

pro hac vice as counsel for defendants. The Court will not strike the entirety of Mr. Ruttenberg's affidavit as it properly and necessarily provides the Court with the relevant documentation upon which plaintiffs' claim relies: (1) a certified copy of plaintiffs' registered 183-page manuscript and (2) true and correct copies of the episodes of defendants' television series against which plaintiffs direct their action.

Plaintiffs object to Mr. Ruttenberg's "objective detailed summary of the Biography/Manuscript." The Court agrees that this portion of Mr. Ruttenberg's affidavit is unnecessary and Exhibit B attached to Mr. Ruttenberg's affidavit is stricken. The Court has reviewed the manuscript in its entirety in evaluating the pending motion for summary judgment.

Plaintiffs also object to Mr. Ruttenberg's "objective scene-by-scene summaries" of episodes 1-3 and 22-23 of the T.V. Series Prison Break. The Court will not strike these summaries, but has independently reviewed the episodes at issue to verify the accuracy of Mr. Ruttenberg's summaries.

The Court will strike Exhibit J attached to Mr. Ruttenberg's affidavit, consisting of Mr. Ruttenberg's "comparison of the characters of the two brothers in the respective works." The Court does not find that the submission of Mr. Ruttenberg's affidavit with its attached exhibits was presented in bad faith, warranting an award of sanctions or attorneys' fees.

B. Facts Relevant to Defendants' Motion for Summary Judgment

The undisputed material facts relevant to the pending motion for summary judgment are set forth below.

1. Echoes From Clay County

Plaintiffs Donald Hughes and Robert Hughes created a manuscript, "Echoes from Clay

County, The Legend of Don and Bob Hughes.” Plaintiffs registered this manuscript with the U.S. Copyright Office under registration number Txu 1-311-636. The manuscript tells the brothers’ story beginning on March 17, 1964 when Bob’s mother, who suffers from mental delusions, falsely complains to the police that 16-year old Bob threatened her with an ice pick and tried to choke her. As a result of the complaint, Bob is incarcerated in the juvenile section of the county jail for two weeks. He is then sent to the State Mental Hospital in St. Joseph, Missouri for thirty days for a “complete mental evaluation.”

At the mental hospital, Bob gradually sorts out the “normal” patients from “those to avoid completely.” Bob undergoes mental tests daily. After a few days, Bob begins working in the kitchen to spend less time with the “zombies.” After two weeks, Bob is transferred to a ward with more privileges.

Bob’s tests show that he is normal so he thinks he will be released. His parents arrive for a visit and his mother apologizes for everything that has transpired.

Instead of being released, Bob is transferred to the juvenile reformatory at Boonville, “the toughest institution in Missouri for young offenders.” According to the manuscript, the guards at Boonville “were known to be sadistic and even the toughest kids in the state feared being sent to Boonville.” In the 100-year history of the Boonville Reformatory, there had never been a successful escape. Prisoners would flee only to be recaptured within a few hours or days. Later, Bob finds out that he has been sentenced to Boonville until he is twenty-one years old.

In the reformatory, Bob is taken to an orientation building for two weeks of orientation. This building is a two-story brick structure with steel mesh on the windows. It has a large dormitory filled with rows of single cots. Bob decides to escape and to be a model inmate to

earn the trust of the guards.

In the orientation building, Bob becomes friends with a black inmate named Jimbo. Bob is unaware that whites and blacks becoming friends is frowned upon at Boonville. After two weeks, Bob is assigned to “C” cottage, near the main road. “C” cottage is supervised by an officer named “Hass,” a “pretty decent guy.” Unfortunately, Bob is assigned to work on the construction crew under the supervision of an officer named Ed Weed, “one of the most brutal guards at Boonville.”

Bob had already learned that the guards were “as dangerous, if not more so,” than the other inmates. Bob describes the guards as “sadists who seemed to thrive on the physical abuse of the inmates.” Ed Weed likes to “whack people with a shovel he always carried with him.” In the manuscript, Bob states that the brutality of the guards is commonplace and that each day, he would witness one or more prisoners being beaten and even tortured.

In the manuscript, the only examples of these beatings and torture that Bob provides are as follows. First, when Bob is assigned to pick strawberries, he sees a duty officer beat a prisoner, Douglas, for inadvertently squeezing the strawberries as he picked them. Bob says that “blood spurted everywhere as [the officer] hit [Douglas] time and again.” Instead of being taken to a hospital, Douglas is thrown into the “hole,” described as a single, windowless cell with only a can for human waste. On another occasion, when the prisoners refuse to eat spoiled green beans, the duty officer screams racial epithets at Jimbo and kicks Jimbo several times in the head. Finally, when Bob accidentally spills a wheelbarrow full of cement, Weed barely restrains himself from smashing Bob over the head with a shovel. Bob learns from other inmates that the Superintendent, DeClue, likes to watch the guards abuse the inmates.

Bob's parents are allowed to visit once per month. They visit in May and tell Bob that they are doing everything they can to gain his release, but with no luck.

In June, Bob begins to work in the bakery under a decent man named Schrader. Each of the inmates makes an unescorted trip one day each week to deliver baked goods to DeClue's house which is just outside the main gate. Bob thinks about escaping during his first delivery to DeClue's house, but realizes that he "can't just take off running." On his way back from DeClue's house, Bob notices that he is only 20 feet from the visitors' parking area. Bob thinks the parking area would be a perfect place for his older brother, Don, "to have a car waiting" for him.

Bob asks several other inmates why they never try to escape. One inmate, who had been allowed to leave to attend a funeral, explains that he did not want to be on the run forever. The inmate adds that if you get caught, "which is highly likely," you also "end up getting more time." Bob says that it is worth it to him.

When Bob refuses to give an inmate a belt that his parents have given him, the inmate pushes Bob down some stairs. When a guard asks what happened Bob refuses to snitch, thereby earning the respect of the other inmates. Bob decides that he does not want to "risk going to the Hole for fighting when [he] was getting close to my chance for freedom."

Bob decides to talk to Arvel Baker, "a big muscular, black inmate, who just happened to be 'Duke of the Hill.'" This title means that he is the undisputed toughest inmate in Boonville. Bob strikes a deal with Baker to provide him with sweets from the bakery in exchange for protection.

The following day, an inmate tries to escape. This causes "things to tighten up at

Boonville.” DeClue decides that he will reduce the bakery staff to four inmates by the second week in July. Bob realizes that he will have only three more visits to DeClue’s house to implement his escape plan. Bob tells his parents about his escape plan when they visit him on June 26. Bob tells his parents that if Don is willing to take the risk, then Don should come to the fireworks display at the reformatory on July 4 to check out the grounds and plan an escape route. Bob’s plan is to escape on Wednesday, July 8. It is decided that if Don is willing to help, Bob’s mother will write him a letter with the word “green” in it.

On July 4, Don visits and checks out Bob’s plan. He decides to help Bob. Bob’s mother sends Bob a letter containing the word “green.” Don rents a white Plymouth Fury similar to the ones used by the Missouri State Highway Patrol and buys side lights and a red siren dome to put on top to make it look like a police car.

Don Hughes waits in the parking area outside the main gate on July 8. Don pretends to check the car’s engine and hoses to divert attention from the fact that he has been waiting there awhile. Finally, Don sees Bob walking to DeClue’s house with bread. When Bob returns, Don pulls the car onto the drive and yells, “Let’s go! Let’s go!” Bob sprints across the grass and dives into the car through a rear window. Don slams the car into reverse and floors the accelerator. Don hears people screaming, “Escape! Escape!”

Bob changes clothes in the back seat. Both Bob and Don are now wearing “starched, tan, matching slacks and shirts” that resemble police uniforms without any patches or badges. Don pulls onto a dirt road and installs the side lights and siren. Back on the main road, a police car drives past and waves, thinking that Bob and Don are cops. Don gets on 70 Highway going east, towards St. Louis, pulls the siren back into the car, and slows to the speed limit. Don explains

that they are taking the “long way around” to Kansas City. They drive around on back roads and then end up on 50 Highway, only about thirty minutes from Boonville. When they encounter a roadblock, Don puts the siren back on top of the car and is waved past the roadblock. Don decides a direct drive to Kansas City will not work. The brothers drive to Oklahoma during the night and then back to Kansas City, Kansas. In the morning, Don calls their parents from a pay phone and the parents meet them at a café for breakfast.

Bob and Don learn that the police have already been by their parent’s house and there is an article about the escape in the morning newspaper. They all agree that Bob must leave Missouri. The parents check Bob into a hotel. Don gets rid of the spotlights, dome, and outfits and returns the rented Fury. Don visits his wife and daughter, knowing it will be his last visit for a long time. They dye Bob’s hair blond. The next day, Bob and Don take a train to stay with their aunt in Decatur, Georgia.

The boys are quickly accepted into the Decatur community. Bob becomes involved with a high school girl, Gabriel, who is also dating a football player named Brock. When Bob and Brock are about to get into a fight over Gabriel, Don screams, “I told you to stay away from her,” and knocks Bob out with a punch. Later, Don explains that if Bob had gotten into a fight with Brock, the police would have come and Bob would have been sent back to Boonville. That night, Bob writes the first of many letters to President Johnson about the horrible conditions at Boonville.

In mid-October, Bob leaves Georgia for Modesto, California, to spend time with his maternal grandparents. Meanwhile, Don returns to Kansas City to celebrate his 21st birthday and meets a woman named Barbara. Don moves in with Barbara. He tries to figure out a way to

work without using his Social Security card. A month later, they have to leave town because Barbara has been “passing bad checks for nearly a year.” Don insists there “be no more secrets between” them and tells her about helping Bob escape from Boonville.

As Barbara and Don do not have any money with which to leave town, Barbara dresses up as a “hooker and a high-priced one at that.” Don buys a half dozen key blanks at a hardware store. Then, Don convinces a bellman at the Muelbach Hotel to give him some plastic key holders “for souvenirs.” Each key holder has a different room number on it. They go to various strip bars and Don tells drunken patrons that they can have a “date” with Barbara for \$100. After getting the \$100, Don hands the man one of the blank keys. The man heads to the Muelbach, expecting to find Barbara waiting for him in the hotel room. Meanwhile, Don and Barbara are at another bar repeating this scheme. The following morning, Don and Barbara leave for Tulsa, Oklahoma.

Bob’s parents visit him in Modesto, California at Christmas. They tell Bob that the “authorities were starting to ask more and more about the family relatives.” They believe it is just a matter of time before they show up at the grandparents’ house in California.

In January, Bob is walking home from church when he sees two police cars parked at the grandparents’ house. Bob goes to his girlfriend Glenna’s house and she agrees to drive him to San Francisco. Bob takes a flight from San Francisco to Kansas City. His parents find him an apartment and buy him a car. Bob continues sending letters to President Johnson about the conditions at Boonville.

After Bob’s girlfriend drives his car onto a sidewalk and witnesses yell, “Call the cops,” Bob moves to Leavenworth, Kansas the following day. In May of 1965, Bob’s parents tell him

that they have been contacted by the FBI. The FBI wants Bob to come in, “under a seventy-two hour amnesty,” to talk about the conditions at the Boonville Reformatory.

Bob and Don agree to meet with FBI agent Graham at the federal courthouse in Kansas City, Missouri. Their parents accompany them to the FBI office. The interview lasts about two hours. Bob tells his story about Boonville. Near the end of the interview, Graham asks Bob where he is living and Bob replies, “Leavenworth.” Graham says that he is going to “let the Missouri boys know [Bob is] living in Leavenworth on Monday morning,” giving Bob the opportunity to turn himself in at Boonville over the weekend. Don is angry that there is no discussion of charges being dropped or some kind of pardon. As they take their suit jackets from a coat rack, Don steals agent Graham’s FBI identification badge.

Don opens a checking account using \$100 in cash and gets twenty starter checks. During the weekend, Don uses the starter checks to purchase food and obtain cash. Don ends up with over \$1,000 in cash by the end of the weekend. On Monday morning, Don returns to Tulsa with Bob. They work a bakery route together, getting paid in cash to avoid using their Social Security cards.

Two months after arriving in Tulsa, Bob turns eighteen. He returns to Liberty, Missouri to register for the draft as required by federal law. Bob did not want any additional charges against him as he still hoped to get the juvenile charges against him dropped some day. After registering, Bob returns to Tulsa with Don.

Thirteen months pass and then Bob receives an induction notice. He is directed to report for a physical to be classified. Bob wonders if the authorities are setting an elaborate trap. Bob goes to Kansas City for his physical and, two weeks later, is inducted into the Army and sent to

Fort Leonard Wood in southern Missouri. Somehow, the Army has overlooked the warrants for Bob's arrest. Bob goes through basic training and qualifies for Officer's Candidate School.

With a week to go before he graduates, the Military Police show up at the barracks to bring Bob in for questioning. Bob is taken to the day room to wait for civilian authorities to pick him up. Bob escapes through an open second floor window, spraining his ankle in the process. He runs three blocks to the Exchange and calls his parents. Bob hides in a boiler room during the night. The following morning, Don picks him up and they return to Tulsa.

Bob's escape makes the Tulsa news. They decide to change their identities to Don Cooper and Bob Cooper. Bob, Don, and Barbara go to Jacksonville, Florida. After a few weeks, Bob is questioned by the Navy Shore Patrol because he is walking around Jacksonville in his military brogans. Bob produces his Missouri driver's license with the name "Bob Hughes" on it. They let him go, but he knows the Navy Shore Patrol will check with other branches of the military to see if they have a "Bob Hughes" missing. Bob, Don, and Barbara leave their rented mobile home just in time. They go to Tampa.

In Tampa, Don decides to "roll a drunk" for some money. Before Don "rolls" Jerry Collins, Collins offers him a job setting appointments for a photographer door to door. The job pays cash. Bob begins working for the same company. In the spring of 1967, when the studio moves back to its main office in Illinois, Bob, Don, and Barbara move to Illinois to continue working for the company. Only three weeks after arriving in Illinois, Barbara is arrested for passing bad checks.

Don poses as an FBI agent, using agent Graham's stolen identification badge, and is allowed to meet with Barbara in an interview room. They escape out an open window. Don

picks up Bob and the threesome head north to Milwaukee, Wisconsin, “right into the middle of the race riots.” They turn around and go to Des Moines, Iowa.

In Des Moines, Iowa, Bob and Don rob a bank. Barbara poses as an FBI agent and notifies the local police dispatcher that the FBI has received a call about a possible bomb threat at the local bank. Bob and Don arrive, posing as the bomb squad. They carry in an “explosives” case and fill it with \$60,000 in cash. They carry the case to their car and instruct a local officer to keep everyone out of the bank until their investigative unit arrives to dust for prints.

The trio travels to Kansas City where Bob and Don see their parents again. Barbara steals a book of payroll checks and an imprinter. The following day, Bob, Don, and Barbara leave for California. They end up in Seal Beach, California. Barbara uses one of the stolen payroll checks to buy groceries and is arrested. Bob gets a ride to the airport. Don gives the suitcase containing the proceeds of the bank robbery to a newlywed couple. The police return and arrest Don for the stolen checks he wrote in Clay County. He is extradited to Missouri, but receives probation on the charges against him. Neither his role in Bob’s escape from Boonville nor the bank robbery is ever mentioned.

Bob rents an apartment in Independence, Missouri. Bob is picked up by the FBI after one of his “friends” turns him in. Bob is sent to the stockade in Fort Riley, Kansas.

In February of 1968, Bob is found guilty of desertion at his court martial. He is sentenced to six months and given a General Discharge under Honorable Conditions. As he nears his release date, Bob learns that authorities in Missouri want to extradite him. On March 10, 1968, a sympathetic news article about Bob is published in the Kansas City Star. At the extradition hearing, the request for extradition is denied. Bob is released and moves to Olathe, Kansas. On

July 27, 1968, Missouri dismisses all charges against Bob. Bob and Don return to Kansas City.

The manuscript includes a discussion in the Introduction and the Epilogue about whether or not one of the brothers is the infamous “D.B. Cooper.”

2. Defendants’ TV Series Prison Break

Defendant Scheuring is a creator of the Series Prison Break. Defendant Fox broadcasts the Series. The Series has completed two seasons, with a total of 44 hour-long episodes.

In the Series, Michael Scofield has had his entire body tattooed over the last few months. He has also plastered every wall of his Chicago apartment with papers, maps, and newspaper articles relating to (1) the conviction of his brother, Lincoln Burrows, for the murder of the Vice-President’s brother and (2) information about criminals and other individuals later revealed to be at the prison where Lincoln is being held on death row. Michael knows that his brother is innocent and has been framed. Michael is determined to break Lincoln out of the Fox River State Penitentiary before his May 11 execution date. No one has ever escaped from this prison.

Michael worked as a structural engineer on a recent re-design of the prison where Lincoln is incarcerated. The tattoos covering his body are the blueprints of the prison plans.

Michael pretends to rob a bank. He is captured without resistance while inside the bank. He pleads guilty to the crime so that he can be sentenced to serve time at the maximum security prison where Lincoln is being held. Lincoln knows nothing about Michael’s escape plan until Michael tells him.

At the prison, Michael falsely tells the female prison doctor, who is the Governor’s daughter, that he suffers from diabetes. He obtains insulin blockers from another prisoner so that his medical records will support his claim. Michael also locates various items, such as screws

and bolts, on the prison grounds. He converts these items to tools and uses them to unscrew his cell's toilet so that he can drop down into the prison sewer system. Michael constantly pushes origami swans through the grates leading to the prison sewer system so that he can learn exactly where each section of the sewer leads.

Plaintiffs add that there is a character in the Series named Brad Bellick, a "brutal" guard who is in charge of the inmate work force. Later in the Series, Bellick is incarcerated at the Fox River State Penitentiary for committing a crime. Bellick gives his dinner dessert to a black inmate named Banks in exchange for Banks' protection from harassment by other inmates.

Michael intentionally meets inmate Charles Westmoreland, who is known to be the infamous D.B. Cooper, although Westmoreland denies it. Michael believes that Westmoreland has hidden financial resources on the outside that will provide much needed financial assistance after the escape.

Michael also befriends inmate John Abruzzi, a mob boss who controls much of what happens in the prison. Michael wants to use Abruzzi's connections to help the escapees disappear once they get out of the prison. Michael is able to form an alliance with Abruzzi because Michael knows the hideout of a mob informant named Fibonacci who Abruzzi wants to silence. This alliance is forged only after Abruzzi's men cut off two of Michael's toes with garden shears in an unsuccessful attempt to force him to reveal Fibonacci's location.

Conflicts among the prisoners lead to a prison riot and the murders of several inmates. Figures on the outside commit murder to maintain the secret that the Vice-President's brother was not murdered, but is alive and has been imprisoned in a small cabin in Montana. The Series is filled with other characters such as Lincoln's teenage son, LJ, who is bordering on

delinquency, and Lincoln's former fiancée Veronica, who was Michael's attorney and is now engaged to another man. Numerous other inmates play roles in Michael's escape plan and/or the racial tensions among the inmates.

Videotape evidence of the apparent murder of the Vice-President's brother seems to confirm Lincoln's guilt. Veronica herself has doubts even after Lincoln explains that the tape is manufactured. Veronica begins to investigate, but those "who know" learn of her activities.

Michael's complicated escape plan plays out over the first twenty episodes of the Series before being implemented in the 21st episode. The escape involves ten prisoners entering the prison doctor's office. The doctor has left the door unlocked to help them. Eight of the inmates escape through a window after removing its bars, using telephone wires to climb out to the barbed-wired outer prison wall. One inmate falls into the courtyard and is recaptured. The 10th inmate, Westmoreland, dies from wounds inflicted on him and he is left in the doctor's office. Before he dies, Westmoreland tells Michael where he has hidden the money from his famous crime. Other escapees overhear this information.

Warden Pope finds the toilet removed in Michael's cell and a hole in the wall of the cell. He orders the capture of the escapees dead or alive. Squad cars speed after them, roadblocks are set up, and helicopters scan the area.

Abruzzi leads the men to a van parked at an old mill. Abruzzi uses a ruse to leave behind one of the escapees, Haywire. The others get into the van. Abruzzi has arranged to have a plane waiting for them at a nearby airfield.

The escapees are forced to abandon the van after it gets stuck in mud while they are attempting to avoid a roadblock. They do not reach the airfield until sundown and watch as the

plane takes off without them because the air controller has advised the pilot that the airstrip closes at sundown.

Michael is aware that one escapee, Tweener, previously tried to betray the group. Michael tells Tweener that he must go it alone. Another escapee, T-Bag, is also left behind by the group. The Series then follows both the groups as well as the three separated escapees.

Meanwhile, the President dies of a massive heart attack and the Vice-President is sworn in as the President.

Michael's group runs for a passing train, jumps into a boxcar, and then out the other side. Two of the escapees get angry when Michael tells them they cannot go and see their loved ones because the police will be waiting. Lincoln suggests dumping the others, but Michael says they know about Westmoreland's money, so, if they get caught, they will reveal where Michael and Lincoln are going. Michael and Lincoln ultimately plan to go to Mexico and then Panama. Michael reveals to Lincoln that he has back-up plans and hidden supplies.

The FBI's lead agent, Mahone, talks to the tattoo artist who worked on Michael and figures out the purpose of the tattoos. He also determines that Michael spent months planning the escape and then destroyed all of the plans by throwing them into the Chicago River below his apartment. Agent Mahone orders divers to search for the plans.

Michael digs up a cemetery plot and retrieves several buried garbage bags containing clothes for all of the escapees, fake IDs, passports, money, and the keys to a car parked 100 yards away. FBI agent Mahone has used Michael's credit card statements to figure out where Michael buried the supplies. He arrives a few minutes late and watches from nearby.

Veronica's investigation leads her to Blackfoot, Montana, where she locates the former

Vice President's brother, Steadman, alive, but locked inside a house. Veronica enters the house and is trapped there by its various security devices and controls. Veronica tries to call the Blackfoot Sheriff's Department, but the call is routed to the captors. She then receives a call from Lincoln on her cell phone and tells him she has found Steadman alive. Before she can say anything more, Steadman's captors arrive and shoot Veronica. Lincoln hears this over the phone.

In Utah, Lincoln leaves his brother Michael and drives to Arizona to find his son. In another episode, Michael impersonates an FBI agent to meet with FBI agent Mahone's ex-wife and gather information on Mahone.

Later, Michael and Lincoln capture a news photographer and make a sympathetic video which airs on television. Subsequently, a federal agent gives testimony exposing political corruption and revealing that Lincoln is innocent. Lincoln is exonerated of the charges against him.

Plaintiffs have not identified any disputed facts.

II. Standard

A motion for summary judgment should be granted if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Rafos v. Outboard Marine Corp., 1 F.3d 707, 708 (8th Cir. 1993) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). The moving party bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact for trial and that the movant is entitled to summary judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A party opposing a properly supported motion for summary judgment may not rest upon the

allegations contained in the pleadings, “but must set forth specific facts showing there is a genuine issue for trial.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In reviewing a motion for summary judgment, this Court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving any doubts as to the facts or existence of any material fact against the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 (1970).

“When the issue is whether two works are substantially similar, summary judgment is appropriate if ‘no reasonable juror could find substantial similarities of ideas and expression[,]’ viewing the evidence in the light most favorable to the nonmoving party.” Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994)(citation omitted).

III. Discussion

Plaintiffs Bob and Don Hughes have brought this lawsuit pursuant to the Copyright Act, 17 U.S.C. §§ 100, *et seq.* In order to prevail on their copyright claims, plaintiffs must show that defendants’ Series copied protected elements from plaintiffs’ Manuscript/Biography. Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 361 (1991); Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120-21 (8th Cir. 1987).

A. Copyright Estoppel

Defendants argue that the protected expression in plaintiffs’ Manuscript is limited. Defendants state that plaintiffs’ work is protected only from “nearly verbatim copying of dialogue” or from the “comprehensive non-literal copying of their ‘story’ or ‘pattern’” because it is factual.

“The general rule is that fictional elements, or fictionalized versions of factual elements,

of an otherwise factual work are protectable under copyright law.” Houts v. Universal City Studios, Inc., 603 F. Supp. 26, 28 (C.D. Cal. 1984)(citing 1 Nimmer on Copyright § 2.11[C]). Under the doctrine of copyright estoppel, however, a plaintiff who holds his work out to the public as factual cannot then claim that the work is actually fiction and thereby entitled to the copyright protection afforded to fictional works. Houts, 603 F. Supp. at 28.

Defendants rely on plaintiffs’ allegations in their Complaint that the Manuscript tells “their respective real life stories.” Thus, defendants conclude that neither the “fact” of an innocent brother sent to prison nor the “fact” of a brother breaking the imprisoned brother out of prison is protected under copyright laws. Defendants add that “each and every portion of plaintiffs’ Manuscript/Biography that plaintiffs claim was stolen by defendants relates to an actual event in plaintiffs’ lives” and not to protectable expression that would support an action for copyright infringement.

Plaintiffs respond that their work has never been “held out to the public” as being factual or “completely true.” Therefore, plaintiffs contend that the doctrine of copyright estoppel does not apply in this case.

Plaintiffs have failed to identify the aspects of their biography that are fictional rather than factual. Plaintiffs do not deny that the alleged similarities relate to facts presented in plaintiffs’ Manuscript. For these reasons, the Court finds that plaintiffs’ Manuscript is factual, at least with respect to the portions alleged to have been copied by defendants, and is entitled to limited protection.

B. Substantially Similar Analysis

To determine whether a defendant’s work is “substantially similar to protected

expression” in a plaintiff’s work, the United States Court of Appeals for the Eighth Circuit employs a two-step analysis. Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120 (8th Cir. 1987). “First, similarity of ideas is analyzed extrinsically, focusing on objective similarities in the details of the works. McCulloch v. Albert E. Price, Inc., 823 F.2d 316, 319 (9th Cir. 1987). Second, if there is substantial similarity in ideas, similarity of expression is evaluated using an intrinsic test depending on the response of the ordinary, reasonable person to the forms of expression. Id.” Id.

“The extrinsic test is an objective test based on specific expressive elements: the test focuses on ‘articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events’ in two works.” Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994)(citation omitted). “The intrinsic test is a subjective test that focuses on ‘whether the ordinary, reasonable audience would recognize defendant’s work as a “dramatization” or “picturization” of the plaintiff’s work.’” Id. (citation omitted). As it is the “pattern” or overall story that constitutes the “original” portion of the copyrighted work, plaintiffs cannot rest a claim of copyright infringement upon lists of random similarities juxtaposed out of sequence. Hartman, 833 F.3d at 120 (citing Kouf, 16 F.3d at 1045-46).

Instead, what must be compared are the actual elements that make up the total sequence of events in each work and the relationships between the major characters as well as the pattern formed by the works’ plots, themes, dialogues, moods, settings, and pace. Shaw v. Lindheim, 919 F.2d 1353, 1355 (9th Cir. 1990).

A comparison of plaintiffs’ Manuscript against the Series Prison Break reveals that there are limited similarities between the two works. No protected elements of plaintiffs’ Manuscript appear to have been copied by defendants.

1. Plot

Plaintiffs describe the plots of both works as a brother incarcerated for a crime he did not commit whose brother breaks him out of prison. Defendants add that the plot in the Series is much more complicated with one brother being incarcerated after being framed for assassinating the brother of the Vice President of the United States. In the Series, Lincoln is on death row in a maximum security federal prison. This is substantially different than a juvenile being sent to a reformatory.

Most importantly, the plot of plaintiffs' Manuscript is much less involved than the plot in the Series. Plaintiff Bob Hughes walks away from a bakery delivery and jumps into his brother's car. The brother is not imprisoned. In the Series, Michael gets himself imprisoned. Then, he has to form alliances to implement his complicated escape plan and ends up attempting the escape with a total of nine other inmates.

2. Theme

The theme of a "falsely imprisoned" character breaking out of a prison is not unique and has been shown in such films as "Shawshank Redemption" and "Man In The Iron Mask." The bond between the brothers is not unique. While plaintiffs identify corruption as a theme, the corruption in plaintiffs' work is within the juvenile justice system while the corruption in defendants' Series involves the political establishment.

3. Dialogue

Plaintiffs have not identified any dialogue that has been copied from their Manuscript.

4. Mood

The mood of the two works is dissimilar.

5. Setting

The setting in plaintiffs' Manuscript is a juvenile reformatory whereas Prison Break is set in a federal maximum security penitentiary. As both involve persons who are incarcerated, the fact that they take place in an institution arises from the plot.

6. Pace

The pace of the works is very dissimilar. Plaintiffs' Manuscript takes place over a five-year period of time. In Prison Break, the first forty hours of the Series takes place over a period of a few months.

7. Characters

The fact that each work involves two brothers does not make them substantially similar. The fact that plaintiffs' Manuscript involves a reformatory and defendants' Series is set in a prison means that both have wardens and correctional officers and other inmates. These are *scenes-a-faire*. Although one brother in each work has a main love interest, that is where the similarity ends.

In addition, there is significantly more character development in the Series as Michael forms his alliances and implements his escape plan.

8. Sequence of Events

The total sequence of events is very different in the Series as compared to plaintiffs' Manuscript.

Plaintiffs have compiled a list of similarities between their Manuscript and the Series Prison Break. It is not enough to focus on isolated elements within the Series. While both Bob Hughes and Lincoln are the "innocent brother sent to prison," their circumstances are very

different. As for the “brother who breaks the imprisoned brother out of jail,” Don drives Bob away from the reformatory whereas Michael commits a bank robbery to get himself sent to the same prison as Lincoln. Once there, he puts a complicated escape plan into action, one that he has spent months planning.

There is no D.B. Cooper character in plaintiffs’ Manuscript. In the Introduction and Epilogue, they discuss whether Don Hughes is the infamous D.B. Cooper. In the Series, one of the inmates turns out to be D.B. Cooper.

As for plaintiffs’ claim of similar incidents of brutality by prison guards, such incidents are common in any work set in a prison or reformatory. Furthermore, while plaintiffs describe Bob being hit with the handle of a knife and an inmate being hit for squeezing strawberries and for refusing to eat spoiled food, the Series involves murders, Michael’s toes being cut off with garden shears, and an inmate’s hand being cut off with an ax.

While plaintiffs’ Manuscript involves an escape by car, the inmates in the Series must hike through woods to get to the van that has been left for them. The van is not disguised to resemble a police vehicle. The van does not help the escapees get through a road block. Instead, an attempt to circumvent a road block results in the van getting stuck in the mud and being abandoned.

The remaining alleged similarities do not warrant detailed discussion by this Court.

For the reasons set forth above, the Court finds that defendants’ Series does not violate plaintiffs’ copyright on their Manuscript.

IV. Conclusion

For the reasons stated above, it is hereby

ORDERED that defendants' Motion for Summary Judgment (Doc. #25) is granted.

ORDERED that plaintiffs' Motion to Strike "Declaration of Edward A. Ruttenberg" and for Sanctions (Doc. #30) is granted in part and denied in part. Exhibits B and J attached to Mr. Ruttenberg's Affidavit are stricken. The remainder of the Affidavit and its attached Exhibits are properly before the Court. It is further

ORDERED that plaintiffs' request for sanctions is denied.

/s/Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

Dated: October 10, 2007