

**TIMOTHY BURTON ANDERSON, Plaintiff, v. SYLVESTER STALLONE, FREDDIE  
FIELDS, DEAN STOLBER, FRANK YABLANS Individually, and MGM/UA, a  
Corporation, Defendants; SYLVESTER STALLONE, Counterclaimant, v. TIMOTHY  
BURTON ANDERSON, Counterdefendant**

Case No. 87-0592 WDK (Gx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

1989 U.S. Dist. LEXIS 11109; 11 U.S.P.Q.2D (BNA) 1161; Copy. L. Rep. (CCH) P22,665

April 25, 1989, Decided and Filed; April 26, 1989, Entered

OPINION: ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

WILLIAM D. KELLER, UNITED STATES DISTRICT JUDGE

This matter came before the Court on the Motion for Summary Judgment of defendants Sylvester Stallone, Freddie Fields, Dean Stolber and MGM/UA Communications Co. Having reviewed the materials submitted and the arguments of counsel, the Court hereby ORDERS the Motion GRANTED IN PART and DENIED IN PART. The plaintiff's First Count, for copyright infringement, is dismissed with prejudice. The plaintiff's Sixth and Tenth Counts for unfair competition and unjust enrichment are also dismissed with prejudice as is the breach of confidence claim in Count Twelve. The Motion is DENIED as to all other counts.

**FACTUAL BACKGROUND**

The movies Rocky I, II, and III were extremely successful motion pictures. Sylvester Stallone wrote each script and played the role of Rocky Balboa, the dominant character in each of the movies. In May of 1982, while on a promotional tour for the movie Rocky III, Stallone informed members of the press of his ideas for Rocky IV. Although Stallone's description of his ideas would vary slightly in each of the press conferences, he would generally describe his ideas as [\*2] follows:

I'd do it [Rocky IV] if Rocky himself could step out a bit. Maybe tackle world problems. So what would happen, say, if Russia allowed her boxers to enter the professional ranks? Say Rocky is the United States' representative and the White House wants him to fight with the Russians before the Olympics. It's in Russia with everything against him. It's a giant stadium in Moscow and everything is Russian Red. It's a fight of astounding proportions with 50 monitors sent to 50 countries. It's the World Cup - a war between 2 countries.

Waco Tribune Herald, May 28, 1982; Section D, pg. 1 (EX 168) In June of 1982, after viewing the movie Rocky III, Timothy Anderson wrote a thirty-one page treatment entitled "Rocky IV" that he hoped would be used by Stallone and MGM Registered TM UA Communications Co. (hereinafter "MGM" ) as a sequel to Rocky III. The treatment incorporated the characters created by Stallone in his prior movies and cited Stallone as a co-author.

In October of 1982, Mr. Anderson met with Art Linkletter, who was a member of MGM's board of directors. Mr. Linkletter set up a meeting on October 11, 1982, between Mr. Anderson and Mr. Fields, who was president of MGM [\*3] at the time. Mr. Linkletter was also present at this October 11, 1982 meeting. During the meeting, the parties discussed the possibility that plaintiff's treatment would be used by defendants as the script or Rocky IV. At the suggestion of Mr. Fields, the plaintiff, who is a lawyer and was accompanied by a lawyer at the meeting, signed a release that purported to relieve MGM from liability stemming from use of the treatment. Plaintiff alleges that Mr. Fields told him and his attorney that "if they [MGM & Stallone] use his stuff [Anderson's treatment] it will be big money, big bucks for Tim." Anderson Depo. at 89-90, 106, 108-109.

On April 22, 1984, Anderson's attorney wrote MGM requesting compensation for the alleged use of his treatment in the forthcoming Rocky IV movie. On July 12, 1984, Stallone described his plans for the Rocky IV script on the Today Show before a national television audience. Anderson, in his deposition, states that his parents and friends called him to tell him that Stallone was telling "his story" on television. Anderson Depo. at pgs. 189-190. In a diary entry of July 12, 1984, Anderson noted that Stallone "explained my story" on national television. Deposition [\*4] of Timothy Anderson, Exhibit 140.

Stallone completed his Rocky IV script in October of 1984. Rocky IV was released in November of 1985. The complaint in this action was filed on January 29, 1987.

## CONCLUSIONS OF LAW

### I. This Court Cannot Rule As A Matter Of Law That Anderson's Contract Claims Are Barred By The Statute Of Limitations

Anderson's causes of action for breach of oral contract, breach of implied-in-fact contract, and tortious breach of implied covenant of good faith and fair dealing fall under California's two year statute of limitations for oral contracts. Cal. Civ. Proc. Code § 339(1) (West 1988); *Thompson v. California Brewing Co.*, 12 Cal. Rptr. 783 (1961); 3 B. WITKIN, CALIFORNIA PROCEDURE, §§ 369, 438-39, pgs. 397, 468-70 (3rd Ed. 1985). For each action, the statute of limitations begins to run on the date that the underlying cause of action accrues. A cause of action accrues when the defendant commits the act - in this case, when he breaches the contract - which gives rise to his obligation or liability. 3 B. WITKIN, CALIFORNIA PROCEDURE, § 351, pg. 389 (3rd Ed. 1985).

Defendants assert that as a matter of law, plaintiff's contract claims accrued when Stallone [\*5] completed the Rocky IV script in October of 1984. If the defendants are correct, the contract claims that were filed in January of 1987, would be time barred under section 339(1). Plaintiff contends that his contract claims did not accrue until the Rocky IV movie was released in November of 1985. Under this version of the facts, the contract actions are not time barred. Both sides erroneously assume that this determination can properly be made at the summary judgment stage.

Professor Nimmer raised and answered the exact question which is before this Court. He wrote in his treatise:

[t]here will be no breach until such time as defendant uses the idea without plaintiff's consent.

The further question arises as to what acts by the defendant constitute a 'use' of the plaintiff's idea such as to satisfy the condition precedent to the defendant's obligation to pay . . . . Does the mere writing of a script which embodies the plaintiff's idea amount to such a 'use' or does the production of a motion picture based upon such script amount to such a

'use'? . . . . The question is ultimately one of fact, since it is open to the parties in making a contract to define 'use' as they will.

[\*6]

(emphasis added) 3 M. Nimmer, NIMMER ON COPYRIGHT, 16.05[F] at 16:43-16:44 (1988).

Professor Nimmer's analysis is very instructive when, as here, a court is being asked at the summary judgment stage to determine when the statute begins to run.

Defendants rely on *Thompson v. California Brewing Co.*, 12 Cal. Rptr. 783 (1961), for the proposition that public policy dictates that the first use of an idea triggers the statute of limitations. However, the Court in *Thompson* concluded that the first use by defendants of plaintiff's marketing ideas was a breach of the contract that triggered the statute of limitation only after finding there "was no evidence from which it can be inferred or implied that the claimed free test period was part of the contract". *Thompson*, 12 Cal. Rptr. 784-85. Thus, the Court in *Thompson* relied on uncontroverted evidence that the terms of the agreement in question contemplated payment upon the first use of the marketing ideas. In contrast, the terms of the agreement which is the subject of dispute in this action is far from uncontroverted. Mr. Anderson states in a declaration that Mr. Fields told him "that if MGM released a Rocky IV movie incorporating [\*7] my treatment, I would receive compensation . . . ." Anderson Declaration, pg. 1, para. 3. According to Anderson, no payment was due under the contract terms unless the movie Rocky IV was released. On the other hand, defendants' claim that the wording of demand letters sent by the plaintiff before the release of the Rocky IV movie conclusively show that Anderson expected payment regardless of whether Rocky IV was released. Therefore, there is a genuine dispute involving a material fact, namely, the terms of the contract.

Simply put, the date of accrual will be determined by the terms of the contract. If Anderson and Fields agreed that Anderson was to be paid only if Rocky IV was released, then the contract causes of actions would accrue when Rocky IV was released in November of 1985. If Anderson and Fields agreed that Anderson would be compensated for any use of his script, than Anderson's cause of action would accrue when Stallone allegedly incorporated Anderson's treatment into his script in October of 1984. This dispute over the terms of the contract precludes the Court from granting summary judgment on the issue of whether the contract actions are time barred.

## II. Anderson's [\*8] Breach Of Confidence Claim Is Barred By The Statute Of Limitations

In Count Twelve of his complaint, Anderson claims that the defendants committed a breach of confidence by revealing the contents of his script. In *Davies v. Krasna*, 121 Cal. Rptr. 705 (1975), the California Supreme Court set forth the requirements for a breach of confidence claim. The Court held that "an action for breach of confidence . . . arises whenever an idea, offered and received in confidence is later disclosed without permission" *Id.* at 710. *Davies* also held that a breach of confidence claim is governed by the two year statute of limitation period set forth in Cal. Civ. Proc. Code § 339. *Id.* at 711.

It is uncontroverted that on July 12, 1984, Stallone described ideas for a Rocky IV script on the Today Show before a national television audience. This interview included a description by Stallone of the East/West confrontation theme for Rocky IV. In his deposition, Anderson claims that Stallone was revealing "his story" on national television. Anderson Depo. at pgs. 189-190. On July 12, 1984, Anderson also noted in his diary that Stallone had explained his story. Stallone did not have Anderson's [\*9] permission to disclose the ideas in Anderson's treatment. If, as Anderson alleges, Stallone did take Anderson's ideas, the breach of confidence occurred on July 12, 1984. This action was filed in January of 1987. The breach of confidence claim was not filed within the two year statute of limitations and is time barred.

Plaintiff argues that the statute should not begin to run until the release of Rocky IV since he suffered no appreciable arm until that time. This argument was considered and rejected in *Davies*. There, in an analogous fact situation, the court held that a disclosure of ideas would destroy marketability of a story and cause actual damage to an author and would immediately trigger the running of the statute of limitations. *Davies*, 121 Cal. Rptr. 711-12. The same impact on marketability occurred here. Anderson's ideas for an East/West boxing confrontation were revealed to millions of people on July 12, 1984. His ideas then entered the public domain and could be used and developed by others without payment to him. If his allegations are true, he suffered an injury the moment his ideas were disclosed without permission. See 3 B. WITKIN, CALIFORNIA PROCEDURE, § [\*10] 358, pg. 386-88 (3rd Ed. 1985).

Plaintiff also argues that even if the marketability of his ideas was impacted on July 12, 1984, the amount of damages he suffered was too uncertain to warrant the running of the statute of limitations. The court in *Davies* explicitly held, contrary to plaintiff's contentions here, "neither uncertainty as to the amount of damages nor difficulty in proving damages tolls the period of limitations". 121 Cal. Rptr. at 713. The holding in *Davies* also comports with common sense, as adoption of a certainty" requirement for the running of a statute

would create chaos as courts attempted to determine on what date a plaintiff knew or should have known the extent of his damages. Anderson's action accrued at the moment of disclosure on July 12, 1984, and there are no facts before this Court that warrant tolling of the statute. Thus, Anderson's breach of confidence claim is time barred.

### III. Plaintiff's Unjust Enrichment And Unfair Competition Claims Are Preempted By Federal Copyright Law

On July 20, 1987, this Court denied defendants' motion to dismiss plaintiff's unjust enrichment claim, finding that it was not preempted by federal law. However, unbeknownst [\*11] to the parties and this Court, on June 23, 1987, the Ninth Circuit held that the plaintiff's unjust enrichment claim was subject to preemption. *Del Madera Properties v. Rhodes & Gardner*, 820 F.2d 973 (9th Cir. 1987) (The court held that plaintiff's unjust enrichment claim based on an unauthorized use of a copyrighted master plan map was preempted by federal copyright law.) In the same case, the Ninth Circuit also held that the plaintiff's unfair competition claim was preempted. *Del Madera*, 820 F.2d at 977.

Surprisingly, *Del Madera* appears to be a case of first impression in this circuit on the issue of preemption of unjust enrichment and unfair competition claims by federal copyright law. However, as shown below, the opinion comports with the test for determining whether a cause of action is preempted by federal copyright law under 17 U.S.C. § 301(b) (West 1977).

Section 301 of the federal copyright statute sets forth a two-part test for determining whether a claim based on state law is preempted by federal copyright law. First, the work on which the state claim is based must be within the subject matter of copyright. 17 U.S.C. 301 (b)(1). Second, the state cause of action [\*12] must protect rights that are qualitatively equivalent to copyright protection. 17 U.S.C. 301(b)(3). Under the second prong, courts focus on whether the state claim has an "extra element" that differentiates the state action from the rights protected by federal copyright law. See *Harper & Row Publishers, Inc. v. Nation Enterprises* 723 F.2d 195, 200 (2nd Cir. 1983), rev'd on other grounds, 471 U.S. 539 (1985).

Under this test, both Anderson's unjust enrichment and unfair trade practice claims are preempted. Both actions are grounded on the defendants' alleged use of a written script. This clearly satisfies the first prong of the test as Anderson's written work of authorship is within the subject matter of copyright. 17 U.S.C. § 102. Under the second prong, the

defendants allegedly copied and incorporated Anderson's work into their own script without permission. The federal copyright laws explicitly protect Anderson's treatment from the copying that forms the basis for these state causes of action. 17 U.S.C. §§ 106(1) & (2). There is no "extra element" such as fraud or palming off to save the unfair competition and unjust enrichment claims from preemption See Ronald Litoff, [\*13] *Ltd. v. American Express Corp.*, 621 F.Supp 981, 984-85 (D.C.N.Y. 1985).

Plaintiff's original opposition to the defendant's motion to dismiss the unjust enrichment claims raised two arguments that warrant discussion by the Court. First, plaintiff argued that portions of his script taken unjustly may not rise to the level of an infringement under copyright laws, but would still constitute unjust enrichment. However, under the preemption test set forth in section 301(b)(1), if the subject matter as a whole falls within federal copyright law, then a plaintiff may not avoid preemption by claiming that the copying, while permissible under the federal laws, would violate an equivalent state law.

Plaintiff can only avoid preemption of his state law claims that fall within the subject matter of copyright if these claims involve a "qualitatively" different right, not a "quantitatively" different right. As the Second Circuit opined in *Harper & Row* in finding that state claims for both conversion and tortious interference with contractual rights were preempted:

The fact that portions of the Ford memoirs may consist of uncopyrightable material . . . does not take the work as a whole outside [\*14] the subject matter protected by the Act. (citations omitted) Were this not so, states would be free to expand the perimeters of copyright protection to their own liking, on the theory that preemption would be no bar to state protection of material not meeting federal statutory standards. That interpretation would run directly afoul of one of the Act's central purposes, to 'avoid the development of any vague borderline areas between State and Federal protection.' (citations omitted)

*Harper & Row*, 723 F.2d 195, 200.

Plaintiff's argument is rejected implicitly by the Ninth Circuit in *Del Madera*; in the language of Section 301(b)(3); and in the thorough reasoning of the Second Circuit in *Harper & Row*.

Second, plaintiff argues that his unjust enrichment claim should not be preempted because it is equivalent to an action for breach of confidence that is not preempted. However, there

is an "extra element" of a confidential relationship in a breach of confidence claim that differentiates it from an unjust enrichment claim and prevents preemption under Section 301(b)(3). As other courts have noted, a breach of confidence claim is "nonequivalent to the rights one can acquire [\*15] under copyright law; rather it rests on an obligation not to disclose to third parties ideas revealed in confidence. . . ." *Smith v. Weintstein*, 578 F.Supp 1297, 1307 (S.D.N.Y. 1984). Plaintiff's unjust enrichment and unfair competition claims do not incorporate any such "nonequivalent" right and are preempted by federal copyright law.

#### IV. Defendants Are Entitled To Summary Judgment On Anderson's Copyright Infringement Claims

This Court finds that the" defendants are entitled to summary judgment on plaintiff's copyright infringement claims on two separate grounds. First, Anderson's treatment is an infringing work that is not entitled to copyright protection. Second, Rocky IV is not substantially similar to Anderson's treatment, and no reasonable jury could find that Rocky IV is a picturization of Anderson's script.

##### A. Defendants Are Entitled To Summary Judgment Because Anderson's Treatment Is An Infringing Work That Is Not Entitled To Copyright Protection

The Court finds that Anderson's treatment is not entitled to copyright protection. This finding is based upon the following determinations that will be delineated further below: (a) the Rocky characters developed in Rocky I, [\*16] II and III constitute expression protected by copyright independent from the story in which they are contained; (b) Anderson's treatment appropriated these characters and created a derivative work based upon these characters without Stallone's permission in violation of Section 106(2); (c) no part of Anderson's treatment is entitled to copyright protection as his work is pervaded by the characters of the first three Rocky movies that are afforded copyright protection.

##### 1. Visually Depicted Characters Can Be Granted Copyright Protection

The precise legal standard this Court should apply in determining when a character may be afforded copyright protection is fraught with uncertainty. The Second Circuit has followed Judge Learned Hand's opinion in *Nichols v. Universal Pictures*, 45 F.2d 119 (2d. Cir. 1930), cert. denied, 282 U.S. 902 (1931). Judge Hand set forth a test, simple in theory but elusive



in application, to determine when a character should be granted copyright protection. Essentially, under this test, copyright protection is granted to a character if it is developed with enough specificity so as to constitute protectable expression. *Id.* at 121.

This circuit originally [\*17] created a more rigorous test for granting copyright protection to characters. In *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, (hereinafter the "Sam Spade" opinion) this circuit held that the literary character Sam Spade was not copyrightable, opining that a character could not be granted copyright protection unless it "constituted the story being told". 216 F.2d 945, 950 (9th Cir. 1954). The Sam Spade case has not been explicitly overruled by this circuit and its requirement that a character "constitute the story being told" appears to greatly circumscribe the protection of characters in this circuit.

Subsequent decisions in the Ninth Circuit cast doubt on the reasoning and implicitly limit the holding of the Sam Spade case. In *Walt Disney Productions v. Air Pirates*, this circuit held that several Disney comic characters were protected by copyright. 581 F.2d 751, 755 (9th Cir. 1978). In doing so the Court of Appeals reasoned that because "comic book characters . . . are distinguishable from literary characters, the Warner Bros language does not preclude protection of Disney's characters." *Id.* *Air Pirates* can be interpreted as either attempting [\*18] to harmonize granting copyright protection to graphic characters with the "story being told" test enunciated in the Sam Spade case or narrowing the "story being told" test to characters in literary works. If *Air Pirates* is construed as holding that the graphic characters in question constituted the story being told, it does little to alter the Sam Spade opinion. However, it is equally as plausible to interpret *Air Pirates* as applying a less stringent test for protectability of graphic characters.

Professor Nimmer has adopted the latter reading as he interprets *Air Pirates* as limiting the story being told requirement to word portraits. 1 M. Nimmer, *THE LAW OF COPYRIGHT*, § 2-12, pg. 2-176 (1988). Further, Professor Nimmer finds that the reasoning of the Sam Spade case is undermined by the *Air Pirates* opinion, even as it relates to word portraits. *Id.* This is true because the use of a less stringent test for protection of characters in the graphic medium casts doubt on the vitality of the more stringent story being told test for graphic characters. As a practical matter, a graphically depicted character is much more likely than a literary character to be fleshed out [\*19] in sufficient detail so as to warrant copyright protection. But this fact does not warrant the creation of separate analytical paradigms for protection of characters in the two mediums.

This circuit's most recent decision on the issue of copyrightability of characters, *Olson v. National Broadcasting Corporation*, 855 F.2d 1446 (9th Cir. 1988) does little to clarify the uncertainties in this circuit as to how the *Air Pirates* decision effects the continued viability of the *Sam Spade* test. In *Olson*, the Court of Appeals cited with approval the *Sam Spade* "story being told test" and declined to characterize this language as dicta. *Id.* at 1451-52 n. 6. The Court then cited *Air Pirates* along with Second Circuit precedent and "recognize[d] that cases subsequent to *Warner Bros [Sam Spade]* have allowed copyright protection for characters who are especially distinctive." *Id.* at 1452. *Olson* also stated definitively that "copyright protection may be afforded to characters visually depicted in a television series or in a movie." *Id.* But later in the opinion, the court in *Olson* distanced itself from the character delineation test that these cases employed, [\*20] referring to it as "the more lenient standards adopted elsewhere". *Id.*

In an implicit acknowledgment of the unsettled state of the law, in considering the characters at issue in *Olson*, the circuit court evaluates the characters in the suit under both tests. *Id.* at 1452-53.

## 2. The Rocky Characters Are Entitled To Copyright Protection As A Matter Of Law

*Olson's* evaluation of literary characters is clearly distinguishable from the visually depicted characters of the first three *Rocky* movies for which the defendant seeks protection here. Thus, the more restrictive "story being told test" is inapplicable to the facts of this case. *Air Pirates*, 581 F.2d at 755, 1 M. Nimmer, § 2-12, pg 2-176. However, out of an abundance of caution this Court will determine the protectability of the *Rocky* characters under both tests. As shown below, the *Rocky* characters are protected from bodily appropriation under either standard.

The *Rocky* characters are one of the most highly delineated group of characters in modern American cinema. The physical and emotional characteristics of *Rocky Balboa* and the other characters were set forth in tremendous detail in the three *Rocky* movies before [\*21] *Anderson* appropriated the characters for his treatment. The interrelationships and development of *Rocky*, *Adrian*, *Apollo Creed*, *Clubber Lang*, and *Paulie* are central to all three movies. *Rocky Balboa* is such a highly delineated character that his name is the title of all four of the *Rocky* movies and his character has become identified with specific character traits ranging from his speaking mannerisms to his physical characteristics. This Court has no difficulty ruling as a matter of law that the *Rocky* characters are delineated so extensively that they are protected from bodily appropriation when taken as a group and transposed into a sequel by another author. Plaintiff has not and cannot put before this

Court any evidence to rebut the defendants' showing that Rocky characters are so highly delineated that they warrant copyright protection.

Plaintiff's unsupported assertions that Rocky is merely a stock character, made in the face of voluminous evidence that the Rocky characters are copyrightable, do not bar this Court from granting summary judgment on this issue. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between [\*22] the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.") (emphasis in original). If any group of movie characters is protected by copyright, surely the Rocky characters are protected from bodily appropriation into a sequel which merely builds on the relationships and characteristics which these characters developed in the first three Rocky movies. No reasonable jury could find otherwise.

This Court need not and does not reach the issue of whether any single character alone, apart from Rocky, is delineated with enough specificity so as to garner copyright protection. Nor does the Court reach the issue of whether these characters are protected from less than bodily appropriation. See *I. M. Nimmer*, § 2.12, pg. 2-171 (copyrightability of characters is "more properly framed as relating to the degree of substantial similarity required to constitute infringement rather than in terms of copyrightability per se")

This Court also finds that the Rocky characters were so highly developed and central to the three movies made before Anderson's treatment that they "constituted the story [\*23] being told". All three Rocky movies focused on the development and relationships of the various characters. The movies did not revolve around intricate plots or story lines. Instead, the focus of these movies was the development of the Rocky characters. The same evidence which supports the finding of delineation above is so extensive that it also warrants a finding that the Rocky characters - Rocky, Adrian, Apollo Creed, Clubber Lang, and Paulie- "constituted the story being told" in the first three Rocky movies.

### 3. Anderson's Work is An Unauthorized Derivative Work

Under 17 U.S.C. section 106(2), the holder of a copyright has the exclusive right to prepare derivative works based upon his copyrighted work. In this circuit a work is derivative "only if it would be considered an infringing work if the material which it had derived from a prior work had been taken without the consent of the copyright proprietor of the prior work." *Litchfield v. Spielberg*, 736 F.2d 1352, 1354 (9th Cir. 1984) (emphasis in original), citing

United States v. Taxe, 540 F.2d 961, 965 n. 2 (9th Cir. 1976). This Court must now examine whether Anderson's treatment is an unauthorized derivative work [\*24] under this standard.

Usually a court would be required to undertake the extensive comparisons under the Krofft substantial similarity test to determine whether Anderson's work is a derivative work. See 1 M. Nimmer, § 3.01 at 3-3; pgs. 25-28 supra. However, in this case, Anderson has bodily appropriated the Rocky characters in his treatment. This Court need not determine whether the characters in Anderson's treatment are substantially similar to Stallone's characters, as it is uncontroverted that the characters were lifted lock, stock, and barrel from the prior Rocky movies. Anderson retained the names, relationships and built on the experiences of these characters from the three prior Rocky movies. 1 M. Nimmer, § 2.12 at 2-177 (copying names of characters is highly probative evidence of infringement). His characters are not merely substantially similar to Stallone's, they are Stallone's characters. As Professor Nimmer stated, "Where there is literal similarity . . . . [i]t is not necessary to determine the level of abstraction at which similarity ceases to consist of an 'expression of ideas' since literal similarity by definition is always a similarity as to the expression [\*25] of ideas." 3 M. Nimmer, § 13.03[3], pg. 13-35. Anderson's bodily appropriation of these characters infringes upon the protected expression in the Rocky characters and renders his work an unauthorized derivative work. 1 Nimmer, § 2.12 at 2-171. By bodily appropriating the significant elements of protected expression in the Rocky characters, Anderson has copied protected expression and his treatment infringes on Stallone's copyrighted work.

#### 4. Since Anderson's Work Is An Unauthorized Derivative Work, No Part Of The Treatment Can Be Granted Copyright Protection

Stallone owns the copyrights for the first three Rocky movies. Under 17 U.S.C. section 106(2), he has the exclusive right to prepare derivative works based on these copyrighted works. This Court has determined that Anderson's treatment is an unauthorized derivative work. Thus, Anderson has infringed upon Stallone's copyright. See 17 U.S.C. section 501(a).

Nevertheless, plaintiff contends that his infringing work is entitled to copyright protection and he can sue Stallone for infringing upon his treatment. Plaintiff relies upon 17 U.S.C. section 103(a) as support for his position that he is entitled to copyright protection [\*26] for the non-infringing portions of his treatment. 17 U.S.C section 103(a) reads:

The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which the material has been used unlawfully.

Plaintiff has not argued that section 103(a), on its face, requires that an infringer be granted copyright protection for the non-infringing portions of his work. He has not and cannot provide this Court with a single case that has held that an infringer of a copyright is entitled to sue a third party for infringing the original portions of his work. Nor can he provide a single case that stands for the extraordinary proposition he proposes here, namely, allowing a plaintiff to sue the party whose work he has infringed upon for infringement of his infringing derivative work.

Instead, Anderson alleges that the House Report on section 103(a) indicates that Congress intended protection for the noninfringing portions of derivative works such as his treatment. The House Report for section 103(a) first delineates the differences between [\*27] compilations and derivative works. H.R. No. 1476, 94th Cong., 2d Sess. at 57-58 (1976). The House Report then reads as follows:

The second part of the sentence that makes up section 103(a) [subsec. (a) of this section] deals with the status of a compilation or derivative work unlawfully employing preexisting copyrighted material. In providing that protection does not extend to "any part of the work in which such material has been used unlawfully," the bill prevents an infringer from benefiting, through copyright protection, from committing an unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work. Thus, an unauthorized translation of a novel could not be copyrighted at all, but the owner of copy right in an anthology of poetry could sue someone who infringed the whole anthology, even though the infringer proves that publication of one of the poems was unauthorized.

The Court recognizes that the House Report language is muddled. It makes a general statement that non-infringing portions of a work should be granted protection if these portions do not employ the pre-existing work. The report then provides two examples: one involving [\*28] a compilation where the noninfringing portion was deemed protected, and another involving a derivative work where no part of the work could be protected. The general statement, when taken in the context of the comparison of compilations and derivative works in the section and the two examples given, is best understood as applying

only to compilations. Although it is not crystal clear, it appears that the Committee assumed that in a derivative work the underlying work is "employed" throughout.

Professor Nimmer also interprets the House Report language as generally denying copyright protection to any portion of an unauthorized derivative work. After setting forth some of the language from the House Report regarding section 103(a) he states,

the effect [of section 103(a)] generally would be to deny copyright to derivative works, in which the preexisting work tends to pervade the entire derivative work, but not to collective works, where the infringement arises from the copying of the selection and arrangement of a number of preexisting works, and not per se from the reproduction of any particular prior work.

1 M. Nimmer, § 3.06, pgs. 3-22.3 thru 3-22.4.

Like the House Report, Nimmer [\*29] also preceded his conclusion that no part of derivative work unlawfully employing preexisting material should be copyrightable with a general statement that "only that portion of a derivative or collective work which employs the preexisting work would be denied copyright". 1 M. Nimmer, § 3.06, pg. 3-22.3. At first blush, both Nimmer's and the Committee's language are internally inconsistent. Both start with a general proposition that only the portion of a work which unlawfully employs the prior work should be denied copyright protection. Both then appear to conclude that no part of an infringing derivative work should be granted copyright protection. Only if a derivative work is assumed to employ the infringing work throughout do these passages read coherently.

The case law interpreting section 103(a) also supports the conclusion that generally no part of an infringing derivative work should be granted copyright protection. In *Eden Toys, Inc. v. Florelee Undergarment Co.*, the circuit court dealt primarily with the question of whether an authorized derivative work contained sufficient originality to gain copyright protection. 697 F.2d 27, 34-35 (2d. Cir. 1982). However, in [\*30] dicta the court opined on what result would be warranted if the derivative work had been made without the permission of the original author. The Court cited to the aforementioned passages from Professor Nimmer's treatise and the House Report and assumed without discussion that the "derivative copyrights would be invalid, since the preexisting illustration used without permission would tend to pervade the entire work" *Id.* at 34 n.6. In *Gracen v. Bradford*, the Seventh Circuit also dealt primarily with whether plaintiff's derivative work had sufficient originality to comply with requirements of section 103. 798 F.2d 300, 302-303 (7th Cir. 1983). *Gracen* also discussed the issue of the copyrightability of an unauthorized derivative work. The Court

stated "if Miss Gracen had no authority to make derivative works from the movie, she could not copyright the painting and drawings, and she infringed MGM's copyright by displaying them publicly." *Id.* at 303. Once again, the Circuit court assumed that no part of an unlawful derivative work could be copyrighted.

Plaintiff has written a treatment which is an unauthorized derivative work. This treatment infringes upon Stallone's [\*31] copyrights and his exclusive right to prepare derivative works which are based upon these movies. 17 U.S.C. § 106(2). Section 103(a) was not intended to arm an infringer and limit the applicability of section 106(2) on unified derivative works. As the House Report and Professor Nimmer's treatise explain, 103(a) was not intended to apply to derivative works and most certainly was not an attempt to modify section 106(2). Section 103(a) allows an author whose authorship essentially is the arrangement or ordering of several independent works to keep the copyright for his arrangement even if one of the underlying works he arranged is found to be used unlawfully. The infringing portion would be easily severable and the scope of the compilation author's own work would be easily ascertainable. Even if this Court were to interpret section 103(a) as allowing an author of an infringing derivative work to sue third parties based on the non-infringing portions of his work, section 106(2) most certainly precludes the author of an unauthorized infringing derivative work from suing the author of the work which he has already infringed. Thus, the Court HOLDS that the defendants are entitled to summary [\*32] judgment on plaintiff's copyright claims as the plaintiff cannot gain copyright protection for any portion of his work under section 103(a). In addition, Anderson is precluded by section 106(2) from bringing an action for copyright infringement against Stallone and the other defendants.

## B. Summary Judgment Is Appropriate On The Copyright Claims Because Rocky IV Is Not Substantially Similar To Anderson's Treatment

### 1. Legal Framework

To prevail on his claim for copyright infringement, Mr. Anderson must prove that he owns a copyright and his work was copied by the defendant. *Sid & Marty Krofft Television v. McDonalds Corp.* 562 F.2d 1157, 1162 (9th Cir. 1977). Because there is rarely direct evidence that an alleged infringer physically copied a work, a plaintiff need only show that the defendant had access to his work and that the defendant's work is substantially similar to the plaintiff's copyrighted work. *Sid & Marty Krofft*, 562 F.2d at 1162-63. (As an aside, the Court notes that an alleged infringer also rarely has direct irrefutable evidence - such as Stallone's press conferences describing his ideas of an East/West boxing confrontation

before receiving Anderson's script [\*33] - that he had independently developed the idea which he allegedly copied from the defendant.) This Court has already held that Anderson's work is not entitled to copyright protection. See pgs. 12-24 supra. This finding alone necessitates that the defendants be granted summary judgment on the copyright infringement claims. However, even if this Court were to hold that Anderson's work was entitled to copyright protection, defendants are entitled to summary judgment on the grounds that the defendants did not copy Anderson's work.

In this circuit, there is a two part test for determining whether an allegedly infringing work is substantially similar to the copyright holder's work. The first prong is referred to as the extrinsic test. Under the extrinsic test, analytic dissection and expert testimony are employed to determine whether there is substantial similarity of ideas between the two works in question. Olson, 855 F.2d at 1449. Application of the extrinsic test to analyze whether a movie is substantially similar to a script requires a court to compare the plot, theme, dialogue, mood, setting, pace, sequence of events, and characters of the two works. Berkic v. Crichton, [\*34] 761 F.2d 1289, 1293 (9th Cir. 1985),; Litchfield v. Spielberg, 736 F.2d 1352, 1356-57 (9th Cir. 1984). Since the extrinsic test relies on objective analytical criterion, "this question may often be decided as a matter of law." Krofft, 562 F.2d at 1164.

The extrinsic prong of the Krofft test has been expanded by this circuit so that the test actually goes beyond a determination of substantial similarity of ideas. It is true that a theme or mood is merely an idea. However, specific plot sequences, highly delineated characters, and dialogue in a work often constitute protectable expression. Thus, the Krofft test as applied in Berkic and Litchfield no longer fits neatly into separate analyses of ideas and expression in two works as the Courts analyzed expression under the extrinsic prong of the test. Berkic, 761 F.2d at 1293-94, Litchfield, 736 F.2d at 1357. In any event, it is the test that this Court applies in determining whether Rocky IV is substantially similar to Anderson's treatment.

The second prong of the Krofft test for substantial similarity is referred to as the intrinsic test. Under the intrinsic test, the plaintiff must show that there [\*35] is substantial similarity of expression between the two works in question. The intrinsic test is subjective and is based on the response of the audience to the look and feel of the two works. In this case, the intrinsic test requires a determination of whether the ordinary reasonable audience could recognize the movie Rocky IV as a dramatization or picturization of Mr. Anderson's work. Berkic, 761 F.2d at 1292; Litchfield, 736 F.2d at 1357.



At the summary judgment stage, Anderson must establish that a triable issue of fact remains as to whether there is substantial similarity of both ideas and expression. Berkic, 761 F.2d at 1292. This Court is cognizant that summary judgment is not favored where there are disputable factual issues that are best left to a jury. This problem is greatest when the Court puts itself in the place of the the reasonable audience and evaluates the total look and feel of a work under the intrinsic test. However, to grant summary judgment, this Court need only find, after analyzing the two works under the objective factors which comprise the extrinsic test, that there is no substantial similarity under the extrinsic prong of the substantial similarity [\*36] test of this circuit. Plaintiff can only prevail on his infringement claim if he shows that there is substantial similarity of both ideas and expression. Berkic, 761 F.2d at 1292, Litchfield, 736 F.2d at 1356, Krofft, 562 F.2d at 1164.

This circuit has upheld grants of summary judgment on the issue of substantial similarity when the plaintiff's claims were much stronger than those before this Court. Berkic, 761 F.2d 1289 (Ninth Circuit affirmed grant of summary judgment in favor of defendant on issue of substantial similarity of the movie Coma and plaintiff's treatment although the court recognized that similarities existed between the works); Litchfield, 736 F.2d 1352 (Ninth Circuit affirmed grant of summary judgment in favor of defendant on issue of substantial similarity between the movie E.T. and plaintiff's play in spite of character and plot similarities); See v. Durang, 711 F.2d 141 (9th Cir. 1983) (Ninth Circuit affirmed grant of summary judgment for defendant on copyright infringement claim, even though it did find that the two plays shared common ideas).

This circuit has also eliminated certain portions of works from evaluation under the substantial [\*37] similarity test. For example, "all situations which flow naturally from a basic plot premise, so called 'scenes a faire'" are not protected against copying. Berkic, 761 F.2d at 1293. For example, any boxing movie, regardless of the source, will contain fight scenes. It is also natural for any boxing movie, regardless of the source, to depict the fighters training and preparing for fights.

Nor do general plot themes or ideas receive any copyright protection. *Id.* Nationalistic themes and themes extolling the virtues of the underdog are not protectable expression. Likewise, a basic idea such as a symbolic struggle between a Russian and an American are not protectable by copyright and are part of the general domain of ideas.

The unusual circumstances of this case also distinguish it from other infringement cases and make a finding of non-infringement appropriate. The first three Rocky movies were made before Anderson wrote his treatment. Plaintiff concedes that he wrote his sequel after

viewing the movies. Thus, Anderson is precluded from basing any inference of copying by Stallone in Rocky IV from similarities that flow naturally from the fact that both works are sequels to the [\*38] first three movies. Second, it is uncontroverted that Stallone had already developed the idea that Rocky IV would center around a symbolic boxing confrontation between the United States and Russia before he knew that plaintiff's treatment existed. Thus, any similarity in the two works based on this symbolic confrontation cannot give rise to an inference that Stallone appropriated this idea from Anderson. Third, it is uncontroverted that it was the defendant, not the plaintiff, who developed the majority of characters in plaintiff's work. These include: Rocky, Adrian (Rocky's wife), Rocky, Jr. (Rocky's son), Paulie (Rocky's brother-in-law), Apollo Creed, Duke (Creed's manager), and Clubber Lang. Even if a court were to find that these characters were not copyrightable, the fact that they originated with the defendant precludes any finding of similarity based on this common element of the two works.

## 2. Application Of The Krofft Test

### A. Extrinsic Test

The extrinsic test requires a comparison of plot, theme, dialogue, mood, setting, pace, sequence, and characters.

#### i. Plot- Rocky IV

In Rocky IV, Ivan Drago, a Russian fighter, arrives in the United States. Drago and his wife hold [\*39] a press conference where she announces that Drago wants to fight professionally in the United States and would like to fight Rocky Balboa, the retired world boxing champion. Rocky is a wealthy ex-boxer and he declines to fight the dangerous Drago. However, Rocky's friend, Apollo Creed, wants to come out of retirement to fight Drago. Rocky, fearing for Apollo's health, unsuccessfully tries to talk Apollo out of fighting Drago. Apollo fights Drago in Las Vegas in a circus-like setting. Rocky is in Apollo's corner during the fight. Apollo refuses to stop fighting, even though Drago is injuring him during the early rounds of the fight. Drago strikes Apollo after the bell with a vicious blow and kills him. Rocky gives the eulogy at Apollo's funeral.

A fight between Rocky and Drago is announced. The fight is a non-sanctioned fight and Rocky will be forced to give up his title to fight Drago. Rocky will not take any prize money for the fight. Drago will not fight in the United States as he fears for his safety after killing Apollo. The fight will be held in Russia on Christmas day. Soviet officials describe the fight as a test of the systems of the two countries. Rocky's wife disapproves [\*40] of the fight and is extremely upset over the news of the fight.

Rocky travels to Siberia to train in isolated surroundings. He is accompanied by Paulie, Duke, and two Soviet observers. Adrian also comes to Siberia where they reconcile their differences. Rocky trains by chopping wood, pulling sleds, running up mountains, shadow boxing, and performing other basic exercises. These scenes are juxtaposed with Drago's training. Drago trains in a technologically advanced environment with specialized machines. He trains surrounded by scientific advisors, and it is suggested that he is taking performance enhancing drugs. Drago looks invincible as he appears much larger and stronger than Rocky.

The fight takes place in Moscow. It is a brutal fifteen round fight. Rocky takes a severe beating but refuses to go down. In the fourteenth and fifteenth rounds, the Soviet crowd begins cheering Rocky's heroism. Rocky wins the fight in the fifteenth round and is hoisted up by the crowd. Rocky then gives an impassioned speech that emphasizes that the United States and the Soviet Union are capable of changing and getting along.

The Court also notes that Rocky IV is replete with scenes in which Rocky has [\*41] flashbacks to the first three Rocky movies.

## ii. Anderson's Treatment

Several scenes at the beginning of the treatment chronicle the development from childhood of an East German boxer Adolph Heinemann. He begins boxing in international competition by the age of sixteen. He goes on to capture the gold medal at the 1984 Olympics. Heinemann then fights the heavyweight champion, Clubber Lang, at Madison Square Garden. Heinemann defeats Lang in the first round. Rocky and Apollo Creed watch the fight from ringside. They are partners in the fight promotion business.

Heinemann makes several successful defenses of his title in Eastern Europe cities of Leningrad, Moscow, Leipzig, and East Berlin. Due to dominance of professional boxing by eastern block fighters, all major fights take place in eastern block countries. Rocky and Apollo continue their fight promotion business. Rocky and Apollo use their own money to finance three days of boxing at Madison Square Garden. They place their fortunes on the line to buy television coverage. The main event pits Clubber Lang against an Irish fighter. There is little interest in the event. Rocky and Apollo go broke. Rocky sells all of his possessions [\*42] to pay his creditors.

Rocky returns to the "row house apartment of Rocky I". (This setting is appropriated from Stallone's first movie by Anderson) He goes to work in a meat packing plant in Philadelphia. (This portion of the story also borrows heavily from Rocky I.) A Soviet leader gives a speech to the United Nations in New York. He states that the Communist world is prevailing over the West as exemplified by their boxing champion. He refers to Rocky as an old and weak ex-fighter. Upon hearing the speech, Rocky and Apollo become very distraught.

Both Rocky and Apollo, unbeknownst to the other, regroup and begin training in seclusion. Rocky is in Philadelphia and Apollo is in Los Angeles. Thereafter, Rocky and Apollo simultaneously take planes to visit the other and break the news of their respective comebacks. Coincidentally, both are on planes which are stopping over in Chicago. While in one of the terminals at the airport they bump into each other. They decide to begin training together.

Rocky and Apollo return to the "old gym of original movie" (setting and training scenes based upon Rocky I) and devise a secret strategy for Rocky to beat Heinemann. An East German representative [\*43] to the United Nations informs Rocky that Heinemann will not fight him because he is too old. Rocky and Apollo then go to New York to East Germany's United Nations ambassador. They barge in the office and intimidate the ambassador into calling Heinemann to ask him to fight Rocky. Rocky insults Heinemann and convinces him to agree to a fight.

To raise money for his training, Rocky fights in exhibitions in Europe and South America. He fights in France, England, and Spain. He also trains in a Parisian bordello and a London nunnery. In London, Rocky is approached by CIA agents and followed by KGB officers. The CIA offers to pay Rocky's training expenses and he refuses. Rocky runs through a number of European capitals and ends up at St. Peters Square in Rome on the day the Pope is to appear.

Rocky fights Heinemann at an outdoor stadium one hundred yards east of the Berlin wall. Heinemann originally dominates the fight. However, Rocky makes a heroic comeback and wins the fight when Heinemann refuses to answer the bell in the sixth round. The East German crowd cheers Rocky's victory.

A comparison of the two plots shows that they are dissimilar apart from the East/West boxing confrontation [\*44] that Stallone, himself, developed. Plaintiff argues that the list of similarities compiled by his expert Michael Roger precludes this Court from granting summary judgment, no matter how dissimilar the plots appear to this Court. However, this circuit has previously held that such lists of random similarities are inherently subjective and unreliable and do not in and of themselves create a material issue of fact. Litchfield, 736 F.2d at 1357. In his declaration, Mr. Rogers states that the plots are similar because in both works a Communist fighter defeats an American and subsequently Rocky defeats the Communist fighter and wins over a Communist crowd. (Rogers Declaration, para. 4) However, Rogers' declaration is deficient. As noted previously, Anderson cannot claim that Stallone copied the idea of an East/West boxing confrontation because there is uncontroverted evidence that Stallone developed the idea independently. In addition, the general similarities cited by Rogers between the plots and the themes of the two movies do not create any material fact issue for this Court, as general themes and basic plots are not protected by copyright. Litchfield, 736 F.2d at 1351-52; [\*45] Jason v. Fonda, 526 F. Supp 774, 777 (C.D. Cal. 1981).

## Setting

The settings of the two movies are also quite different. In Anderson's treatment Rocky is a promoter in New York. After losing his savings he returns to where he lived in Philadelphia and Apollo returns to a gym in Los Angeles. (These settings in Philadelphia and Los Angeles are used in the first Rocky movies and are evidence that Anderson is copying Stallone's settings from the earlier Rocky movies, not that Stallone is copying the setting from Anderson's treatment.) In Anderson's treatment, Heinemann grows up in East Germany. Rocky trains in France, England, Spain, Germany, and Denmark. Rocky runs through major cities in each of these countries. The settings for his training include a bordello in Paris, a London nunnery, the Eiffel tower, and St. Peters Square. The final fight between Rocky and Heinemann takes place next to the Berlin wall in East Germany.

In Rocky IV, Apollo fights Drago in Las Vegas. Rocky rains in Siberia. The final fight is set in Moscow.

## Dialogue

Anderson's treatment contains very little dialogue as the treatment is a brief thirty-one page storyline. In his papers before this Court, [\*46] Anderson did not claim that Rocky IV contained any dialogue similar to that in his treatment. However, in a "surreply", submitted without authorization by this Court, plaintiff's expert asserted that both works contained a short propaganda speech by a Soviet official which were very similar. This Court did not find a substantial similarity between these two speeches or any any portions of the dialogue of the two works.

## Themes

A symbolic struggle between the United States and the eastern block is the overriding theme of both movies. Once again, the Court notes that there is uncontroverted evidence that Stallone developed this theme independently. However, unlike Anderson's treatment, Rocky IV ends with a speech in which he emphasizes the theme that the United States and the Soviet Union should attempt to change their adversarial relationship. No such theme of potential resolution of the East/West conflict appears in Anderson's script.

Rocky IV also contains a number of other underlying themes that are not found in Anderson's treatment. In Rocky IV, Rocky fights Drago to exact revenge for Drago's killing of his friend. Also, Stallone emphasizes that Rocky's old fashioned training [\*47] can succeed against highly sophisticated Soviet athletic training.

Both movies also share a nationalistic theme. However, this nationalistic theme is also emphasized in Rocky I, II, and III and this would be a necessary component of any sequel to the prior Rocky movies.

## Sequence

The only similarity in the sequencing of the two works is that both end with Rocky fighting a Communist fighter. However, Stallone had originally emphasized that the climax of his movie would be a fight between Rocky and a Russian fighter.

## Tone and Mood

Anderson did not claim that the tone and mood of the two movies were similar until this deficiency was pointed out by the defendants and he filed an unauthorized surreply. This Court finds it difficult to determine the tone and mood of Anderson's work due to its brevity and the lack of dialogue. This Court finds the tone and mood of Rocky IV to be very similar to that of the prior Rocky movies developed by Stallone. All of the Rocky movies are nationalistic, upbeat movies laced with occasional bits of humor, and involving Rocky Balboa in some new challenge. Whether these qualities could be extrapolated from Anderson's treatment is of little consequence, [\*48] as the sequel Rocky IV shares the same tone and mood as the prior Rocky movies that were created by Stallone.

## Characters

Rocky IV features the following characters: Rocky, Adrian (Rocky's wife), Rocky, Jr. (Rocky's son), Paulie (Rocky's brother-in-law), Apollo Creed, Duke (Creed's manager), Clubber Lang, Ivan Drago (Soviet boxer), Ludmilla (Drago's wife/spokeswoman), and Nicolai Koloff (Drago's manager).

Anderson's treatment features the following characters: Rocky, Adrian, Rocky, Jr., Paulie, Apollo Creed, Duke, Clubber Lang, Adolph Heinemann (East German boxer), and an unnamed Soviet propaganda expert.

As can be seen from above, the majority of characters used in Anderson's treatment were created by Stallone. As noted throughout this opinion, these characters cannot be the basis for any finding of substantial similarity between Anderson and Stallone's work for purposes of establishing infringement. However, Anderson created two characters in his treatment that serve the same function as two of the characters from Rocky IV. Anderson's Adolph

Heinemann and Stallone's Ivan Drago play similar roles as do Anderson's unnamed Soviet propaganda expert and Nicolai Koloff.

Both Heinemann [\*49] and Drago are large powerful boxers from the eastern bloc being used as propaganda tools in the boxing arena. Both are bigger than Rocky and favored to win their fights with him. However, this similarity is not a basis for inferring that Stallone copied Anderson's treatment, because in all of Rocky's previous fights he was the underdog to a physically superior opponent. In addition, Stallone's original plot ideas necessitated that he create a Soviet boxer. Heinemann is not described in great detail in Anderson's script although he is referred to as an "aryan German". In Rocky IV, Drago is blond and has blue eyes.

Likewise, Anderson's unnamed propaganda official is not well developed. In fact, he appears in only two scenes in the treatment. Apparently, this official is the mastermind of the plan to create a Communist world boxing champion. On the other hand, Stallone's Nicolai Koloff is Drago's manager who appears at all the press conferences and is partially responsible for Drago's training. Koloff plays a different and more prominent role than the unnamed propaganda official. In addition, neither Heinemann nor the propaganda official are delineated with great specificity in Anderson's [\*50] treatment.

As delineated above, Anderson cannot base a finding of substantial similarity on the characters and themes that Stallone had developed previously. Nor can a finding of substantial similarity be based on the fact that the two works both culminate in a symbolic boxing confrontation between the United States and the Soviet Union. This symbolic confrontation was developed independently by Stallone. When the two works are compared without considering Stallone's own characters and themes, it is abundantly clear that the plot, setting and sequence of events are very dissimilar. Most of the characters in Anderson's work were appropriated from Stallone. The two characters that Anderson created independently, Heinemann and the Soviet propaganda expert, are not highly delineated. Nor are they substantially similar to Drago or Koloff, the two parallel characters in Stallone's treatment. These character similarities cannot be the basis for a finding of substantial similarity. See Olson, 855 F.2d at 1451-53 (Substantial similarity cannot be based on loose similarity between plaintiff's thinly sketched character and defendant's allegedly infringing characters.) Nor can the common [\*51] ideas and themes that plaintiff alleges to exist between the two works be a basis for a finding of substantial similarity, as these general themes are not protectable expression. Berkic, 761 F.2d at 1293. Based upon an analysis of the objective criteria above, the Court holds that under the extrinsic test the two works are dissimilar.



This Court need not reach the question of whether there is substantial similarity between the two works under the intrinsic test because it has ruled as a matter of law that the two works are dissimilar under the extrinsic prong of this circuit's test for substantial similarity. *Berkic*, 761 F.2d at 1292; *Litchfield*, 736 F.2d at 1356; *Krofft*, 562 F.2d at 1164. This conclusion follows logically as it would be incongruous for a court to find as a matter of law that the two works are based on dissimilar ideas and then find that a material issue of fact remains as to whether the higher threshold of substantial similarity of expression exists between the two works.

#### B. Intrinsic Test

In any event, the Court finds that no reasonable audience would recognize the movie *Rocky IV* as a dramatization or picturization of Anderson's work. Under the [\*52] intrinsic test as well as under the extrinsic test, a finding of substantial similarity cannot be based on unprotectable scenes-a-faire or characters, themes, and plots which Stallone originally created himself. *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987), *Berkic*, 761 F.2d at 1293. Taking away these portions of Anderson's work, no reasonable jury could find that *Rocky IV* is a picturization of Anderson's treatment. This necessitates a holding that the two works are dissimilar as a matter of law under the intrinsic test. *Berkic*, 761 F.2d at 1292, *Litchfield*, 736 F.2d at 1357.

The Court finds that *Rocky IV* is not substantially similar to Anderson's work. Nor is any portion of Anderson's work entitled to copyright protection under 17 U.S.C. sections 103(a) & 106(2). The Court GRANTS defendants summary judgment on Anderson's claim that they infringed Anderson's copyright.

IT IS SO ORDERED:

DATED: APRIL 25, 1989