

United States District Court,

E.D. Michigan, Southern Division.

**Douglas Alan STROMBACK, Plaintiff,**

v.

**NEW LINE CINEMA, et al., Defendants.**

**No. 01-73898.**

Oct. 23, 2002.

OPINION AND ORDER

OMEARA, J.

\*1 Before the Court is Defendant New Line Cinema's motion for summary judgment. The crux of this controversy concerns copyright infringement. In late 1998 and early 1999, Plaintiff Douglas Alan Stromback, an actor, aspiring screenwriter, and former professional hockey player, created an original poem entitled "The Keeper." Plaintiff then created an original treatment and outline of a screenplay based upon "The Keeper" poem, entitled "The Keeper." According to Plaintiff, various versions of both the poem and screenplays were registered with the Writers Guild of America and the Copyright Office. [FN1]

FN1. Defendant New Line Cinema argues that only the screenplay and not the poem of "The Keeper" were federally registered, and thus compares "Little Nicky," the alleged infringing work, to only the registered screenplay. In his response, Plaintiff explains that the poem was also copyrighted under Registration No. TXU 893-361 but that he erroneously did not include this number in the complaint. (Apparently, Plaintiff has refused to provide New Line with a copy of either the poem or screenplay of "The Keeper", thus forcing New Line to contact the U.S. Copyright office for copies of the works. When New Line could not locate the poem, it questioned whether it was federally registered.) Accordingly, Plaintiff requests that we consider the poem version as registered, or allow him to amend the complaint. For the reasons discussed above in the text, even if we consider the poem as copyrighted and federally registered, no reasonable juror could find substantial similarity between the poem and the movie, "Little Nicky." Because the Court is granting Defendant's summary judgment motion, there is no need to allow Plaintiff to amend the complaint. The Plaintiff should know, however, that the Court considered the poem when making this ruling.

According to Plaintiff (and not specifically disputed by New Line Cinema), in early 1999, Mr. Stromback showed

both the poem and the screenplay for "The Keeper" to Larry Hess and John Apothaker, individuals he had met in Los Angeles. Plaintiff contends that Mr. Hess and Mr. Apothaker passed "The Keeper" poem, treatment, outline, and several versions of screenplays to New Line Cinema. (New Line Cinema states that the Court can assume this "access" is true for purposes of this motion.)

After seeing "Little Nicky" in the theater, Plaintiff realized that it contained substantial similarities to his works and filed suit, naming Mr. Hess, Mr. Apothaker, New Line Cinema, and the three credited screenwriters, Adam Sandler, Steven Brill, and Tim Herlihy as Defendants. Plaintiff did not serve summons on Mr. Hess or Mr. Apothaker, and after discussions with New Line Cinema's counsel, dismissed the individual named screenwriters without prejudice, essentially consolidating this action into one directed at the movie's owner/distributor, New Line Cinema. Thus, New Line Cinema is the only Defendant in this litigation. [FN3]

FN3. Initially, Plaintiff also included the movie "Mr. Deeds" as an infringing work, but subsequently dropped that allegation. Therefore, the only claim remaining is against New Line Cinema for its movie "Little Nicky."

Plaintiff argues that "Little Nicky" and Plaintiff's original works share a number of similarities in theme, character treatment and development, idiosyncratic character traits, and scene selection. Specifically, Plaintiff asserts that "The Keeper" poem (Ex. C to Response) is essentially a thematic prelude to "The Keeper" screenplay (Exhibit D to Response). Plaintiff describes the poem and screenplay as follows: [FN4]

FN4. The Court quotes at length from Plaintiff's response (pages 3-7; citations omitted) because his description of the two works is important to consider because the Court ultimately rules against him at this stage of the litigation. As explained *infra*, even his descriptions--which point out similarities between the two works--illustrate overall that the two works are entirely different stories, and it would be incredibly hard to see any relation between the two if not for Plaintiff's assertion of similar themes, which as explained *infra*, are, in fact, very different.

The poem introduces a dark and dreary castle, a gatekeeper, a hellish place. The Keeper senses something is wrong ... somebody wants to leave the castle ground." The character "has found a way out ... he has found the gate he is going to open ... he has left the castle behind ... and the Keeper is yelling come back, come back." The screenplay "Keeper" presents a metaphoric story of Ted, a loser, misfit, odd character, battling his "antichrist" devil

brother who wants to take over the earth. Ted's character is clearly not wholly of this world: he speaks in rhymes, fights devil voices in his head, napping at work, and traveling peripatetically up and down between a metaphorical hell, the basement in which he works trying to defeat his brother devil, and the world above. Ted is characterized as the white son of black parents. It is later revealed that his mother was an 18 year old who had an affair with a prominent politician, who it is also implied is the father of the antihero of the story, Governor John. The "Keeper" [screenplay] ends with Governor John trying and failing to kill Ted.

\*2 Plaintiff compares "Little Nicky" to "The Keeper" as follows:

"Little Nicky" is portrayed not as a metaphoric, but a literal story taking place between Hell and Earth. In "Little Nicky" the main character, Nicky, is characterized as a loser devil battling his brothers, one of whom is depicted as a black man, to prevent them (and eventually only one of them) from taking over the Earth. Nicky is portrayed as a conflicted character, forever shuttling between Hell below and the Earth above, speaking in "devil" voices, napping at odd times. As does Ted, Nicky reveals his "devilness" at a party, gets accosted by two gang members, gets interested in a woman "above"--- Sue is Ted's interest at the National Paper, Valerie is Nicky's-- and survives a climactic scene where his brother attempts to kill him. Ted's survival occurs as he fools two henchmen sent by Governor John to kill him by pretending his friend is him; Nicky's survival occurs as he fools henchmen sent by his brother into believing he is someone else. In the end, Nicky although he is the son of Satan, discovers his mother is a young-looking angel, and we are to infer his brothers are actually of different mothers.

"The Keeper" screenplay begins with Ted, the main character, speaking in rhymes: "I know who not I am but I opened the dam." As the story begins Ted goes into the basement at the National Paper after obtaining an assignment to look at various old files in the basement. Early on it is established that Ted is the son of a black mother. In the meantime, we are introduced to Governor John, an unbalanced and evil character who wants to be president of the United States. Ted immediately gets angry at the thought of Governor John. Ted meets with his friends in a bar where he reveals himself as a man who speaks in puns--"ass," "bass. Upon leaving the bar Ted goes home and begins talking to himself again in strange and disturbing rhymes.

Ted returns to the basement and starts to write rhyming clues about the Governor. Meanwhile, Governor John is

shown sitting complacently with his cronies talking unpleasantly about a party. He says, "Soon I will control everything. God this world is full of stupid [expletive]."

Ted is next shown at a house party twitching. "My name is Ted and I am not dead. Nor do I revel with the devil." Ted confesses he was born in a dark and dreary castle, and that the keeper of that castle owns their flesh and bones. Repeated dungeon references are made throughout the screenplay.

Throughout the screenplay Ted is shown napping at odd times. Ted is shown to be interested in a woman named "Sue" also working for the National Paper. Ted approaches Sue through a trick (having Scott, his friend, turn the lights off at the National Paper at 9:10 p.m.) A recurrent theme of the screenplay is Ted's movement between the "dungeon" basement and the world. He is repeatedly ordered to the "dungeon" basement by his boss Dave. Ted reveals that the case he has been reading about in the basement has to do with a cult of the devil, in which Governor John was the prime suspect. He says, "I think he is the anti- Christ." Throughout this time whenever he is alone, and in the presence of his friends, Ted keeps speaking in rhymes. Ted reveals that he will expose John the anti-Christ to the world. "I think the Governor is the devil which he is." "The Governor is the keeper." The screenplay shows Ted speaking in rhymes while listening to a minister on television: "I'm not from the dam but I'm back whose back ... your plan is to be the # 1 man ... because truly you are the devil or at least have the same heart." Ted has been mailing riddles to the National Paper dropping hints about the Governor. As the screenplay progresses, an image of a reporter on the street appears saying "the frenzy is building." Governor John decides to kill him. Ted tells him, "I am stopping the soul stealer." He says, "You're the devil." As the screenplay progresses, Ted finds out from his black mother that he was adopted from an 18 year old who had an affair with a politician--presumably Governor John's father making Governor John his evil brother or half-brother. A showdown between them is presaged in the story.

\*3 In the penultimate scene, Governor John's henchmen Maurice and Amir pull up at the National Paper at night, and get by the security guard. In a climatic scene, Ted fools Maurice into thinking that his friend Scott is really Ted and survives Maurice shooting off his gun. Sue comes to the basement to find Ted. In the final treatment, Ted becomes elected Governor and, presumably showing himself to have lost the battle in his head, reveals his own evil and rapes Sue.

Plaintiff describes in more detail "Little Nicky":

After the movie opens with a set up scene involving the death of John Lovitz, the "Little Nicky" VHS version shows a visual portrait of a hellish palace and the viewer is introduced to three brothers, Nicky, Adrian and Cassius. Nicky (played by Adam Sandler) is characterized as the subservient brother of the three. As the movie begins, Cassius wants to mind-wrestle with Nicky. We are also introduced to the gatekeeper of hell who tries to keep the dominant brothers Adrian and Cassius from leaving hell. After the dominant brothers Adrian and Cassius do leave hell to go to Earth, Nicky, the son of Satan, is sent up to Earth to retrieve his brothers and return them to hell. From the very beginning of the movie, Nicky goes up and down between hell and earth with much of the action taking place in subterranean locations. For example, the introductory scenes show Nicky hit by a subway and returning to hell before being sent back to Earth. Many other times Nicky returns to hell before going up to the Earth in the movie.

Nicky returns to the Earth, he discovers Popeye's Chicken, a recurring theme in the movie. Nicky portrays himself to a roommate on hell as being from the "Deep South." Nicky sleeps all the time and talks to himself as he sleeps in a sing-song, devilish-sounding voice. As the movie progresses, Nicky gets interested in Valerie, a girl he meets on Earth. At a party with his actor roommate Nicky reveals to the guests that he is a devil.

Nicky is on a mission to find Adrian and bring him back down to hell. Adrian has succeeded in causing trouble on Earth in part by occupying the body of New York's mayor. Unknown to humans, the mayor issues various proclamations that cause a frenzy in the City. Adrian wants to find Nicky to kill him so that he does not have to return to hell. Adrian turns into (or inhabits the body of) the Police Commissioner, and finds out where Nicky is hiding--in the subway. In the climactic scene between Nicky and Adrian, Nicky tries to disguise himself as a friend to get away from Adrian in the subway. Nicky survives the attempt to kill him. Nicky then finds out the truth about his mother, who is shown as a 20'ish California Valley girl angel. The movie has a Hollywood ending with Nicky remaining on Earth, marrying Valerie, and fathering a child.

Plaintiff's lawsuit against New Line Cinema alleges violations of The Copyright Act, 17 U.S.C. § 106, Lanham Act, 15 U.S.C. § 1125, and various state law claims which are preempted. Although formal discovery has not occurred (and this appears to be the fault of Plaintiff who has not prosecuted his case), New Line argues that the Court can grant summary judgment now because a comparison of the works shows that no reasonable juror could find them substantially similar.

While Plaintiff argues that more discovery needs to be taken, the only outstanding discovery that he mentions are the various screenplays of "Little Nicky," which were never published to the public, and thus are not germane to this dispute. [FN5] Therefore, the Court grants New Line's motion for summary judgment and dismisses Plaintiff's case in its entirety. However, the Court does not grant New Line's request for attorney's fees and costs to Defendant. [FN6]

FN5. Also, in Plaintiff's complaint, he only alleges that the movie "Little Nicky" is an infringing work--not the various screenplays.

FN6. At the hearing on this matter on October 25, 2002, defense counsel also requested that the Court sanction Plaintiff's counsel for bringing forth this frivolous case. While the Court dismisses Plaintiff's case with prejudice, we do not find that it was so frivolous to merit monetary sanctions.

#### STANDARD OF REVIEW

\*4 The usual summary judgment standard applies: a motion under Fed.R.Civ.P. 56 may be granted if the pleadings and all supporting documentation show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. See *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1245 (6th Cir.1995). However, the moving party need not produce evidence showing the absence of a genuine issue of material fact. Rather, "the burden on the moving party may be discharged by 'showing'-that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The court must view all the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. See *Bender v. Southland Corp.*, 749 F.2d 1205, 1210-11 (6th Cir.1984).

Once the moving party discharges its burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. See Fed.R.Civ.P. 56(e); *Talley*, 61 F.3d at 1245. To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact. See *Lucas v. Leaseway Multi Transp. Serv., Inc.*, 738 F.Supp. 214, 217

(E.D.Mich.1990).

## LAW AND ANALYSIS

### I. Copyright Act (Count I)

To establish copyright infringement, a plaintiff must show: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1095 (6th Cir.1995). Because Plaintiff's ownership of a copyright to "The Keeper" is not disputed, the sole question is whether it was copied. [FN7] Direct evidence of copying is rare, so frequently the plaintiff will attempt to establish an inference of copying by showing (1) access to the allegedly-infringed work by the defendant(s) and (2) a substantial similarity between the two works at issue. See *Robert R. Jones Assocs., Inc. v. Nino Homes*, 858 F.2d 274, 276-77 (6th Cir.1988); *Wickham v. Knoxville Int'l Energy Exposition, Inc.*, 739 F.2d 1094, 1097 (6th Cir.1984). Here, Defendant has conceded access [FN8] and focused its attack on the substantial similarity prong.

FN7. Again, for purposes of this motion, we are considering both the poem and screenplay of "The Keeper" as properly copyrighted because Plaintiff has submitted evidence in his response that the poem was registered--he just forgot to include the registration number in his complaint.

FN8. In his response, Plaintiff makes much of this "access" prong, arguing that it is intertwined with the analysis of substantial similarity and that there needs to be discovery on this issue. Plaintiff is correct that, if access is established (and Defendant has conceded for the purposes of this motion that it has been, so there is no need for discovery on this point to decide this motion), then the showing of substantial similarity can be less. See *Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir.1999)(recognizing that the degree of proof of access is inversely proportional to the strength of similarity between the two works at issue). Yet, as Defendant points out, there still must be a showing of substantial similarity between the works irrespective of the access question. See *Wickham*, 739 F.2d at 1097-98 ("The district court correctly concluded there exists no substantial similarity. Therefore, it became unnecessary to resolve the access issue. No amount of proof of access will suffice to show copying if there are no similarities.") (citation omitted) (emphasis added). As discussed above, the Court finds that there is not enough similarity to create a jury question, even with access being conceded by Defendant.

The Court recognizes that this inquiry of "substantial

similarity" is inherently factual. As *Arnstein v. Porter*, 154 F.2d 464 (2nd Cir.1946) noted many years ago, granting summary judgment, particularly in favor of a defendant, is a practice to be used sparingly in copyright infringement cases. Yet, the Sixth Circuit has held that a court may compare the two works and render a judgment for the defendant on the ground that as a matter of law a trier of fact would not be permitted to find substantial similarity. *Wickham*, 739 F.2d at 1097. In fact, this Court in *Burns v. Grier*, No 00-CV- 70916, 2000 WL 1923514, \* 2-3 (E.D.Mich. November 17, 2000)(J. O'Meara) did just this and found no copyright infringement as a matter of law without the question going to the jury. The Court does so here too.

\*5 In assessing "substantial similarity," Plaintiff requests that we apply an "extrinsic" test as well as an "intrinsic" test. An "extrinsic" test allows for expert testimony dissecting the works and determining whether they contain similar ideas subject to copyright protection. [FN9] The "intrinsic" test is essentially the "ordinary observer" test, described below. The "intrinsic" test is usually undertaken without the benefit of experts. See *Towler v. Sayles*, 76 F.3d 579, 583-84 (4th Cir.1996); *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062-63 (9th Cir.1981).

FN9. If the "extrinsic" test were the one employed by the Sixth Circuit, then we obviously could not grant Defendant's summary judgment motion right now as there has not been any expert discovery yet. But, as explained above, this is not the approach in this jurisdiction.

Significantly, the Sixth Circuit--while not formally adopting a specific approach--has typically used the "ordinary observer" test, which is the traditional standard of analyzing copyright infringement. See *Ellis v. Diffie*, 177 F.3d 503, 506, n. 2 (6th Cir.1999). The ordinary observer test requires the trier of fact to gauge the similarities of the two works solely on the basis of his "net impression" and without relying on expert analysis or dissection (the "extrinsic test"). *Id.* This was the approach we used previously in *Burns* and the one prevalent in this jurisdiction. See, e.g., *Winfield Collection, Ltd. v. Sun Hill Industries, Inc.*, No. 00-CV-74841, 2002 WL 1480832, \*4 (E.D. Mich. June 20, 2002) ("[T]he 'ordinary observer' test ... is the traditional standard of copyright infringement.") (citations omitted). Accordingly, we employ it here.

As we held in *Burns*: "Summary judgment for defendant is appropriate even if the court concludes that the similarity between the works concerns a shared idea, if the court also concludes that no reasonable jury, properly

instructed, could find the works substantially similar ... The question of whether or not there exists a genuine issue of material fact with respect to the issue of substantial similarity is one of law for the Court." Burns, 2000 WL 1923514 at \* 2 (citations omitted). This Court then conducted a "sideby-side examination" of the two sets of works to determine if a reasonable jury could find substantial similarity. *Id.* In undertaking this analysis, it is important to remember that "a general impression of similarity is not sufficient to make out a case of infringement." *Mihalek Corp. v. Michigan*, 814 F.2d 290, 295 (6th Cir.1987) (citation omitted). Because ideas and general concepts themselves cannot be copyrighted, it is the court's task to examine the expression of the shared idea for substantial similarity of treatment. *Wickham*, 739 F.2d at 1097.

Here, the net impression of the works is entirely different. "The Keeper" is a story about Ted, a real person, who causes the downfall of the corrupt Governor of California and then takes his job. At the end of the story, Ted abuses his power and rapes a woman that has spurned his affections. Ted often speaks in rhymes and is weird and eccentric. For employment, he organizes files in the basement of a national paper in Los Angeles, which his boss refers to as the "cave" or "dungeon." The story shifts back and forth to the Governor who hopes to become President. At some point, Ted--who is reading old newspaper files-- finds out that the Governor (then Secretary of State) was involved in a cult having something to do with the devil and got off the hook for a murder. Ted figures out that the Governor was responsible for the murder and undertakes an anonymous campaign of sending rhyming riddles to the newspaper that will ultimately reveal that the Governor is the murderer, the antichrist and the devil. (The use of terminology referring to the devil and hell are all metaphoric--the Governor is not really the devil.)

\*6 Eventually, the Governor figures out that the newspaper's riddles implicate himself and then sends someone to kill the "rhyming dude." Ted reveals himself and dares the Governor to kill him. The Governor orders his murder but Ted sets a trap for his friend, Scott, who the Governor's henchmen mistakenly think is Ted. They kill Scott thinking he is Ted. Ted videotaped the whole trap and sends it to the police. The Governor is arrested and Ted becomes the new Governor and rapes a woman.

"Little Nicky" is actually about the devil and his three sons, Cassius, Adrian, and Nicky. Adrian and Cassius pick on Nicky, the simple and sweet son, and mind wrestle with him causing him to say things he would otherwise not say. When the movie opens, the devil (Satan) is considering retiring after 10,000 years and his

sons Adrian and Cassius want the job. Nicky wants his father to keep it. Satan decides to rule for another 10,000 years to maintain the balance of good and evil, and this greatly upsets Adrian and Cassius who concoct a plan to escape hell, travel to earth, and corrupt as many souls as possible to threaten the balance of good and evil. When they leave hell, they clog the portal, thus not allowing new souls to enter hell. Satan begins to decompose (literally, at one point he is a talking mouth) and sends his son Nicky after them to "bottle" them up and bring them back to hell.

Nicky reluctantly travels to earth and dies several times coming back to hell, only to be dispatched to earth once again by his decomposing father, Satan. On earth, Nicky meets a woman Valerie and falls in love. At one point, he dies trying to save her from a speeding train and is sent to heaven (and not hell) where he meets his mother, an angel, who tells him that he must release his inner good to battle his brothers on earth. She gives him a magic sphere from God to help him battle his brothers,

On earth, his brothers Adrian and Cassius are invading people's bodies and causing them to say and do things. They invade the mayor of New York and a preacher and cause them to say things to instigate corruption, like lowering the drinking age to 10. New York becomes a mess of corruption. Eventually, at the end, Nicky smashes the sphere from God and Ozzy Osbourne is released and bites the head off Adrian (who had turned into a bat). With both brothers in the bottle, Valerie kills Nicky by hitting him in the head with a rock (out of love), sends him back to hell, just in time to save his father. Satan survives, the brothers are forever trapped in the bottle, and the balance of evil and good is restored. Satan sends Nicky back to earth where he marries Valerie, has a son, and lives happily ever after.

The stories are entirely different. While both Nicky and Ted are weird and eccentric, only Ted talks in rhymes. Nicky has a speech impediment because his brothers beat him with a shovel when he was little. Ted works in a newspaper basement and causes the downfall of the Governor. He is attracted to a woman whom he eventually rapes. Imagery of hell and the devil are used as metaphors. In contrast, Nicky is a simple-minded, sweet, actual son of the devil who has to defeat his devil brothers on earth. "Little Nicky" is a comedy with a happy ending, while "The Keeper" is a bleak story with no apparent humor. There are too many differences to list. The overriding point is that the setting, characters, and events are very different between the two works, and the Court finds as a matter of law that no reasonable jury properly instructed would find otherwise.

\*7 The similarities that Plaintiff relies on are all superficial. While both works employ similar words such as the "devil," clearly the concept of hell and the devil are not protected expressions. While the basement is described as a hellish place, it is not really hell, as is the setting in "Little Nicky." While both works share a theme of "good versus evil," such a theme is commonplace and not protected. While Plaintiff argues that the sequence of events is similar (i.e. leaving hell (or the basement), bottling/battling brother (Ted is presumably the brother of the Governor in "The Keeper", although this is not conclusively established), attempted killing of main character), this is not enough to create a genuine issue of material fact on the issue of substantial similarity. The use of "up and down imagery" as Plaintiff argues also is not enough, especially where Nicky is literally going back and forth from hell and earth, and Ted simply leaves the basement at the end of the work day. While there is a love interest in both works, one ends in marriage and the other in rape, and love is a common thread throughout many works of art. There are also other trivial similarities such as racial allusions and supporting characters that are de minimis and not worth addressing in detail.

After watching "Little Nicky" and comparing it to "The Keeper," the Court finds that a reasonable person would not conclude that the Defendant unlawfully appropriated Plaintiff's protected expression by taking material of substance and value. Although there are some similarities between the works as described above, a close examination reveals there is no substantial similarity and that an average reasonable layperson upon such examination could not find substantial or sufficient similarity to establish copyright infringement.

Plaintiff has various responses that will only be briefly addressed. He argues that Defendant failed to establish "independent creation" as a defense to copyright infringement. Yet, as Defendant points out in its response, independent creation is a defense that can be made after Plaintiff establishes his prima facie case. Because Plaintiff has failed to establish "substantial similarity" between the works, Defendant does not need to argue "independent creation" in rebuttal. See *Ellis v. Diffie*, 177 F.3d at 507 ("[A]n inference of copying is rebuttable by evidence of independent creation of the allegedly infringing work .").

Finally, Plaintiff argues that New Line failed to attach the screenplay of "Little Nicky" as an exhibit, and that we are only analyzing whether the movie of "Little Nicky" infringes "The Keeper." [FN10] Therefore, according to Plaintiff, there needs to be discovery because there could be infringement on the "intermediary acts" of the various screenplays leading up to the final product, the released movie. Yet, only the video or movie was published to the

public--not the screenplays--and Plaintiff only alleges in his complaint that the movie is an infringing work--not the underlying scripts. [FN11] Therefore, because the Court does not see how additional discovery would make a difference, and because Plaintiff's counsel at the hearing did not articulate a compelling reason for more discovery, the Court finds that we have enough information at this juncture to grant Defendant's summary judgment motion on the copyright infringement claim.

FN10. Plaintiff insinuates that the home video of Little Nicky (attached as an exhibit) is different than the actual movie theatrically released to the public, thereby implying that we do not have the relevant evidence before us to make an informed decision about substantial similarity. Yet, in New Line's reply, it attaches a declaration from Jeffrey Halsey, Vice-President of Video Services for New Line, attesting that the videocassette version is the same as the version released in theaters.

FN11. In *Walker v. Time Life*, 615 F.Supp. 430, 434, n 2 (S.D.N.Y.1985), the court rejected this "intermediary acts" argument: "The Court considers the works as they were presented to the public. Plaintiff requests the court to compare the two works on the basis of lists of random similarities and on earlier scripts of the screenplay. This request is denied. Courts have routinely rejected requests to consider earlier drafts of the screenplay. Consideration of earlier versions of the screenplay is too unreliable in determining substantial similarity." (Emphasis added) (citations omitted).

## II. Lanham Act (Count V)

\*8 Plaintiff also argues that the public would likely be confused if presented with "Little Nicky" and "The Keeper" such that New Line Cinema is liable for reverse passing off under § 43(a) of the Lanham Act. As Defendant points out, however, this Circuit has dismissed a § 43(a) claim where the court has determined that no substantial similarity exists. See *Milhalek*, 814 F.2d at 296 (dismissing Lanham Act claim for same lack of substantial similarity which undermined copyright claim). While Plaintiff argues that there is no inconsistency between application of the Copyright Act and the Lanham Act, this is not the relevant inquiry. Indeed, both a Lanham and Copyright claim may coexist if there is substantial similarity between the two works. Thus, because there is no substantial similarity between the works, this claim is also dismissed.

## III. Preemption

Plaintiff's commercial misappropriation claim (Count II), breach of quasi contract claim (count III),

misappropriation of trade secrets under Michigan and California law (count VI), breach of implied duty of good faith and fair dealing (Count VII), unfair competition/unjust enrichment (Count VIII) and interference with prospective economic advantage (Count IX) are all preempted by state law. [FN12] Plaintiff even concedes in his response that Count III for breach of quasi contract and Count VIII for unfair competition/unjust enrichment are preempted based on the Sixth Circuit's holdings in *Wrench v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir.2001) and *Murray Hill v. ABC Communications, Inc.*, 67 F.Supp.2d 754, 762 (E.D.Mich.1999), *aff'd in part*, 264 F.3d 622, 638 (6th Cir.2001). Yet, Plaintiff argues that his other state law claims are not preempted.

FN12. Count IV for breach of quasi-contract against Mr. Hess and Mr. Apothaker has been voluntarily dismissed by Plaintiff.

Under § 301 of the Copyright Act, a state common law or statutory claim is preempted if (1) the work is within the scope of the subject matter of the copyright and (2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright. *Wrench*, 256 F.3d at 453. Plaintiff correctly maintains that if there is an "extra-element" that changes the nature of action so that it is qualitatively different from a copyright infringement claim, then there is no preemption of the state cause of action. Yet, none of Plaintiff's state law claims contain such an "extra- element."

First, with respect to Plaintiff's breach of the implied duty of good faith and fair dealing (Count VII), as Defendant points out in its reply, this claim must be dismissed because it cannot exist in the absence of an actual, valid contract. See *Van Arnhem Co. v. Manufacturers Hanover Leasing Corp.*, 776 F.Supp. 1220, 1223 (E.D.Mich.1991). Because Plaintiff's breach of quasi- contract claim is preempted (a fact conceded by Plaintiff), then this claim fails as well. (Plaintiff does not even address this count in his response.)

Second, Plaintiff's commercial misappropriation claim (Count II) and misappropriation of trade secrets (Count IV) are also preempted. There are no "extra-elements" that would distinguish these causes of action from the exclusive rights granted by the Copyright Act. [FN13] See *Artie Fields Prods., Inc. v. Channel 7 of Detroit, Inc.*, No. 94-CV-70730, 1994 WL 559331, at \* 2 (E.D. Mich. June 10, 1994) (holding that "commercial misappropriation" claim was preempted by Copyright Act because claim was "grounded solely in the copying of a plaintiff's protected expression" and was thus not "qualitatively different from a copyright infringement action"); *Idema v. Dreamworks, Inc.*, 162 F.Supp.2d

1129, 1192 (C.D.Cal.2001) (holding that "misappropriation" claim was preempted by Copyright Act because claim alleged misappropriation of story and characters that were within the subject matter of copyright). Plaintiff's misappropriation of trade secret claim is substantively no different than his commercial misappropriation claim--both allege that Defendant stole his protected expression of "The Keeper." Because both of these claims fall within the subject matter of the copyright, they are hence preempted.

FN13. Cases have held that a confidential or fiduciary relationship can be an "extra-element" foreclosing the preemption argument. See *Artie Fields*, 1994 WL 559331 at \* 2 (citation omitted). Yet, Plaintiff does not argue that there was such a fiduciary relationship between the parties in the case sub judice.

\*9 Finally, Plaintiff's interference with prospective economic advantage claim (Count IX) is also preempted. See *Aqua Bay Concepts, Inc. v. Grosse Pointe Board of Realtors*, No. 91-CV-74819, 1992 WL 350275, at \* 4 (E.D.Mich. May 7, 1992) (holding that interference with contractual relationship claim was preempted by Copyright Act because "alleged 'tortious interference' rest[ed] upon [the defendants'] 'act of copying and distributing plaintiff's copyrighted work--acts that are clearly contrary to the rights encompassed with Section 106 of the Copyright Act of 1976.'" ; *Idema*, supra, 162 F.Supp.2d at 1193 (same). Plaintiff fails to distinguish these cases and instead asserts--without any support--that his tortious interference claim contains an extra element of wrongful purpose in taking of the work. Because such a wrongful purpose is already encompassed by the Copyright Act, and Plaintiff cites no authority stating otherwise, this argument is rejected.

#### IV. Attorney's Fees and Costs

Defendant requests that we grant it attorney's fees and costs pursuant to § 505 of the Copyright Act. This is a matter in our "equitable discretion" guided by consideration of several non-exclusive factors, including "frivolousness, motivation, objective unreasonableness and deterrence." *Cross Keys Publ'g Co v. Wee, Inc.*, 921 F.Supp. 479, 482 (W.D.Mich.1995) (citation omitted).

Defendant argues that the copyright claim has been utterly frivolous and objectively unreasonable from its inception, pointing out that Plaintiff had to drop the movie "Mr. Deeds" from its complaint and eventually dropped the credited screenwriters, Adam Sandler, Steven Brill, and Tim Herlihy from this litigation (after Defendants filed a motion to dismiss) and did not even serve summons on Mr. Hess and Mr. Apothaker. Defendant

maintains that Plaintiff is trying to extract settlement value from New Line Cinema, the deep-pocket film studio, after dismissing the other Defendants. Furthermore, Plaintiff has failed to prosecute this case by setting a scheduling conference and refused to provide New Line with a copy of "The Keeper"--forcing it to contact the U.S. Copyright Office.

While Plaintiff has not been very cooperative and did seem to file an overbroad complaint (and then dismissed various Defendants and claims as the litigation continued), the Court does not believe Plaintiff's behavior has been so egregious as to warrant attorney's fees and costs. There is no direct evidence that Plaintiff's claims were not brought in good faith [FN14] and, for the most, were warranted under existing law, even though they were found to be meritless in the end. Given the Act's grant of discretion and the factors that are to be balanced, the Court does not think it should exercise its discretion to award attorney's fees and costs. See, e.g., Murray Hill, 264 F.3d at 639-40 (reversing district court's award of attorney fees in Copyright Act case where claims were colorable, albeit meritless).

FN14. Defendant did concede "access," for instance.

#### ORDER

**\*10** It is hereby ORDERED that Defendant's motion for summary judgment is GRANTED IN PART. Plaintiff's case is DISMISSED in its entirety but there is no awarding of attorney's fees and costs.

2002 WL 31548620 (E.D.Mich.), 2003 Copr.L.Dec. P 28,551

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United States Court of Appeals,

Sixth Circuit.

**Douglas Alan STROMBACK, Plaintiff-  
Appellant/Cross-Appellee,**

**v.**

**NEW LINE CINEMA, Defendant-Appellee/Cross-  
Appellant,**

**Larry Hess, et al., Defendants-Appellees.  
Nos. 02-2387, 02-2388.**

Argued June 8, 2004.

Decided and Filed Sept. 14, 2004.

Rehearing Denied Oct. 8, 2004.

Background: Author of poem and screenplay entitled "The Keeper" sued movie distributor, asserting claims for copyright infringement, reverse passing-off in violation of Lanham Act, commercial misappropriation, breach of quasi- contract, misappropriation of trade secrets, breach of implied duty of good faith and fair dealing, unfair competition/unjust enrichment, and interference with prospective economic advantage. The United States District Court for the Eastern District of Michigan, John Corbett O'Meara, J., 2002 WL 31548620, granted summary judgment for distributor. Author appealed.

Holdings: The Court of Appeals, Quist, District Judge, held that: (1) district court's failure to apply two-part test for substantial similarity did not require remand; (2) expert testimony on issue of substantial similarity was not required; (3) no similarity existed between author's poem and screenplay and distributor's movie, precluding distributor's liability for copyright infringement; (4) determination that no substantial similarity existed between parties' works precluded Lanham Act claim; (5) Copyright Act preempted commercial misappropriation claim; (6) Copyright Act did not preempt claim for misappropriation of trade secrets; and (7) Copyright Act preempted claim for tortious interference with prospective economic advantage.

Affirmed.

West Headnotes


**[1] Copyrights and Intellectual Property**  **51**  
99k51

Plaintiff may bring a claim against a person who

infringes any of plaintiff's exclusive rights in a copyright by demonstrating two elements: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. 17 U.S.C.A. § 106.

**[2] Copyrights and Intellectual Property**  **83(3.1)**  
99k83(3.1)

Since direct evidence of copying is rarely available, plaintiff asserting copyright infringement claim may establish an inference of copying by showing (1) access to the allegedly infringed work by defendant, and (2) a substantial similarity between the two works at issue.

**[3] Copyrights and Intellectual Property**  **83(3.1)**  
99k83(3.1)


In the context of showing required for inference of copying, in support of copyright infringement claim, "access" is essentially hearing or having a reasonable opportunity to view plaintiff's work and thus having the opportunity to copy.


**[4] Copyrights and Intellectual Property**  **53(1)**  
99k53(1)

In determining substantial similarity as required for copyright infringement claim, court considers both parts of substantial similarity test, which requires identifying which parts of artist's work are protectible by copyright, then deciding whether allegedly infringing work is substantially similar to protectible elements of artist's work.

**[5] Federal Courts**  **941**  
170Bk941

District court's failure to first filter out unoriginal, unprotectible elements of author's "The Keeper" poem and screenplay before applying ordinary observer test by considering whether allegedly infringing movie was substantially similar to protectible elements of poem and screenplay, as required by two-part test for determining substantial similarity, did not require remand of author's copyright infringement claim, inasmuch as inquiry on appeal, whether conclusion of no substantial similarity was correct, remained the same even if district court considered both protectible and unprotectible elements of author's work.

**[6] Copyrights and Intellectual Property**  **83(3.1)**  
99k83(3.1)

**[6] Evidence**  **508**  
157k508

Whether expert testimony should be allowed in copyright infringement case is a matter committed to the trial court's discretion; however, when the subject matter is not complex or technical, such as a computer program or a functional object, but instead involves a literary work aimed at a general audience, expert testimony will seldom be necessary to determine substantial similarity. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

**[7] Copyrights and Intellectual Property** 🔑83(4)

99k83(4)

**[7] Copyrights and Intellectual Property** 🔑83(5)  
99k83(5)

Expert testimony on issue of substantial similarity was not required in copyright infringement action brought by author of "The Keeper" poem and screenplay against distributor's allegedly infringing movie.

**[8] Copyrights and Intellectual Property** 🔑5  
99k5

**[8] Copyrights and Intellectual Property** 🔑7  
99k7

Superficial elements of author's "The Keeper" poem and screenplay involved common themes and ideas throughout literature, and thus were not entitled to copyright protection and could not be relied upon to establish substantial similarity with allegedly infringing movie, including Hell-dungeon setting, racial allusions, and love interests, themes of saving the world, battles between good and evil, and familial secrets, concepts like a barrier between Earth and Hell, and plots involving the foiling of antagonist's attempt to rule the world. 17 U.S.C.A. § 102(b).

**[9] Copyrights and Intellectual Property** 🔑4.5  
99k4.5

No author may copyright facts or ideas; rather, copyright is limited to those aspects of the work, termed "expression," that display the stamp of the author's originality. 17 U.S.C.A. § 102(b).

**[10] Copyrights and Intellectual Property** 🔑12(2)  
99k12(2)

Principle of scenes a faire excludes copyright protection for incidents, characters, or settings which are as a practical matter indispensable, or at least standard, in the

treatment of a given topic.

**[11] Copyrights and Intellectual Property** 🔑53(1)  
99k53(1)

Under two-part test for determining substantial similarity in copyright infringement action, after filtering out unprotectible elements of alleged infringed work, such as ideas and scenes a faire, final step is to determine whether allegedly infringing work is substantially similar by comparing the two works.

**[12] Copyrights and Intellectual Property** 🔑53(1)  
99k53(1)

In the copyright infringement context, "substantial similarity" exists when the accused work is so similar to plaintiff's work that an ordinary, reasonable person would conclude that defendant unlawfully appropriated plaintiff's protectible expression by taking material of substance and value.

**[13] Copyrights and Intellectual Property** 🔑55  
99k55

**[13] Copyrights and Intellectual Property** 🔑65  
99k65

Under test for substantial similarity in copyright infringement action, theme, characters, plot, sequence, pace, and setting of allegedly infringed poem and screenplay entitled "The Keeper" could be examined for similarities with allegedly infringing movie.

**[14] Copyrights and Intellectual Property** 🔑53(1)  
99k53(1)

Random similarities scattered throughout the works may be discounted in determining whether substantial similarity supporting copyright infringement claim exists between works.

**[15] Copyrights and Intellectual Property** 🔑53(1)  
99k53(1)

In applying substantial similarity test as part of copyright infringement analysis, central question is whether, based upon his net impression of the works' expressive elements, ordinary lay observer would find them substantially similar to one another.

**[16] Copyrights and Intellectual Property** 🔑55  
99k55

**[16] Copyrights and Intellectual Property** 🔑65  
99k65

No similarity existed between allegedly infringed poem and screenplay, entitled "The Keeper," and alleged infringing movie beyond those appearing at a superficial level, and therefore movie distributor was not liable to author of poem and screenplay for copyright infringement.

**[17] Copyrights and Intellectual Property** 🔑55  
99k55

**[17] Copyrights and Intellectual Property** 🔑65  
99k65

Movie distributor's admission of access to allegedly infringed poem and screenplay, entitled "The Keeper," did not preclude finding that no substantial similarity existed between those works and movie, inasmuch as absence of substantial similarity prevented any inference of copying arising from access.

**[18] Copyrights and Intellectual Property** 🔑84  
99k84

Author of "The Keeper" poem and screenplay was not entitled, in copyright infringement action, to discovery as to screenplays which preceded final version of allegedly infringing movie, inasmuch as only movie was published to the public and author's complaint alleged only that movie was infringing work.

**[19] Antitrust and Trade Regulation** 🔑38  
29Tk38

(Formerly 382k412.1, 382k340.1 Trade Regulation)

When plaintiff's Lanham Act claim parallels his copyright infringement claim, a finding of no substantial similarity on the copyright claim precludes the Lanham Act claim. Lanham Trade-Mark Act, § 1 et seq., 15 U.S.C.A. § 1051 et seq.

**[20] Antitrust and Trade Regulation** 🔑42  
29Tk42

(Formerly 382k404 Trade Regulation)

**[20] Antitrust and Trade Regulation** 🔑78  
29Tk78

(Formerly 382k404 Trade Regulation)

Determination that no substantial similarity existed between movie and allegedly infringed poem and

screenplay precluded claim by author of poem and screenplay for reverse passing-off under Lanham Act, given author's failure to distinguish Lanham Act claim from copyright infringement claim, or to explain how there could be likelihood of confusion when two works were not substantially similar. Lanham Trade-Mark Act, § 43, 15 U.S.C.A. § 1125.

**[21] Copyrights and Intellectual Property** 🔑109  
99k109

**[21] States** 🔑18.87  
360k18.87

State-law claim will be preempted under Copyright Act when two requirements are met: work must come within the scope of the subject matter of copyright, and rights granted under state law must be equivalent to any of the exclusive rights within scope of federal copyright protection. 17 U.S.C.A. § § 102, 103, 301(a).

**[22] Copyrights and Intellectual Property** 🔑109  
99k109

**[22] States** 🔑18.87  
360k18.87

Subject matter requirement for preemption of state-law claim under Copyright Act is satisfied if a work fits within the general subject matter of copyright, as set out in Act, regardless of whether it qualifies for copyright protection. 17 U.S.C.A. § § 102, 103, 301(a).

**[23] Copyrights and Intellectual Property** 🔑109  
99k109

**[23] States** 🔑18.15  
360k18.15

**[23] States** 🔑18.87  
360k18.87

**[23] Torts** 🔑203  
379k203  
(Formerly 379k10(3))

**[23] Antitrust and Trade Regulation** 🔑416  
29Tk416  
(Formerly 382k986 Trade Regulation, 379k10(5))

Allegedly infringed poem and screenplay, as original literary works fixed in tangible medium of expression, fell

within range of materials protected by Copyright Act, and therefore author's state-law claims against alleged infringer for commercial misappropriation, misappropriation of trade secrets, and interference with prospective economic advantage satisfied subject matter requirement for preemption under Copyright Act, even assuming that time, money, and effort expended by author in preparing works was separate element of commercial misappropriation claim. 17 U.S.C.A. § 102(a), 301(a).

**[24] Copyrights and Intellectual Property** 109  
99k109

**[24] States** 18.87  
360k18.87

Equivalency requirement for preemption under Copyright Act is analyzed by applying functional test to determine whether the state-law right is equivalent to any of exclusive rights granted under Copyright Act. 17 U.S.C.A. § 106, 301(a).

**[25] Copyrights and Intellectual Property** 109  
99k109

**[25] States** 18.87  
360k18.87

Existence of an extra element in state-law claim, beyond exclusive rights granted under Copyright Act, precludes preemption under Act only when the element changes the nature, rather than the scope, of the action. 17 U.S.C.A. § 301(a).

**[26] Copyrights and Intellectual Property** 109  
99k109

**[26] States** 18.87  
360k18.87

Copyright Act preempted commercial misappropriation claim in which author alleged that movie distributor copied portions of his poem and screenplay after he expended significant time, effort, and money in creating them, with the expectation that he would reap the benefits, inasmuch as assertion that claim was based upon time, effort, and money expended by author was not extra element of claim beyond exclusive rights granted under Act. 17 U.S.C.A. § 301(a).

**[27] Copyrights and Intellectual Property** 109  
99k109

**[27] States** 18.87

360k18.87

Misappropriation claim will survive preemption under Copyright Act if it alleges an extra element beyond exclusive rights granted under Act, such as a confidential or fiduciary relationship. 17 U.S.C.A. § 301(a).

**[28] Antitrust and Trade Regulation** 414  
29Tk414

(Formerly 382k984 Trade Regulation, 379k10(5))

Under Michigan law, the elements of a common-law claim for misappropriation of trade secrets are (1) the existence of a trade secret, (2) defendant's acquisition of the trade secret in confidence, and (3) defendant's unauthorized use of it.

**[29] States** 18.15  
360k18.15

**[29] Antitrust and Trade Regulation** 416  
29Tk416

(Formerly 382k986 Trade Regulation, 379k10(5))

Proof of confidential relationship that was necessary element in claim for misappropriation of trade secret under Michigan statute and common law provided extra element of claim beyond exclusive rights granted under Copyright Act, and therefore Act did not preempt author's claims for misappropriation of trade secrets against distributor of movie which allegedly contained characters, scenes, and events copied from author's poem and screenplay. 17 U.S.C.A. § 301(a); M.C.L.A. § 445.1901 et seq.

**[30] Federal Courts** 612.1  
170Bk612.1

While it will generally decline to consider on appeal issues not considered by the district court, Court of Appeals recognizes an exception when the issue presents only a question of law.

**[31] Copyrights and Intellectual Property** 109  
99k109

**[31] States** 18.87  
360k18.87

In determining whether equivalency required for Copyright Act to preempt state-law claim exists, court should compare elements of causes of action, not the facts pled to prove them, when state-law claim itself furnishes extra element needed to avoid equivalency; nonetheless,

court may be required to review facts as pled by plaintiff to determine whether acts giving rise to state-law claim are merely acts of copyright infringement. 17 U.S.C.A. § 301(a).


**[32] Federal Courts**  762  
170Bk762

Court of Appeals may affirm district court's decision if decision was correct for any reason, including one that district court did not consider.

**[33] Antitrust and Trade Regulation**  420  
29Tk420

(Formerly 382k990 Trade Regulation, 379k10(5))

Poem and screenplay were not "trade secrets" under Michigan law, inasmuch as they had no independent economic value from being kept secret. M.C.L.A. § 445.1902(d)(i).

**[34] Antitrust and Trade Regulation**  417  
29Tk417

(Formerly 382k987 Trade Regulation, 379k10(5))

Under Michigan law, essence of a trade secret is that it derives its value from secrecy. M.C.L.A. § 445.1902(d)(i).

**[35] Antitrust and Trade Regulation**  420  
29Tk420

(Formerly 382k990 Trade Regulation, 379k10(5))

Even if author's poem and screenplay derived some independent economic value from being held in secrecy, such that they qualified as trade secrets under Michigan law, they were not misappropriated by movie distributor, given that only similarities between author's works and movie arose from common and well-known themes, plots, and character traits that were not protectible as trade secrets. M.C.L.A. § 445.1902(d)(i).

**[36] Torts**  211  
379k211

(Formerly 379k10(1))

**[36] Torts**  213  
379k213

(Formerly 379k10(1))

Under Michigan law, elements of claim for interference with prospective economic advantage are (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy by

defendant, (3) intentional interference by defendant which induces or causes a breach or termination of the relationship or expectancy, and (4) damage to plaintiff.

**[37] States**  18.15  
360k18.15

**[37] Torts**  203  
379k203

(Formerly 379k10(3))

Copyright Act preempted author's claim against movie distributor for tortious interference with prospective economic advantage under Michigan law, inasmuch as claim was based on distributor's alleged copying, display, and distribution of author's poem and screenplay, and thus on activity constituting copyright infringement, and was not qualitatively different from copyright infringement claim, notwithstanding author's contention that development of his reputation was extra element rendering claim different from copyright infringement claim. 17 U.S.C.A. § 301(a).

\*289 Andrew J. Kochanowski (argued and briefed), Sommers, Schwartz, Silver & Schwartz, Southfield, MI, for Plaintiff-Appellant.

Herschel P. Fink (argued and briefed), Honigman, Miller, Schwartz & Cohn, Detroit, MI, for Defendants-Appellees.

Before MARTIN and SUTTON, Circuit Judges;  
QUIST, District Judge. [FN\*]

FN\* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

OPINION

QUIST, District Judge.

Plaintiff, Douglas Alan Stromback ("Stromback"), sued Defendant, New Line Cinema ("NLC"), and others, alleging violations of the Copyright Act, 17 U.S.C. § 106, and the Lanham Act, 15 U.S.C. § 1125, and alleging various state law claims under Michigan and/or California law. Stromback's claims all arise out of his allegations that the movie "Little Nicky," which is owned and distributed by NLC, infringes Stromback's poem entitled "The Keeper" as well as his original treatment and outline of a screenplay based upon "The Keeper" poem entitled "The Keeper." [FN1] The district court granted summary judgment to NLC on all of Stromback's claims and

dismissed the case. Stromback filed this timely appeal. We affirm on all issues.

FN1. Stromback also sued the three credited screenwriters, Adam Sandler, Steven Brill, and Tim Herlihy, and two other individuals. Stromback eventually dismissed the screenwriters without prejudice and did not serve summons on the other two individuals. Therefore, the case proceeded only against NLC.

#### I. FACTUAL AND PROCEDURAL BACKGROUND

In late 1998 and early 1999, Stromback, an actor, aspiring screenwriter, and former professional hockey player, created an original poem entitled "The Keeper." Stromback then created an original treatment and original outline of a screenplay based upon "The Keeper" poem and entitled each one "The Keeper." Later, Stromback created several original screenplays of "The Keeper." Stromback registered the poem and a version of the screenplay with the Copyright Office. Stromback also registered several versions of the screenplay with the Writers Guild of America.

Stromback alleges that in early 1999, he shared the poem and the screenplay with Larry Hess and John Apothaker to solicit their comments on his work. According to Stromback, Hess and Apothaker subsequently passed copies of "The Keeper" poem and screenplay to NLC. In November 2000, NLC released a movie it produced called "Little Nicky," starring Adam Sandler. Stromback alleges that after seeing "Little Nicky" in the theater, he realized that it contained substantial similarities to his works, including similarities in theme, character treatment and development, idiosyncratic character traits, and scene selection. A description of the two works follows. [FN2]

FN2. In its opinion, the district court stated that it was adopting Stromback's description of the two works in light of the fact that it was deciding substantial similarity at the summary judgment stage.

#### **\*290** *The Keeper*

The registered screenplay version of "The Keeper" is a story about "Ted," who brings down the corrupt Governor of California, "John." Racial themes are presented throughout the story. Ted is white. Ted's adoptive mother is "Martina," an older black lady. Ted's grandfather, "Fred," is an 87-year-old black man who lives in a nursing home and is apparently losing his mental faculties. When Ted was young, Fred taught Ted to speak in rhymes, as Ted often does throughout the story. Fred thought that being able to rhyme was the secret to succeeding in life because Muhammed Ali spoke in rhymes. Fred told Ted that he was teaching Ted how to

rhyme so that Ted would deliver the family "from the gutter." Ted regularly talks to himself in his apartment, apparently responding in a schizophrenic manner to voices inside his head. Ted asks Martina to explain the voices and why he is troubled but she is reluctant to tell him the truth, which is that he was abandoned in a dumpster as a baby by his birth mother. Eventually, Ted's mother told him that they found him on church grounds and that his mother was an eighteen year old girl who was having an affair with a politician.

The story opens with Ted starting a new job at the "national paper." Ted is hired to work in the basement of the building organizing old files. Ted's boss, "Dave," calls the basement "the cave" or "the dungeon." Ted works in the evening and often sleeps during work. Ted is attracted to a female writer named "Sue." Ted concocts and carries out a plan to approach Sue in the dark and reveal his feelings toward her through a rhyme. Sue figures out that Ted was the person who approached her in the dark but she won't date him because he is "totally weird."

Shortly after he begins working at the national paper, Ted begins to obsess about Governor John. [FN3] Governor John is portrayed as a power hungry politician who does no real work and whose ambition is to become president and take over the world. Ted believes that Governor John is "cocky and arrogant" as well as evil, and at various times Ted refers to Governor John as the devil. Ted begins a campaign against Governor John by sending anonymous rhyming riddles to the national paper that the newspaper prints in its editorial page. Eventually it is revealed that Ted has been reading about a "Jokela murder case," in which a reporter ("Jokela") was murdered in the same basement in which Ted now works. Jokela discovered that the then-secretary of state (Governor John's father) was involved in a cult having "some thing to do with the devil." Governor John's father was the prime suspect in the murder but "got off the hook and the case never went to trial." He went on to have a distinguished career as Governor. Ted knows that Governor John's father was responsible for the murder and includes clues about it in his riddles.

FN3. Stromback claims that the reader can infer that the politician with whom Ted's birth mother had the affair was Governor John's father, making Governor John Ted's evil brother or half-brother. However, the only basis for this inference is Stromback's subjective reading of the text.

Governor John reads the riddles and eventually catches on that the author is out to get him. The Governor and his henchmen decide to kill "that rhyming dude." Ted reveals

himself to the Governor and dares him to "get me if you can." Governor John arranges for three individuals to find and murder Ted at the national paper. However, Ted sets a trap in which he uses his "good friend," "Scott," to trick the hit-man into thinking that Scott is actually \*291 Ted. The hit-man ends up killing Scott. Having videotaped the murder, Ted tells a dying Scott: "I needed you, you were a good friend, but everybody needs a ladder to get to the top. You're my ladder scott [sic]."

Ted shows the tape of the murder to the police, who eventually link the murder to Governor John. The story ends with the Governor going to jail and Ted being elected as the Governor of California. On election night Sue goes to Ted's hotel room, where he rapes her. Sue has no recourse because Ted now has the power. Ted calls Sue a "bitch" as she leaves.

#### *Little Nicky*

Little Nicky is a "comedy" about the Devil, "Satan," and his three sons: "Casius," the strong, tough son; "Adrian," the smart, ruthless son; and "Nicky," the weaker, sweet son, who also has a speech impediment caused by his brother hitting him in the face with a shovel. Adrian and Casius frequently pick on Nicky and "mind wrestle" with him, causing him to do or say things against his will. The grandfather, "Lucifer" (Rodney Dangerfield), appears occasionally but does not really interact with Nicky.

The movie opens with Satan trying to decide if he should retire after 10,000 years of rule. If he does, one of his sons would take over Hell. Casius and Adrian both want the job. Nicky does not want it and prefers that his father keep the job. Satan decides to keep the job and rule for another 10,000 years in order to maintain the balance between good and evil (he does not believe that his sons are capable of doing this). Casius and Adrian are furious at this decision and plan to escape to Earth, where they will try to corrupt as many souls as possible (to threaten the balance between good and evil) in their quest to assume control. During their escape, Casius and Adrian travel through a wall of fire, by which damned souls are intended to fall into, but not leave, Hell. Adrian and Casius cause the wall of fire to freeze and a logjam of souls ensues outside the wall of fire. Without new souls entering, Satan begins to decompose. His only hope is to send Nicky to Earth to force his brothers to drink from a magic flask, in which they will be trapped. Once he has his brothers inside the flask, Nicky must pass through the wall of fire and return to Hell, which will save Satan.

Nicky travels to New York City, where Satan's friend, a talking dog, "Beefy," serves as Nicky's guide. Nicky is also assisted by two cult-worshipping "groupies" named

"John" and "Pete." Beefy, John, and Pete all want Nicky to "release his inner evil" in order to overpower Casius and Adrian. Nicky has a difficult time finding his brothers because they hide by randomly "possessing" humans. Casius possesses the Mayor of New York and lowers the drinking age from 21 to 10, causing chaos. All three of them have a difficult time adapting to Earth's cold weather.

While on Earth, Nicky meets and falls in love with a woman named "Valerie." During a chance encounter, Adrian mind wrestles with Nicky and causes him to insult Valerie. However, Nicky wins back Valerie's affection by telling her the truth about his family and mission on Earth. During the story, Nicky is killed several times (e.g., by a train or bus) and is sent back to Hell, where he is re-dispatched to Earth. The final time, Nicky dies trying to save Valerie and goes to Heaven. There, he meets an angel named "Holly," who turns out to be his mother. Holly tells Nicky that she met Satan at a "Heaven and Hell Mixer." Holly tells Nicky releasing his inner good is the key to victory over his brothers. Holly also gives Nicky a magic \*292 sphere from God for Nicky to use when it is time.

Nicky manages to trap Casius in the magic flask, but Adrian has assumed the throne of Hell and has caused Hell to rise through Central Park in New York. At the stroke of midnight, all of New York's souls will be damned and belong to Adrian in Hell. Nicky uses the magic sphere, releasing "good" versus "evil." Nicky smashes the magic sphere and Ozzy Osbourne (a rock star with a reputation for biting the heads off bats) appears and bites off Adrian's head (who appears in the form of a bat) and spits it into the magic flask. Nicky then commits one last superficially bad act to ensure that he will be sent to Hell. Valerie tells Nicky that she loves him and then smashes him on the head with a rock (out of love) to kill him and send him back to Hell. Satan is saved and the balance between good and evil is restored. Satan sends Nicky back to Earth to be with Valerie and they have a son and live happily ever after.

Stromback filed his complaint on October 15, 2001, and filed an amended complaint in December 2001. [FN4] Stromback's amended complaint alleged claims for copyright infringement; reverse passing off in violation of the Lanham Act; commercial misappropriation; breach of quasi contract; misappropriation of trade secrets; breach of the implied duty of good faith and fair dealing; unfair competition/unjust enrichment; and interference with prospective economic advantage. On September 13, 2002, NLC, the only remaining defendant, moved for summary judgment. At that time, the case had been pending for about a year and Stromback had not

sought a Rule 16 conference with the district court, nor had he sought any discovery. In his response, Stromback argued that summary judgment should be denied because he needed to conduct discovery on whether the various screenplays leading up to the final product (the movie) infringed on "The Keeper" poem or screenplay. The district court found that the movie was the only relevant work because only the movie, and not the various versions of the screenplays leading up to the movie, were published to the public and because Stromback alleged in his amended complaint only that the movie was an infringing work. The district court concluded that NLC was entitled to summary judgment on the copyright infringement and Lanham Act claims because no reasonable jury could find that "Little Nicky" is substantially similar to "The Keeper" poem or screenplay. The district court also concluded that summary judgment was proper on Stromback's state law claims on the basis that they are preempted by § 301 of the Copyright Act.

FN4. In addition to alleging that "Little Nicky" infringed "The Keeper," Stromback also initially alleged that the movie "Mr. Deeds" was an infringing work. Stromback eventually dropped the allegation regarding "Mr. Deeds."

## II. ANALYSIS

### A. Standard of Review

Stromback contends that the district court erred in granting summary judgment to NLC on his various claims. In reviewing a district court's grant of summary judgment, this Court applies a *de novo* standard. See *E.I. Du Pont de Nemours & Co. v. Okuley*, 344 F.3d 578, 584 (6th Cir.2003). Summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c). The proper inquiry is whether the evidence is such that a reasonable jury could return a verdict for the plaintiff. See *Anderson v. Liberty \*293 Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

### B. Copyright Infringement Claim

[1] The Copyright Act provides protection for original works of authorship expressed in various media. 17 U.S.C. § § 101-1332. Subject to certain exceptions not applicable here, the owner of a copyright has the exclusive rights (1) to reproduce the copyrighted work; (2) to prepare derivative works; (3) to distribute copies; (4) to perform publicly a copyrighted work; and (5) to display publicly a copyrighted work. 17 U.S.C. § 106. A plaintiff may bring a claim against a person who infringes any of the plaintiff's exclusive rights in a copyright under

§ 106 by demonstrating two elements: "(1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 1296, 113 L.Ed.2d 358 (1991); accord *Kohus v. Mariol*, 328 F.3d 848, 853 (6th Cir.2003). The parties do not dispute Stromback's ownership of a valid copyright in "The Keeper" poem and screenplay. Thus, copying is the only issue in dispute.

[2][3] Since direct evidence of copying is rarely available, a plaintiff may establish "an inference of copying by showing (1) access to the allegedly-infringed work by the defendant(s) and (2) a substantial similarity between the two works at issue." *Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir.1999); see also *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir.1992). "Access is essentially 'hearing or having a reasonable opportunity to [view] the plaintiff[s] work and thus having the opportunity to copy.'" *Ellis*, 177 F.3d at 506 (quoting *Tree Publ'g Co. v. Warner Bros. Records*, 785 F.Supp. 1272, 1274 (M.D.Tenn.1991)). In *Ellis*, we observed that in some cases the relationship between the degree of proof required for similarity and access may be inversely proportional: where the similarity between the two works is strong, less compelling proof of access may suffice, and vice-versa. *Id.* at 507. See *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir.2000) (stating that under the "inverse ratio rule," a lower standard of proof of similarity is required where a high degree of access is shown); *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir.1946) (stating that "a case could occur in which the similarities were so striking that we would reverse a finding of no access, despite weak evidence of access (or no evidence thereof other than the similarities)"). For purposes of its motion for summary judgment, NLC conceded the issue of access, electing to focus solely on the issue of substantial similarity of the two works.

[4] In ruling on NLC's motion, the district court observed, correctly, that the Sixth Circuit had not formally adopted a specific test or approach for determining substantial similarity in copyright cases. Drawing on statements in *Diffie* as well as prior decisions from the Eastern District of Michigan, the district court applied the "ordinary observer" test, which allows the trier of fact to gauge his "net impression" of the two works by conducting a side-by-side comparison without the benefit of expert testimony or dissection. (Dist. Ct. Op. at 8.) The district court rejected Stromback's argument that it should apply the two-part test employed by the Ninth Circuit, which consists of an extrinsic test and an intrinsic test, see *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir.1977), although the district court did state that summary judgment would be

improper at that stage if the Sixth Circuit employed the "extrinsic" test because expert discovery had not occurred. Subsequent \*294 to the district court's opinion and order granting summary judgment and dismissing the case, this court adopted a two-part test in *Kohus v. Mariol*, 328 F.3d 848 (6th Cir.2003), which follows the test employed by the D.C. Circuit in *Sturdza v. United Arab Emirates*, 281 F.3d 1287 (D.C.Cir.2002). We stated that "the first step 'requires identifying which aspects of the artist's work, if any, are protectible by copyright,' [and] the second 'involves determining whether the allegedly infringing work is "substantially similar" to protectible elements of the artist's work.'" *Kohus*, 328 F.3d at 855 (quoting *Sturdza*). This test is really just a refinement of the ordinary observer test that, as its initial step, parses from the work the elements neither afforded copyright protection nor properly considered in the ordinary observer test. "The essence of the first step is to filter out the unoriginal, unprotectible elements-- elements that were not independently created by the inventor, and that possess no minimal degree of creativity, through a variety of analyses." *Id.* (citation omitted). Our test is similar to the Ninth Circuit's test, because the first part, like the Ninth Circuit's extrinsic test, requires a determination of only the expressive elements of a work, while the second part, like the Ninth Circuit's intrinsic test, asks whether the ordinary, reasonable observer would find the works, taken as a whole, to be substantially similar. *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 318 (6th Cir.2004).

However, significant differences remain in both parts. In particular, we apply a more stringent standard regarding when to allow expert testimony on the first part of the test. Also, not having adopted the eight *Kouf* factors [*Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042 (9th Cir.1994)], the first part of our test remains more free in form than the Ninth Circuit's extrinsic test.

*Id.* In addition, for purposes of summary judgment, the Ninth Circuit considers only the extrinsic test, while the intrinsic test is reserved for the jury. *See Kouf*, 16 F.3d at 1045 ("A plaintiff avoids summary judgment by satisfying the extrinsic test which makes similarity of the works a triable issue of fact."). In contrast, a court considers both parts of our test in determining substantial similarity on a motion for summary judgment. *See Kohus*, 328 F.3d at 857-58 (discussing the district court's analysis on remand under both prongs of the test). This remains consistent with our prior observation that while summary judgment in favor of a defendant in a copyright case is a practice that should be used sparingly, in an appropriate case, "a court may compare the two works and render summary judgment for the defendant on the

ground that as a matter of law a trier of fact would not be permitted to find substantial similarity." *Wickham v. Knoxville Int'l Energy Exposition, Inc.*, 739 F.2d 1094, 1097 (6th Cir.1984) (citations omitted); *accord Kohus*, 328 F.3d at 853.

[5] Our decision in *Kohus* answers one of Stromback's central arguments on appeal, namely, that the district court erred by conducting a side-by-side comparison of the two works rather than applying the extrinsic/intrinsic test or some other test that allows for analytic dissection of what Stromback characterizes as "complex copyright subject matter." Though the district court failed to apply the proper two-part test, we need not remand the case because the issue presented is one of law. *See, e.g., Chase Manhattan Bank, N.A. v. Am. Nat'l Bank & Trust Co.*, 93 F.3d 1064, 1072 (2d Cir.1996) ("An appellate court has the power to decide cases on appeal if the facts in the record adequately \*295 support the proper result or if the record as a whole presents no genuine issue as to any material fact.... Thus, if we find that a party must prevail as a matter of law, a remand is unnecessary.") (internal quotation marks and citations omitted); *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1539 (10th Cir.1996) ("In the present case, the debate is purely legal, and remand on this issue is unnecessary"). That is, the district court applied the ordinary observer test--the second part of the *Kohus* test--without first filtering out the unoriginal, unprotectible elements of "The Keeper" poem and screenplay. To the extent that the district court considered both protectible and unprotectible elements of Stromback's works, the inquiry for purposes of this appeal remains the same--whether the district court's conclusion of no substantial similarity was correct. [FN5]

FN5. Although the district court did not purport to apply the two-part test, it in fact did so as part of its analysis when it observed that many of the alleged similarities, such as the concepts of Hell and the devil, are too commonplace and not protected.

[6][7] Nor is remand required for consideration of expert testimony, as the district court believed might be the case under the extrinsic/intrinsic test. Even in the Ninth Circuit expert testimony is not a requisite for a copyright infringement case. *See Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir.1994) (stating that a court may use expert testimony, "if necessary," to determine whether any of the allegedly similar features are subject to copyright protection). Our test "appl[ies] a more stringent standard regarding when to allow expert testimony on the first part of the test." *Murray Hill Publ'ns, Inc.*, 361 F.3d at 318. We remanded in *Kohus* in part because the copyright involved a latch for a portable

children's play yard, and we thought that expert testimony would be necessary to determine whether certain elements of such a latch should be excluded from the substantial similarity analysis. See *Kohus*, 328 F.3d at 856. Whether expert testimony should be allowed in a particular case remains a matter committed to the discretion of the trial court under Federal Rule of Evidence 702 if such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." However, where, as here, the subject matter is not complex or technical, such as a computer program or a functional object, see, e.g., *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 834-35 (10th Cir.1993) (noting that in most cases involving computer programs expert testimony will be helpful to the court in applying an abstractions test), but instead involves a literary work aimed at a general audience, expert testimony will seldom be necessary to determine substantial similarity. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (1930) (Hand, Learned) ("[Expert testimony] ought not to be allowed at all; and while its admission is not a ground for reversal, it cumbers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal."); *Kindergartners Count, Inc. v. Demoulin*, 249 F.Supp.2d 1214, 1232 (D.Kan.2003) ("Unlike technical computer programs, the trier of fact does not need an expert to compare two literary works that are expressed in simple English."); *Costello v. Loew's Inc.*, 159 F.Supp. 782, 789 (D.D.C.1958) ("No amount of expert or lay testimony as to fancied similarities could change the obvious content of the exhibits before the court.... Nor could expert testimony affect the spontaneous \*296 and immediate impression of the plaintiff's and defendant's literary works upon the mind of the ordinary observer."). Therefore, we reject Stromback's suggestion that expert testimony is necessary in this case.

#### 1. Filtering of Unprotected Elements

[8][9] Although there is no clear line separating protected from nonprotected work, two principles help to guide that determination in this case. See *Kohus*, 328 F.3d at 855-56. First, copyright protection extends only to expression of ideas and not to ideas themselves. 17 U.S.C. § 102(b); *Mazer v. Stein*, 347 U.S. 201, 217, 74 S.Ct. 460, 470, 98 L.Ed. 630 (1954) ("Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea--not the idea itself."). "Ideas are free to the world, and one person's idea can be appropriated by another with impunity." *Taylor v. Metro-Goldwyn-Mayer Studios*, 115 F.Supp. 156, 157 (S.D.Cal.1953). "[N]o author may

copyright facts or ideas. The copyright is limited to those aspects of the work--termed "expression"--that display the stamp of the author's originality." *Feist Publ'ns*, 499 U.S. at 350, 111 S.Ct. at 1290 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547, 105 S.Ct. 2218, 2224, 85 L.Ed.2d 588 (1985)) (internal quotation marks omitted). The abstraction test articulated by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (1930), provides some guidance in divining protected expression:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

*Id.* at 121. The test itself does not identify protectible elements of a work, but instead is a tool for accomplishing that task. *Kohus*, 328 F.3d at 855.

[10] Second, the principle of *scenes a faire* excludes copyright protection for "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir.1982); see also 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* ("Nimmer") § 13.03[F][3] (2004). For example, parties, alcohol, co-eds, and wild behavior are natural elements in a story about a college fraternity. Similarly, "[e]lements such as drunks, prostitutes, vermin and derelict cars would appear in any realistic work about ... policemen in the South Bronx," and therefore are not afforded copyright protection. *Walker v. Time Life Films*, 784 F.2d 44, 50 (2d Cir.1986); see also *Murray Hill Publ'ns, Inc.*, 361 F.3d at 319-20 (citing examples).

Stromback relies upon numerous examples to support his claim of substantial similarity between the works. As Stromback concedes, however, many of these elements are superficial, e.g., the Hell/dungeon setting, the sequence of certain events (main characters leaving Hell, battling their brother, the attempted killing of the main character), racial allusions and a love interest. These are common themes and ideas throughout literature and are beyond any level of abstraction at which copyright protection might begin to attach. See *Cavalier v. Random House, Inc.*, 297 \*297 F.3d 815, 823 (9th Cir.2002) ("Familiar stock scenes and themes that are staples of literature are not protected."). The same is true for

character traits or descriptions such as "whacked," "odd," "misfit," "evil," or "conflicted"; themes, such as saving the world, the battle between good and evil, sibling rivalry or familial secrets and issues, and racial issues; scenes, such as parties; concepts, such as a dam or barrier between Earth and Hell; and plots, such as foiling the antagonist's attempt to rule the world. *See generally Nichols*, 45 F.2d at 122 ("A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*."); *Whitehead v. Paramount Pictures Corp.*, 53 F.Supp.2d 38, 49 (D.D.C.1999) ("The general concept of an interracial relationship ... is not copyrightable.") (citing *Matthews v. Freedman*, 157 F.3d 25, 27 (1st Cir.1998)). These elements are too general to qualify for copyright protection.

## 2. Comparing the Works

[11][12][13][14][15] After filtering out the unprotectible elements such as ideas and *scenes a faire*, the final step is to determine whether the allegedly infringing work is "substantially similar" by comparing the two works. *Wickham*, 739 F.2d at 1097. Substantial similarity exists where "the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value." *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir.1996) (internal quotation marks and citation omitted). In *Murray Hill* we wrote:

"A story has a linear dimension: it begins, continues, and ends. If a defendant copies substantial portions of a plaintiff's sequence of events, he does not escape infringement by adding original episodes somewhere along the line." "The misappropriation of even a small portion of a copyrighted work may constitute an infringement under certain circumstances." "Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity." "No plagiarist can excuse the wrong by showing how much of his work he did not pirate."

361 F.3d at 320 (citations omitted). In a case such as this, it is appropriate to examine the theme, characters, plot, sequence, pace, and setting for similarities. *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir.1996). "However, 'random similarities scattered throughout the works' may be discounted." *Murray Hill Publ'ns, Inc.*, 361 F.3d at 320 (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir.1984)). In the end, the question is whether, based upon his "net impression" of the works' expressive

elements, the ordinary lay observer would find them substantially similar to one another. *See, e.g., Ellis*, 177 F.3d at 506 n. 2.

[16] Having reviewed "The Keeper" poem and screenplay and "Little Nicky," we are unable to find any similarity between the works other than at perhaps the most superficial level. Casting aside the many stock themes, *scenes a faire*, and raw ideas cited by Stromback, we are left with two works that are completely dissimilar in both their overall look and feel and in their constituent expressive elements.

The respective themes, plots, moods, and settings of the works are dissimilar. "The Keeper" is a dark, disturbing, and humorless story about real people. Its theme is difficult to discern, but it appears to be that power and success in life can be \*298 attained through rhyming. The story takes place in California, and much of it occurs in the basement of the national paper where Ted works. While at the national paper Ted is attracted to a woman, Sue, who spurns him because he is "weird." Ted dislikes the corrupt Governor and at some point figures out that the Governor was connected with a cult of devil worshipers and had something to do with a murder. In an effort to bring down the Governor, Ted sends a series of rhyming clues to the national paper that ultimately reveal the Governor's connection to the murder. [FN6] Ted refers to the Governor as "evil" and "the antichrist" several times throughout the story, but this is only his use of a metaphor, as there is never any suggestion that Governor John actually is the devil. The Governor eventually figures out that Ted is the "rhyming dude" and sends henchmen to kill Ted. Ted betrays his friend, Scott, by leading a henchman to believe that Scott is Ted. After the henchman shoots Scott, Ted reveals to Scott that he used Scott as his "ladder." In the end, Ted becomes Governor and uses his power to exact revenge on Sue by raping her.

FN6. The district court and the parties state that the Governor was responsible for the murder, but the text of "The Keeper" suggests that the Governor's father committed the murder ("Well the big deal is that a prime suspect in the case was the secretary of the state.... Well, the secretary of states [sic] kid is now the governor. The one that will be the next president."). (J.A. at 334-35.)

In contrast, "Little Nicky" is a comedy about the devil and his three sons. The predominant theme in "Little Nicky" is that good should and will prevail over evil. The story takes place in Hell, New York City, and Heaven. Little Nicky, the youngest of the three sons, is sent to Earth to bring back his two brothers, Casius and Adrian, who have escaped from Hell as part of their plan to

assume control. Nicky must bring his brothers back to Hell in order to restore the balance of good and evil and to save his father, Satan. On Earth, Nicky meets and falls in love with Valerie. After dying and returning to Hell several times, Nicky ends up in Heaven and discovers that his mother is an angel. Just as Adrian is about to prevail and claim all of the souls of New York City, Nicky returns to Earth and, using the magic sphere his mother gave him, bottles Adrian in the magic flask. After Nicky returns his brothers to Hell, Satan sends Nicky back to Earth, and Nicky and Valerie have a son and live happily ever after.

The main characters, Ted and Nicky, are markedly different. Ted is portrayed as a slick and scheming character whose most prominent trait is that he speaks in rhymes, often as a means to deceive and lure women. For example, in one scene, Ted tells a waitress that he would like her "ass," but when she responds in apparent disgust he says "I would like your bass, bass ale." Ted reveals his evil side at the end of the story by betraying his friend and raping the woman who rejected him. In contrast, as a son of the devil, Nicky is unexpectedly portrayed as sweet, good-hearted, and naive. Nicky succeeds in the end by using his inner good and ultimately saves the world by restoring the balance of good and evil.

The list of similarities cited by Stromback is extensive, but nonetheless insufficient to render the two works substantially similar. Some of the alleged similarities do not exist, others are overstated, and, to the extent there are similarities, they are simply too general or tenuous to meet the legal standard for similarity. By way of example, Stromback says that Ted is shown as a riddler and a punner and \*299 claims that the same "wordplay" occurs in Nicky's character development, but this is simply not true. Unlike Ted, Nicky does not speak in rhymes or use wordplay. Likewise, Stromback claims that Ted and Nicky both assume the same burden--saving the world and souls. But, a fair read of "The Keeper" shows that Ted's true concern is his own self-interest. While there are some similarities--for example, references to Hell and the devil and interracial families--Stromback's claim fails because the similar details are trivial or scattered details. See *Williams*, 84 F.3d at 590-91. "Where as here, the slight similarities are not thematically related, the whole is no greater than the sum of the parts." *Murray Hill Publ'ns, Inc.*, 361 F.3d at 325. Thus, the district court was correct in concluding that a reasonable person could not conclude that NLC copied protected expression from "The Keeper."

[17] In spite of the absence of similar protectible elements in both works, Stromback contends that NLC's admission of access precludes a finding of no substantial

similarity as a matter of law. This argument is easily rejected, because without substantial similarity, there can be no inference of copying, and thus, no infringement. In *Wickham v. Knoxville International Energy Exposition, Inc.*, 739 F.2d 1094 (6th Cir.1984), we held that because there was no substantial similarity, access was irrelevant: "No amount of proof of access will suffice to show copying if there are no similarities." *Id.* at 1097; accord *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir.1946) ("Of course, if there are no similarities, no amount of evidence of access will suffice to prove copying.").

[18] Finally, Stromback contends that the district court erred in granting summary judgment to NLC because it should have allowed discovery on the underlying and prior versions of the screenplay in order to permit Stromback to fully develop his claim. Stromback points out that he alleged not only that the movie "Little Nicky" infringed his copyright in "The Keeper," but also that NLC substantially copied and prepared versions of "The Keeper." Stromback contends that discovery was necessary to this portion of his claim and was relevant to address the question of how the movie "Little Nicky" was prepared in light of NLC's election not to rely upon independent creation as a defense. The district court rejected Stromback's request because only the movie was published to the public and because Stromback alleged in his amended complaint only that the movie was an infringing work. We think that this was the correct result. In deciding infringement claims, courts have held that only the version of the alleged infringing work presented to the public should be considered. See *Davis v. United Artists, Inc.*, 547 F.Supp. 722, 724 n. 9 (S.D.N.Y.1982) ("Since the ultimate test of infringement must be the film as produced and broadcast, we do not consider the preliminary scripts."). "Courts have routinely rejected requests to consider earlier drafts of the screenplay. Consideration of earlier versions of the screenplay is too unreliable in determining substantial similarity." *Walker v. Time Life Films, Inc.*, 615 F.Supp. 430, 435 (S.D.N.Y.1985); see also *Madrid v. Chronicle Books*, 209 F.Supp.2d 1227, 1234 (D.Wyo.2002) (quoting *Walker* and refusing to grant the plaintiff's request for discovery on the development of the defendant's movie because such discovery would be "pointless"). As the *Madrid* court noted, the "intermediate copying" concept has only been recognized in a very limited application to cases involving computer programs--because of the complex nature of the subject. *Id.* at 1236. Because this \*300 is not such a case, there is no need to apply the concept. Furthermore, in spite of Stromback's assertion to the contrary, the district court's assessment of the amended complaint was accurate because Stromback only alleged that the movie "Little Nicky" infringed "The Keeper" poem and screenplay.

### C. Lanham Act Claim

[19][20] Stromback also contends that the district court erred in granting summary judgment on his claim for reverse passing off under Section 43 of the Lanham Act. Where a plaintiff's Lanham Act claim parallels his copyright infringement claim, a finding of no substantial similarity on the copyright claim precludes the Lanham Act claim. *Mihalek Corp. v. Michigan*, 814 F.2d 290, 296 (6th Cir.1987); see also *Litchfield v. Spielberg*, 736 F.2d 1352, 1358 (9th Cir.1984) (stating that "without substantial similarity there can be no claim for reverse passing off" under the Lanham Act). Stromback makes no attempt to distinguish his Lanham Act claim from his copyright infringement claim or to explain how there could be a likelihood of confusion when the two works are not substantially similar. Therefore, summary judgment was proper.

### D. State Law Claims

The district court concluded that NLC was entitled to summary judgment on all of Stromback's state law claims on the ground that they were subject to copyright preemption. On appeal, Stromback takes issue only with the district court's dismissal of his claims for commercial misappropriation, misappropriation of trade secrets, and interference with prospective economic advantage claims.

[21] Section 301 of the Copyright Act provides that:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as defined by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright ... are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a). A state law claim will be preempted under Section 301 where two requirements are met. First, the work must come within the scope of the "subject matter of copyright" as set forth in Sections 102 and 103 of the Copyright Act. *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir.2001). Second, the rights granted under state law must be equivalent to any of the exclusive rights within the scope of federal copyright protection. *Id.* These requirements are often referred to as the "subject matter requirement" and the "general scope" or "equivalency" requirement. *Id.* (citing *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 848 (2d Cir.1997)).

### 1. Subject Matter Requirement

[22][23] The subject matter requirement of Section 301 is satisfied if a work fits within the general subject matter of Sections 102 and 103 of the Copyright Act, regardless of whether it qualifies for copyright protection. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 676 (7th Cir.1986) (quoting H.R.Rep. No. 94-1476, at 131, reprinted in 1976 U.S.C.C.A.N. 5659, 5747). In *Wrench*, this court joined several other circuits in holding that for purposes of preemption, the scope of the Copyright Act's subject matter is broader than the scope of its protection. *Wrench*, 256 F.3d at 454-55. Stromback's claims meet the \*301 subject matter requirement because "The Keeper" poem and screenplay fall squarely within the range of materials protected by the Copyright Act; that is, they are both original literary works "fixed in [a] tangible medium of expression." 17 U.S.C. § 102(a). Stromback does not dispute that the poem and screenplay meet the subject matter requirement, but he does argue that his commercial misappropriation claim avoids preemption on this basis because it relates to "the time, effort, and money that [Stromback] expended" as well as NLC's unauthorized "uses" of Stromback's efforts. (Appellant's Br. at 55-56.) This argument ignores the principle cited above, that the subject matter of copyright is broader than its protections. Thus, Stromback's citation to *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 338, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991), for the proposition that there is no copyright protection for "sweat of the brow" efforts is not germane to the subject matter inquiry. Moreover, even assuming that Stromback's time, effort, and money constitute a separate element of his claim, it would still be within the subject matter of copyright because the claim is based upon NLC's unauthorized use of "The Keeper" poem and screenplay. Cf. *Nat'l Basketball Ass'n*, 105 F.3d at 848 ("We hold that where the challenged copying relates in part to the copyrighted broadcasts of the games, the subject matter requirement is met as to both the broadcasts and games."). Moreover, Stromback's argument that Section 106 of the Copyright Act does not grant a copyright owner the exclusive right to "use" a work is sophistry. See *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 787 (5th Cir.1999) ("Use of a copyrighted work by one who does not own the copyright constitutes infringement under federal law, provided the use falls within the scope of a copyright owner's exclusive rights.") (footnote omitted).

### 2. Equivalency Requirement

[24][25] Courts analyze equivalency by applying "a functional test" to determine whether the state law right at issue is equivalent to any of the exclusive rights under

Section 106 of the Copyright Act. *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1164 (1st Cir.1994). In *Wrench*, we stated:

Equivalency exists if the right defined by state law may be abridged by an act which in and of itself would infringe one of the exclusive rights. Conversely, if an extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display in order to constitute a state-created cause of action, there is no preemption, provided that the extra element changes the nature of the action so that it is qualitatively different from a copyright infringement claim.

256 F.3d at 456 (citation omitted). See also *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc.*, 7 F.3d 1434, 1440 (9th Cir.1993). The existence of an extra element precludes preemption only where the element changes the nature, rather than the scope, of the action. *Data Gen.*, 36 F.3d at 1164-65.

#### a. Commercial Misappropriation

[26][27] Stromback alleges in his commercial misappropriation claim that Stromback "expended significant time, effort, and money" to create "The Keeper" screenplay with "the expectation that he would reap the benefits of the production of the screenplay into a film for commercial sale" and that NLC misappropriated the poem and screenplay, including its characters, scenes and events and will reap the benefits that Stromback was expecting. \*302 (1st Am. Compl. ¶¶ 48-49, J.A. at 242.) The essence of this claim is that NLC copied portions of "The Keeper" poem and screenplay. Courts faced with similar misappropriation claims have held them to be preempted by the Copyright Act because they allege an act that infringes upon one of the exclusive rights set forth in Section 106. See, e.g., *Daboub v. Gibbons*, 42 F.3d 285, 289 (5th Cir.1995) (concluding that the plaintiffs' claims, including misappropriation, were preempted because they merely alleged wrongful copying, distribution and performance of lyrics without alleging an extra element rendering the claim different from a copyright infringement claim); *Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir.1985) (finding "no distinction" between the state law right asserted in the misappropriation claim and the exclusive rights granted under the Copyright Act); *Artie Fields Prods., Inc. v. Channel 7 of Detroit, Inc.*, No. 94-CV-70730-DT, 1994 WL 559331, at \*2-3 (E.D.Mich. June 10, 1994) (holding that the plaintiff's misappropriation and unfair competition claims grounded solely in the copying of the plaintiff's protected expression were preempted); 1 Nimmer § 1.01[B][1][f][iii] ("Except for a few stray rulings, legions of cases ... have held preempted claims

for misappropriation") (citations omitted). Of course, a misappropriation claim will survive preemption if it alleges an extra element, such as a confidential or fiduciary relationship. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir.1992). However, Stromback's assertion that his claim is based upon the time, effort, and money that he expended in developing the screenplay is not an extra element that saves his claim from preemption. See *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 976-77 (9th Cir.1987) (finding the plaintiff's misappropriation claim preempted because the "[e]ffort expended to create a Tentative Map and supporting documents is effort expended to create tangible works of authorship" and "[a]s such, this effort is within the scope of copyright protection"); *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F.Supp. 1523, 1535 (S.D.N.Y.1985) (rejecting as preempted the plaintiff's unfair competition/misappropriation claim alleging misappropriation of the plaintiff's time, effort, and talent). Therefore, this claim is preempted.

#### b. Misappropriation of Trade Secrets

[28][29] Count VI of Stromback's first amended complaint alleged a claim for misappropriation of trade secrets under the Michigan Uniform Trade Secrets Act ("MUTSA"), M.C.L. § 445.1901-1910, and under Michigan and California common law. [FN7] Under Michigan law, the elements of a common law claim for misappropriation of trade secrets are: (1) the existence of a trade secret; (2) the defendant's acquisition of the trade secret in confidence; and (3) the defendant's unauthorized use of it. *Aerospace Am., Inc. v. Abatement Techs., Inc.*, 738 F.Supp. 1061, 1069 (E.D.Mich.1990) (citing *Kearns v. Ford Motor Co.*, 203 U.S.P.Q. 884, 888 (E.D.Mich.1978)). MUTSA displaces common law trade secret misappropriation claims arising after October 1, 1998--the effective date of MUTSA. M.C.L. § 445.1910. Stromback alleged in his complaint that "Defendants had a duty not to disclose or exploit confidential information acquired from [Stromback]"; that "Defendants were aware that the information obtained by [sic] Stromback was confidential \*303 information and/or trade secrets"; that "Defendants disclosed and exploited the confidential information they received from [Stromback], without Stromback's permission"; and that Stromback has been damaged as a result of "[Defendants'] breaches of their duty of confidentiality." (1st Am. Compl. ¶¶ 64-67, J.A. at 246.)

FN7. The district court did not decide whether Michigan or California law applies to this claim, and it appears that the parties did not raise the issue in their briefing. We find it unnecessary to address the choice of law issue at this point.

In concluding that the misappropriation of trade secrets claim was preempted, the district court lumped it together with Stromback's commercial misappropriation claim, stating that it was "substantively no different than [the] commercial misappropriation claim." In doing so, however, the district court failed to recognize that a considerable number of cases have held that misappropriation of trade secrets claims are not preempted because they require proof of a confidential relationship, which provides the extra element required to survive preemption. For example, in *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir.1992), the Second Circuit stated:

[M]any state law rights that can arise in connection with instances of copyright infringement satisfy the extra element test, and thus are not preempted by section 301. These include unfair competition claims based upon breaches of confidential relationships, breaches of fiduciary duties and trade secrets.

....

Trade secret claims often are grounded upon a defendant's breach of a duty of trust or confidence to the plaintiff through improper disclosure of confidential material. The defendant's breach of duty is the gravamen of such trade secret claims, and supplies the "extra element" that qualitatively distinguishes such trade secret causes of action from claims for copyright infringement that are based solely upon copying.

*Id.* at 717 (citations omitted). See also *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 218 (3d Cir.2002) ("We agree with Geac that if their misappropriation of trade secrets claim was based on such breach of duty of trust and confidentiality, it would survive preemption in this case."); *Ez-Tix, Inc. v. Hit-Tix, Inc.*, 919 F.Supp. 728, 737-38 (S.D.N.Y.1996) (holding that because "plaintiff's claim for trade secret misappropriation require[d] proof of a breach of confidence, it [was] not preempted by federal law"); 1 Nimmer § 1.01[B][1][h] ("Actions for disclosure and exploitation of trade secrets require a status of secrecy, not required for copyright, and hence, are not preempted.") (footnotes omitted). Several courts have held that claims brought under state trade secret statutes modeled on the Uniform Trade Secrets Act, such as MUTSA, survive preemption because the required proof of the existence and breach of a confidential relationship provides the extra element necessary to survive preemption. See *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1165 (1st Cir.1994) (holding that a claim under Massachusetts trade secret law was not preempted "because participation in the breach of

a duty of confidentiality--an element that forms no part of a copyright infringement claim--represents unfair competitive conduct qualitatively different from mere unauthorized copying"); *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 660 (4th Cir.1993) (holding that a claim under the Maryland Uniform Trade Secrets Act was not preempted because it "require[d] proof of a breach of trust or confidence"); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1090 n. 13 (9th Cir.1989) (noting that a claim under the California Uniform Trade Secrets Act would not involve a legal or equitable right equivalent to an exclusive right of a copyright owner under the Copyright Act); \*304 *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 847-48 (10th Cir.1993) ("Because Gates' claim for trade secret misappropriation under the Colorado Uniform Trade Secrets Act requires proof of a breach of trust or confidence--proof that is not required under the Copyright Act--Gates' state law claims are not preempted by federal law."); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1549 (11th Cir.1996) (expressing "no doubt that the Florida trade secret statute at issue satisfies the 'extra element' test generally employed by courts in performing copyright preemption analysis"). Because proof of a confidential relationship is a necessary element in a trade secret misappropriation claim under both the common law and uniform trade secrets laws such as MUTSA, we hold that Stromback's trade secrets misappropriation claim is not preempted by Section 301; proof of a confidential relationship and its breach provide an extra element.

[30][31] In noting that Stromback did not argue that there was an extra element, such as a fiduciary relationship, the district court failed to undertake the proper inquiry in an equivalency analysis. [FN8] In *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655 (4th Cir.1993), the Fourth Circuit stated that in determining equivalency, a court should compare "the elements of the causes of action ..., not the facts pled to prove them." *Id.* at 659. See also *Gates Rubber Co.*, 9 F.3d at 847 (examining elements of the state cause of action for misappropriation of trade secrets to determine whether the extra element requirement was met); *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1543 (10th Cir.1996) (following *Trandes Corp.*). We believe that *Trandes Corp.* provides an accurate statement of the law generally, where the state law claim itself furnishes the extra element needed to avoid equivalency. In this case, for example, the district court could have determined the preemption issue solely by examining the elements for a trade secrets misappropriation claim under Michigan law. Because a plaintiff alleging such a claim must prove the existence and breach of a confidential relationship, the claim itself is not preempted. Whether the plaintiff has actually alleged the proper elements of the claim goes to

the question of whether the claim could survive a Rule 12(b)(6) motion to dismiss, not whether the claim is preempted. See *Firoozye v. Earthlink Network*, 153 F.Supp.2d 1115, 1131 (N.D.Cal.2001) ("The defendants' contention that the plaintiff has failed to allege a confidential relationship and their citation to *Design Art* address the merits of the plaintiff's trade secret claim, not whether that claim is preempted by the Copyright Act."). Nonetheless, a court may be required to review the facts as pled by the plaintiff in order to determine whether the acts giving rise to the state law claim are merely acts of copyright infringement. See *Sturdza*, 281 F.3d at 1304 ("To determine whether a state law claim is qualitatively different from a copyright claim-- that is, whether the state claim has an 'extra element'--courts generally examine both the elements of the state law cause of action and the way the \*305 plaintiff has actually pled that cause of action."). For example, a conversion claim will usually survive preemption because the tort relates to the unauthorized exercise of dominion and control, or interference with, another's personal property. See, e.g., *Carson v. Dynege, Inc.*, 344 F.3d 446, 456-57 (5th Cir.2003) (holding that conversion claim under Texas law survived preemption); *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir.1997) ("It is hornbook law that a state law action for conversion will not be preempted if the plaintiff can prove the extra element that the defendant unlawfully retained the physical object embodying its work.") (internal quotations and citations omitted). Where the conversion claim involves intangible property, a court should examine the plaintiff's allegations to determine whether the state law right is equivalent to one of the exclusive rights under Section 106. See *Daboub*, 42 F.3d at 289-90 (holding that the conversion claim was preempted where the plaintiffs alleged that the defendants improperly copied, distributed, and performed their song); *Berge*, 104 F.3d at 1463 (holding conversion claim preempted because "what is crucial is that Berge makes no claim that appellants converted any tangible objects embodying her intellectual property"). Likewise, a promise in a breach of contract claim may suffice as an extra element, but this determination must be based upon a review of the plaintiff's allegations. *Higher Gear Group, Inc. v. Rockenbach Chevrolet Sales, Inc.*, 223 F.Supp.2d 953, 958 (N.D.Ill.2002). We followed this approach in *Wrench*. Although we examined Michigan law regarding contracts implied in fact and contracts implied in law, it was necessary to also examine the plaintiffs' breach of contract allegations to determine whether the promise was a "promise to pay for the use of the work," which would not have been preempted, or merely "a promise to refrain from reproducing, performing, distributing or displaying the work," which would have been preempted. *Wrench*, 256 F.3d at 457. Similarly, in *Murray Hill Publications*,

*Inc. v. ABC Communications, Inc.*, 264 F.3d 622 (6th Cir.2001), we set forth the law in Michigan regarding conversion and then determined from the plaintiffs' allegations that the claim was preempted because it met the equivalency requirement. *Id.* at 636-37.

FN8. NLC contends that because Stromback did not argue to the district court that there was a fiduciary relationship with NLC, the argument should be precluded on appeal. While we will generally decline to consider on appeal issues not considered by the district court, we do recognize an exception where the issue presents only a question of law. *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 360 n. 9 (6th Cir.1998) (quoting *City Mgm't Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 255 (6th Cir.1994)). Here we address the issue of a confidential relationship as part of our legal analysis.

[32][33][34][35] Although the district court incorrectly determined that the misappropriation of trade secrets claim was preempted, this panel may affirm if the decision was correct for any reason, including one the district court did not consider. *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 330 F.3d 747, 750 (6th Cir.2003). We conclude that dismissal was proper because, as a matter of law, "The Keeper" poem and screenplay were not trade secrets and, even if they were, there was no misappropriation. In order to constitute a trade secret under MUTSA, information alleged to be a trade secret must "[d]erive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." M.C.L. § 445.1902(d)(i). Thus, the essence of a trade secret is that it derives its value from secrecy. Here, Stromback could not possibly argue that his poem and screenplay had "independent economic value" because he kept them secret. Those works would have "independent economic value" only if they were exploited publicly through broad dissemination. Furthermore, even if Stromback's poem and screenplay had some independent economic value from being held in secrecy, Stromback could not prove misappropriation. As set forth above, "The \*306 Keeper" poem and screenplay and "Little Nicky" are not at all similar. The only similarities arise from common and well-known themes, plots, and character traits that "are readily ascertainable by other means," *id.*, and therefore cannot constitute trade secrets. Because we have concluded that the two works are not substantially similar, no reasonable juror could conclude that NLC misappropriated any trade secrets from Stromback's works.

*c. Interference with Prospective Economic Advantage*

[36][37] Stromback's final state law claim is a claim for interference with prospective economic advantage. The elements of the claim are: (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy by the defendant; (3) intentional interference by the defendant which induces or causes a breach or termination of the relationship or expectancy; and (4) damage to the plaintiff. *BPS Clinical Labs. v. Blue Cross & Blue Shield of Mich.*, 217 Mich.App. 687, 698, 552 N.W.2d 919, 925 (1996) (per curiam). Stromback's allegations in support of this claim are that he "had a legitimate expectation of a future economic benefit from the development of his poetry and screenplay"; that NLC "knew that the use of [Stromback's] poem and screenplay would interfere with [his] reputation and [its] development ... within the film industry"; and that NLC's "actions in misappropriating the poem and screenplay including the characters, character interplay, scenes and events ... and passing them off as [its] own in the production of 'Little Nicky' ... were made with the intent that [Stromback's] expected relationships would be disrupted." (1st Am. Compl. ¶ 77-79, J.A. at 248.)

Generally, tortious interference claims (with contract or prospective economic advantage) are held to be preempted because the rights asserted in such claims are not qualitatively different from the rights protected by copyright. See, e.g., *Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1129, 1193 (C.D.Cal.2001) (holding that the plaintiff's claim for negligent interference with prospective economic advantage did "not protect any right 'qualitatively different' from those rights protected by copyright"); *Titan Sports, Inc. v. Turner Broadcasting Sys., Inc.*, 981 F.Supp. 65, 74 (D.Conn.1997) ("The right that Plaintiff's contracts with Hall and Nash seeks to protect is Plaintiff's exclusive ownership right in its copyrighted material--precisely what the Copyright Act seeks to protect."); *Aqua Bay Concepts, Inc. v. Grosse Point Bd. of Realtors*, No. 91-CV-74819, 1992 WL 350275, at \*4 (E.D.Mich. May 7, 1992) ("There is no indication that the state allegation of contractual interference is 'qualitatively different' from the copyright infringement claim."). According to Professor Nimmer,

Inssofar as unauthorized reproduction, distribution, performance or display causes the plaintiff to lose the benefits that would flow from an actual or prospective contract whereby plaintiff would authorize any such acts, the rights created by the tort of contract interference do not appear to differ qualitatively from rights under copyright; copyright also contemplates loss of actual or prospective contract benefits by reason of such unauthorized acts. Pre-emption in this

context would, then, appear to be justified. The fact that the tort, unlike copyright infringement, requires awareness of the conflicting contract and an intentional interference with it merely means that the state-created right is narrower than its copyright counterpart, not that it is qualitatively different so as to preclude pre-emption.

\*307 1 Nimmer § 1.01[B][1][a] (footnotes omitted). See also *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir.1983), *rev'd on other grounds*, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985) (finding the tortious interference claim preempted because unauthorized publication was the basis for the violation and the elements of awareness and intentional interference pled in the tortious interference claim did not render the claim different from a copyright claim).

Here, Stromback's tortious interference claim arises out of NLC's alleged copying, display, and distribution of "The Keeper" poem and screenplay--acts which also violate the exclusive rights granted by Section 106. This claim is based upon activity which constitutes copyright infringement and is preempted because it is not "qualitatively different" from a copyright infringement claim. We reject Stromback's argument that the development of his reputation is an extra element that somehow renders the claim different from a copyright infringement claim. The bottom line is that the foundation of Stromback's claim is NLC's violation of rights that are granted under and protected by the Copyright Act.

### III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

384 F.3d 283, Fed. Sec. L. Rep. P 28,878, 72 U.S.P.Q.2d 1545, 2004 Fed.App. 0314p

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