaintiff also compares Toni Ann and Joy. Toni Ann is 27 and
26 attractive. She is a habitual drug user and dealer, and a struggling
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28

1 model. Tori Ann is sarcastic and tough, but has a good heart, and
2 eventually turns her life around.

3 Like Tori Ann, Joy is also in her twenties, is attractive, and has
4 a sarcastic attitude. Other those general character traits, however,
5 the women have little in common.²⁴ Joy is not a habitual drug user or
6 dealer, nor is she a struggling model. Joy is a mother of two who
7 lives in a trailer park and runs a nail salon out of her trailer.
8 Unlike Tori Ann, Joy is an irredeemable character. She is manipulative
9 and selfish, and often looks out for herself at the expense of others.

10 The role Tori Ann and Joy play in the works and their
11 relationships with the main characters are extremely different. In
12 Karma!, Tori Ann and Frankie start off as friends and gradually build a
13 romantic relationship. At the end of the screenplay, the two are
14 deeply in love and are portrayed as soul mates. Tori Ann respects and
15 looks up to Frankie, who is much older than her, and is so inspired by
16 Frankie's decision to turn his life around that she too embarks on her
17 own journey of redemption. Frankie tells Tori Ann that he will share
18 his lottery winnings with her so they can build a better life together.
19 After his death, Frankie spends his days in the afterlife looking over
20 Tori Ann. Angel Man tells Frankie that Tori Ann will soon join them in
21 heaven.

22 Joy, on the other hand, is far from Earl's soul mate. Joy and
23 Earl got married while extremely drunk in Las Vegas. At the time they
24 were married, Joy was already pregnant with another man's child, and
25 soon thereafter she cheats on Earl, has a child with Crabman, and
26

27 ²⁴ These character traits - young, attractive, and sarcastic - are not protectable.
28 Indeed, "young, attractive, and sarcastic" could be used to describe half of the
women appearing on television and in films today.

1 leaves Earl. Joy is a nuisance and an antagonist to Earl. Unlike Tori
2 Ann, she is not inspired by Earl's good deeds; instead, she often works
3 against Earl and pokes fun at his list and his efforts at redemption.
4 Moreover, unlike in Karma!, where Frankie wants to share his lottery
5 winnings with Tori Ann, Earl often takes pains to hide his lottery
6 winnings from Joy, who is on a constant quest to steal Earl's money for
7 herself.

8 Plaintiff's argument that both Tori Ann and Joy know how to use a
9 firearm actually demonstrates the significant difference between the
10 two characters. While it is true that both women use a gun, Tori Ann
11 uses the gun to try and *save Frankie's life* by shooting at Frankie's
12 rival, James Randson. Joy, in contrast, uses the gun to *try and kill*
13 *Earl* so as to inherit his lottery winnings. In sum, the roles that
14 Tori Ann and Joy play in each work and their relationships with the
15 main characters bear nothing in common.

16 The supporting cast in each work is not similar. Although both
17 Frankie and Earl have brothers, Frankie's brother, Augustus, is an
18 enlightened priest and a minor character in the screenplay. Earl's
19 brother Randy, in contrast, is a prominent character who serves as
20 Earl's dim-witted sidekick throughout the show. Unlike Augustus, Randy
21 appears to have no religious convictions. Further, Shrimp and Crabman
22 (a.k.a Darnell) are nothing alike. Shrimp is a crude, unintelligent
23 "punk kid" who plays the partner-in-crime to a local drug dealer. In
24 contrast, Crabman is a quiet and gentle friend of Earl's. He is
25 extremely intelligent and possesses a near Zen-like calmness. Apart
26 from being African-American and perhaps the same age, Crabman is
27 nothing like Shrimp.

1 Finally, there are several critical characters in Karma! that have
2 no counterpart in Earl - most notably, Angel Man, Frankie's unborn son,
3 and James Randson.

4 **e. Setting**

5 Although both works take place in the present, the geographic and
6 physical settings of Earl and Karma! are different. Earl is set in a
7 suburban town named Camden. In the first episode, Earl makes reference
8 to the fact that they have to drive into "the city." Karma!, in
9 contrast, takes place in slums of New York City.

10 The physical settings are also different. In Karma!, the scenes
11 are often set in dark and threatening locations, such as the subway, a
12 deserted alley at night where Frankie is chased by a menacing dog,
13 James Randson's house which is furnished with gothic paintings and
14 filled with drug dealers, and the landfill where Frankie busts the
15 climatic drug deal. The physical settings are for the most part
16 gritty, dark, and somber, and reflect the dramatic mood of the
17 screenplay.

18 In Earl, on the other hand, the physical settings are not ominous
19 or threatening. Earl and Randy live in a cheap but comfortable motel,
20 and Joy lives in a kitschy trailer park. Each setting has quirky
21 characteristics that are set up for laughs - for example, in the motel
22 where Earl lives, the maid rinses out plastic cups to be reused by
23 guests; at the Crabshack - a local eatery where Earl and his friends
24 hang out - Randy plays the "claw" videogame machine to win a live mouse
25 instead of one of the stuffed animals; at Joy's trailer park, recliners
26 are only allowed on the front lawn if they match the color of the
27 trailer. The settings in Earl are used to reinforce the light-hearted,
28

1 silly mood of the series. There are no unique physical settings in
2 Karma! that also appear in Earl.²⁵

3 Plaintiff notes that both works use rock music from the 1970s and
4 1980s in the background. However, the works do not use the same songs.
5 Moreover, while the rock songs used in Plaintiff's work all relate to
6 either the theme of karma or to religious themes - thereby reinforcing
7 the religious undertones of the work - the rock songs used in Earl are
8 not thematically similar to one another (e.g., compare Cindy Lauper's
9 "Time After Time" and Lynyrd Skynyrd's "Steps"). Finally, the use of
10 modern rock music in a work set in the present day is not a
11 copyrightable expression.

12 **f. Mood and Pace**

13 Earl is paced as a television show, with half-hour long episodes.
14 Each episode is structured in the same basic manner with Earl choosing
15 which wrong he is going to remedy, and then taking the necessary steps
16 to see it through. Earl also narrates each episode with flashbacks to
17 the points in time in which he committed the initial bad act. The
18 events in the first season occur over the span of several years' time,
19 as Joy has an infant in the pilot episode (Crabman's baby), and in a
20 later episode (Barn Burner), Joy's kids appear to be the age of school
21 children. Further, some of Earl's flashbacks bring the audience back
22 to a time where Earl was a young child.

23 Karma!, on the other hand, is paced as a full-length feature film
24 with the action reaching a crescendo at the end of the film. The
25 entire screenplay unfolds over a matter of days, or at most weeks.

26
27
28 ²⁵ Plaintiff notes that both works have scenes that take place in a bar/restaurant.
However, a bar or restaurant is not a unique copyrightable setting.

1 There is only one flashback, and unlike in Earl, none of the characters
2 act as a narrator.

3 Earl is a comedy. The mood of the series is light and cheerful.
4 The main character is witty and sarcastic and often finds himself in
5 humorous situations. While in some episodes, Earl attempts to remedy
6 what would ordinarily be considered a serious wrong - for example,
7 faking his own death - the events are always presented in a light-
8 hearted and humorous way.

9 Karma! is written as a dramatic action film with a few humorous
10 moments. The little humor in Karma! comes from Frankie's sarcasm, but
11 the situations themselves are not comical. Frankie's past wrongs are
12 not made light of; instead they have the potential to ruin the life of
13 his unborn child. For the most part Karma! is a serious depiction of
14 Frankie's spiritual awakening and his redemption.

15 g. Dialogue

16 To support a claim of substantial similarity based on dialogue,
17 the plaintiff must demonstrate "extended similarity of dialogue."
18 Olson v. National Broadcasting Co., 855 F.2d 1446, 1450 (9th Cir.
19 1998). Ordinary words and phrases are not entitled to copyright
20 protection, nor are "phrases or expressions conveying an idea typically
21 expressed in a limited number of stereotyped fashions." Narrell v.
22 Freeman, 872 F.2d 907, 911-12 (9th Cir. 1989). Here, the works have no
23 similar dialogue.

24 Plaintiff's work is riddled with street slang that echoes the
25 rough and gritty nature of the characters and New York City generally.
26 For example, when Frankie first sees the picture of the angel, he
27 exclaims, "well Mr. Guardian angel where are you now?! I stole your
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1 buddies [sic] wallet right under his nose Shit! I'm hip to your
2 shit!!" (Rubin Decl., Exh. D, pg. 82). Other examples include when
3 street kids tell Frankie, "Look holmes! You're messin' with the wrong
4 mother . . ." (Id. at 106.) or when James Randolph tells Sonny, "It's
5 my money that . . . financed your bitches. . . . Good work Dawgs."
6 (Id. at 169.) This hard-core street vernacular is unique to
7 Plaintiff's work; it has no counterpart in Earl. Rather, the dialogue
8 in Earl is principally sarcastic and witty. Every serious thought is
9 followed up with a humorous quip, geared toward keeping the mood of the
10 series light. The dialogue in the two works is not similar.

11 Plaintiff points to several alleged similarities in dialogue;
12 however, when the works are examined, these similarities prove to be
13 nonexistent or insubstantial. For example, Plaintiff notes that in
14 both works a supporting character tells Frankie and Earl that they are
15 forgiven for a past misdeed. Although each character uses some
16 variation of the word "forgive," this is a standard, ordinary word that
17 is not entitled to copyright protection. Similarly, Plaintiff notes
18 that in one scene, Frankie says "I'll be damned," while Earl says
19 "Damn." These expressions are not the same, nor do they have the same
20 meaning; regardless, these short phrases are not copyrightable. Third,
21 Plaintiff points out that in Karma!, Frankie yells at Angel Man when he
22 is frustrated with his journey to redemption, and Earl yells toward the
23 sky at "karma" when he neglects his list and bad things happen to him.
24 But the two characters do not use the same language, nor are the scenes
25 otherwise similar.

26 Finally, Plaintiff notes that each work contains several
27 references to Catholicism. However, none of the references include the
28

1 same words. More importantly, the references to Catholicism play
2 different roles in each work. As discussed above, in Karma!, religion
3 is an important backdrop for Frankie's transformation. The religious
4 references demonstrate that Frankie initially does not believe in God,
5 but as the story progresses, he begins to have faith in the power of
6 God, and eventually enters the afterlife as an angel. As Frankie
7 himself relates, Frankie turns his life around by the "grace of God."

8 In Earl, on the other hand, the religious references are comedic
9 and used to draw laughs. For example, most of the religious references
10 Plaintiff points to occur in the episode "Quit Smoking." In that
11 episode, Earl let his friend Donny take the fall for Earl's botched
12 bank robbery, and when Donny goes to prison, he finds religion. Once
13 Donny is released, Earl goes to Donny's house to make amends, and
14 discovers that his former criminal friend is now a religious zealot.
15 Donny's faith is portrayed as over-the-top and ridiculous - for
16 example, Donny has a large tattoo of Jesus on his chest, and peers
17 through the collar of his shirt to ask Jesus for advice. Donny also
18 asks Earl if he would like to see that tattoo of Moses parting the red
19 sea on Donny's buttocks, and Donny's mother has Earl read to her from a
20 4-foot-thick Bible with enlarged print. In a later episode also
21 featuring Donny, Donny says, "Oh, I want Jesus to see this," and
22 unbuttons his shirt to reveal the tattoo. The remaining religious
23 references are also used for comedic effect - e.g., Randy dresses as a
24 nun, and Earl's father tells door-to-door missionaries that "for the
25 last time, we already have a lord." Earl himself does not appear to be
26 religious, nor does he take Catholicism seriously. In short, unlike in
27 Plaintiff's work, the religious references in Earl are not serious, and
28

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1 they bear no relation to Earl's karmic realization or his journey to be
2 a better man.

3 **IV. CONCLUSION**

4 For the reasons stated above, the Court holds that Plaintiff has
5 not introduced sufficient evidence, beyond pure speculation and
6 conjecture, to establish a triable issue of fact regarding Defendants'
7 access to Plaintiff's screenplay. Additionally, even assuming arguendo
8 that there is a triable issue regarding access, no reasonable jury
9 could conclude that Karma! and Earl are substantially similar. For
10 these reasons, the Court GRANTS Defendants' Motions for Summary
11 Judgment.

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14 IT IS SO ORDERED.



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17 DATED: 2/22/10

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STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE