

No. 19-4126

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

RICHARD DUTCHER,
Plaintiff/Appellant,

v.

BOLD FILMS, L.P., *et al.*,
Defendants/Appellees.

On Appeal of a Final Judgment from the United States District Court,
District of Utah, Honorable Dee Benson, No. 2:15-cv-110-DB

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Oral Argument Is Requested

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PRIOR OR RELATED APPEALS

1. *Richard Dutcher v. Bold Films, L.P., Bold Films Productions, LLC, Open Road Films, LLC, NBCUniversal Media, LLC, and Universal Studios Home Entertainment, LLC*, Appeal No. 19-4165 (10th Cir.), currently pending.

DISCLOSURE STATEMENT

1. Boldest Film CY Ltd. is the parent corporation of Bold Films, LP, and Bold Films, LP is the parent corporation of Bold Films Productions, LLC. No publicly held corporation owns 10% or more of the stock of Bold Films LP or Bold Films Productions, LLC (collectively, “Bold”).

2. Open Road Releasing, LLC is the parent of Open Road Films, LLC (“Open Road”). No publicly held corporation owns 10% or more of the stock of Open Road.

3. Universal Studios Home Entertainment LLC (“USHE”) is an indirect subsidiary of NBCUniversal Media, LLC (“NBCUniversal”). NBCUniversal is indirectly owned by Comcast Corporation, a publicly held corporation. No other publicly held corporation holds a 10% or more of the stock of USHE or NBCUniversal.

Defendants/Appellees Bold, Open Road, NBCUniversal, and USHE are collectively referred to as “Defendants.”

INTRODUCTION

This case involves the straightforward application of settled copyright law to two films that are dramatically different in almost every meaningful way. The district court correctly concluded that no reasonable jury could find *Nightcrawler* is substantially similar to the protected elements of *Falling*, and therefore summary judgment was proper. This Court should affirm.

Defendants produced and distributed the film *Nightcrawler* in 2014. *Nightcrawler* was written and directed by Dan Gilroy, an acclaimed Hollywood screenwriter with decades of experience and many credits to his name. After *Nightcrawler* was nominated for an Academy Award for best original screenplay in 2015, Plaintiff Richard Dutcher (“Dutcher”), a Utah filmmaker who describes himself as the “father of Mormon Cinema,” brought this action alleging that *Nightcrawler* infringed on his film *Falling*—a film Dutcher made but could not sell, never commercially released, and screened only a handful of times in isolated locations starting in 2008. Prior to this action, Mr. Gilroy had never even heard of Dutcher, much less seen his obscure film *Falling*.

The only real commonality between the two films is that both have main characters engaged in the “stringer” profession. A stringer is a real job, dating back decades, in which freelance photographers and videographers obtain graphic footage from accident and crime scenes to sell to local news outlets. *Nightcrawler*

and *Falling* are not the first films or visual works to address this occupation. There have been multiple books, movies, news stories, and television shows depicting stringers that predate both of the works at issue here. All involve similar elements of increasingly graphic footage, sales to news outlets, and dangerous situations.

Other than the occupation of the main character, *Falling* and *Nightcrawler* could not be more different. *Falling* is about a lapsed Mormon missionary who experiences moral decline as a result of his job, struggles to hold his marriage together, and seeks religious redemption on his deathbed. *Nightcrawler* is about a murderous sociopath who makes amoral decisions, thrives in his job as the result of a soulless capitalist system, and ultimately succeeds because of his lack of a moral compass.

Because both films involve the same profession, there are obvious similarities that derive from that profession. Both characters drive around Los Angeles listening to police scanners (as real stringers do), both arrive at accident and crime scenes to obtain graphic footage that they sell, and both plots culminate in violent murder scenes that lead to lucrative payoffs. Those elements are nothing new. They happen in real life and are contained in multiple prior works also involving the stringer profession. That is why copyright law does not protect those types of general similarities, instead treating them as *scènes à faire*—elements that one would expect to follow from a particular plot, profession, or story.

Dutcher does not have a monopoly over any work about the stringer profession. He was not the first to discover it, nor will he be the last to produce a fictional work about it. Yet when he brought this action, he claimed that *Falling* was the “first film to center on a stringer.” [Appellant’s Appendix (“Appx.”) Vol.I:207.] Although the district court allowed Dutcher to survive a motion to dismiss, discovery proved that Dutcher was simply wrong. On summary judgment, the district court was given the benefit of multiple other works about the stringer profession, as well as Mr. Gilroy’s own date-verified scripts for *Nightcrawler* dating back to the 1980s. Between them, these works contained all of the supposed similarities that Dutcher alleged *Nightcrawler* had copied from *Falling*—establishing beyond dispute that those similarities were simply unprotectable ideas or *scènes à faire*.

As a result, the district court correctly concluded that no reasonable jury could find *Nightcrawler* was substantially similar to **protectable** elements of *Falling*. In doing so, the district court engaged in exactly the type of filtration analysis this Court has not only endorsed, but required, in cases like this. That put the district court in broad company with courts around the country, which routinely and appropriately dismiss copyright claims as a matter of law after filtering unprotected elements and subsequently determining that no reasonable jury could find substantial similarity based on what is left.

There was nothing radical about the district court's decision. It was in keeping not only with this Court's precedent, but with well-settled principles of copyright law. Dutcher's insistence that he should be entitled to reach a jury, no matter how dissimilar the works, because he personally believes the works are similar is not supported by any authority and would eliminate the district court's important filtration role in copyright cases. The district court's summary judgment ruling was correct and should be affirmed.

In the alternative, although the district court did not reach the issue in its final summary judgment ruling, this Court can affirm the district court on the basis that the record contains no competent evidence of access necessary to establish copying. Prior to this action, Mr. Gilroy had never heard of Dutcher or seen *Falling*, and Dutcher adduced no evidence that Mr. Gilroy had access to that unreleased film. Because there is no such evidence, Dutcher must establish that *Falling* and *Nightcrawler* are strikingly similar—a rigorous standard that requires the works be so identical as to preclude even the possibility of independent creation. That standard is plainly not met here.

On either of these grounds, the district court should be affirmed.

STATEMENT OF THE ISSUES

1. Did the district court err in concluding on summary judgment that no reasonable jury could find that *Nightcrawler* is substantially similar to protected elements of *Falling*?
2. Can the district court's ruling be affirmed on the alternative ground that there is no competent evidence of access, and the two films are not strikingly similar?
3. Did the district court abuse its discretion in denying Dutcher's motion to compel regarding expert Robert Gale?

STANDARD OF REVIEW

On Issues 1 and 2, this Court "review[s] the grant of summary judgment de novo applying the same standard as the district court." *Spring Creek Exploration & Prod. Co., LLC v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1032 (10th Cir. 2018) (citation omitted). On Issue 2, this Court "may affirm the district court for any reason supported by the record." *Id.* at 1032-33 (citation omitted). On Issue 3, this Court "review[s] a district court's discovery rulings, including the denial of a motion to compel, for abuse of discretion." *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 647 (10th Cir. 2008).

STATEMENT OF THE CASE

1. Statement of Facts¹

Dutcher brought this action in February 2015, alleging that the Oscar-nominated film *Nightcrawler* was so similar to Dutcher's film *Falling* that it infringed his copyright. [Appellees' Supplemental Appendix ("Supp.Appx." Vol.I:40-63.] His claim was centered around his mistaken belief that his film was the first to focus on a stringer, [Appx.Vol.I:207], a profession in which freelance photographers and videographers take footage of lurid accident and crime scenes, largely at night, and sell them to local news outlets.

Dutcher did not create the idea of a stringer. It is a real-life profession dating back to the early 1930s and the godfather of freelance crime scene photographers, Arthur "Weegee" Fellig, who listened to early police-band radios so he could go to fresh crime scenes and obtain gruesome photographs to sell to newspapers. [Supp.Appx.Vol.I:151-52.] Mr. Fellig's exploits are detailed in a

¹ Defendants submit their own Statement of Facts because Dutcher's is argumentative and incomplete. Dutcher's failure to properly cite the record is endemic throughout his brief. Many statements are simply asserted with no supporting evidence or citation. "'Mere conclusory allegations with no citations to the record or any legal authority for support' does not constitute adequate briefing." *MacArthur v. San Juan Cnty.*, 495 F.3d 1157, 1160-61 (10th Cir. 2007) (citation omitted); *accord* Fed. R. App. P. 28(a)(6).

number of books containing his photographs,² and over the years many other films and television programs in the public domain have also depicted the stringer profession, including *The Public Eye* (1992), *Prime Time Murder* (1992), *Stringer* (1999), *The Ghouls* (2004), an NPR radio piece entitled “*Searching Out Mayhem with Video ‘Nightcrawlers’*” (2005), and twelve episodes of the reality television program *Stringers: LA* (2007-08). All of these works, which have been conventionally filed with this Court and are described in further detail below, predate *Falling* (2008) and, as the district court concluded, contain the very same elements that Dutcher claims *Nightcrawler* copied from *Falling*.

Falling* and *Nightcrawler

Falling and *Nightcrawler* are, quite literally, night-and-day different. Dutcher’s brief is filled with characterizations and cherry-picked alleged similarities of what he thinks the films are about. But like the district court, this Court’s substantial similarity analysis is driven by its own review of the works, not Dutcher’s characterizations. See *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 434 (S.D.N.Y. 1985) (“In determining copyright infringement, the works

² See e.g., <https://en.wikipedia.org/wiki/Weegee> (last visited January 4, 2020); Arthur Weegee Fellig, *Naked City* (1945); Arthur Weegee Fellig, *Weegee: Masters of Photography Series*, Aperture (1978); Arthur Weegee Fellig, *Weegee’s New York: 335 Photographs 1935-1960* (1982); Pantheon Photo Library, *Weegee* (1986); Brian Wallis, *Weegee: Murder is My Business* (2013).

themselves supersede and control contrary allegations and conclusions, or descriptions of the works as contained in the pleadings.”). And when it does review the two films, the correctness of the district court’s determination that the films are not substantially similar will be manifest. Consequently, Defendants offer the below brief summaries of the two works not to supplant the Court’s independent review, but solely for the Court’s convenience.³

Falling.

Falling is a religiously-themed morality tale, told almost entirely in flashback, about two essentially good people who, through a series of bad choices, spiritually “fall” and are killed as a result.

The film centers on the relationship between two main characters: Eric Boyle and his wife, Davey. Eric is an aspiring screenwriter and Davey is an aspiring actress. Both are former members of the Church of Jesus Christ of Latter-day Saints who previously moved to Los Angeles to pursue their Hollywood dreams. Neither has succeeded and their religious faith has lapsed. Davey continues to audition for small films, while Eric tries to sell screenplays, earning money in the meantime as a daytime stringer. Eric’s time spent as a daytime

³ Should the Court desire a more extensive, scene-by-scene description of the two works with time references, *see Supp.Appx.Vol.I:64-92*.

stringer is not a major part of *Falling*. The film dedicates less than five minutes of total screen time to Eric visiting crime and accident scenes.

Both Eric and Davey emotionally struggle with the moral compromises their work requires—Eric taking violent footage or writing violent screenplays and Davey having an affair with a casting director in an attempt to get a movie part—and the effects those compromises have on their marriage. Their stories parallel the compromises they make as their relationship degrades, and as Eric laments the loss of his faith. At one point, while on a payphone with Davey, Eric randomly witnesses (rather than seeking out) a gang stabbing and murder, which he films rather than helping the victim and then sells the footage. This scene, less than halfway through the movie, is the last scene involving Eric acting as a stringer.

These moral failings inevitably lead to the destruction of Davey's and Eric's marriage, as well as each other. Davey reveals to Eric that she had an abortion and is not sure the baby was his. Eric responds by almost choking Davey to death. Eric then discovers that his boss, Hector, has been murdered by the gang members Eric recorded and that they have Eric's address. Eric speeds home to find Davey hanging from the ceiling, apparently staged by the same gang members. Eric then confronts the gang members and kills them in gratuitously violent fashion while being fatally stabbed himself. As Eric hallucinates near death, a sequence filled with religious imagery depicts Eric kneeling before a Christus statue at the LDS

Temple and begging God for help while stigmata-like cuts drip from his palms.

Then he dies and the movie ends.

Nightcrawler.

Nightcrawler is a film about a loner sociopath named Lou Bloom who, devoid of any moral compass, views the world in purely transactional terms and is unrestrained by empathy, guilt, or regret. Lou's ultimate triumph is a direct result of his lack of moral restraint and his elevation of business success over all else.

Nightcrawler has nothing to do with religion, aspiring actresses, or lost faith. It is a critique of capitalism designed to illustrate how an amoral system unduly rewards amoral actors like Lou at the expense of others.

Lou begins the film as a petty thief looking for a job. He comes across a nighttime accident scene and observes a stringer named Joe recording gruesome footage to sell to the local news. After Joe declines to give Lou a job, Lou decides to become a stringer on his own.

From that point on, *Nightcrawler* is occupied almost exclusively by Lou's (largely nighttime) stringer activities and his interaction with the news station to whom he sells his footage. Lou hires an "intern" named Rick to drive him around and help decode the police scanner. Over the course of several weeks, Lou becomes increasingly successful in selling his footage and upgrades his car and equipment. He also becomes increasingly valuable to Nina, the news director of

the local station who craves ratings. Lou uses this leverage to force Nina to go on a date with him, and then to sleep with him.

Lou's most lucrative footage comes when he races to a home invasion scene before the police and records two murderers leaving the premises, as well as graphic footage of the dead bodies inside. This footage is used by the news station to produce several stories designed to stoke fear of poor people invading rich neighborhoods—something that rates far higher than stories of crime in poor neighborhoods.⁴ Before selling the footage, however, Lou alters it to hide the identities of the murderers. He later uses this information to track them down and stage an elaborate police shootout that he also records. In the course of this shootout, several people are killed, including Rick, whom Lou intentionally lures into harm's way and records as Rick dies.

Following these events, Lou is interrogated by the police, to whom he successfully lies and escapes without consequence. The film ends with Lou at a new pinnacle of success, with two new vans and new “interns” driving off into the Los Angeles night.

⁴ This theme is part of *Nightcrawler*'s critique of capitalism—the idea that footage of crimes against poor people in poor neighborhoods does not sell because poor lives matter less. In that way, this scene could not be more different than the murder scene in *Falling*, which is in a poor part of town involving an apparently poor victim.

Dan Gilroy's Independent Creation of *Nightcrawler*

Dan Gilroy is one of Hollywood's most acclaimed screenwriters. Over a career that has stretched more than thirty years, he has written approximately thirty screenplays and co-written at least five more. Nine of his screenplays have been made into commercially-released films, including *Freejack* (1992), *Chasers* (1994), *Two for the Money* (2005), *The Fall* (2005), *The Bourne Legacy* (2012), *Kong: Skull Island* (2017), *Roman J. Israel, Esq.* (2017), and *Velvet Buzzsaw* (2019). Mr. Gilroy's work has garnered two Oscar nominations: a best actor nod for Denzel Washington for *Roman J. Israel, Esq.*, and a best original screenplay nomination for *Nightcrawler*. [Appx.Vol.III:496-97, 525; Supp.Appx.Vol.I:151.]⁵

Like many screenwriters, Mr. Gilroy's work has involved two basic types of screenplays—works for hire from studios, which are typically done on short eight-week deadlines, and what are known as “spec scripts,” unpaid projects based on Mr. Gilroy's own ideas that are developed over a much longer period of time with the goal of selling the script to a studio. Screenwriters typically work on spec scripts between paying work for studios. [Appx.Vol.III:503, 518-20; Supp.Appx.Vol.I:151.]

⁵ See also https://www.imdb.com/name/nm0319659/?ref_=fn_al_nm_1 (last visited December 23, 2019).

Nightcrawler fell in the latter category. Mr. Gilroy first had the idea to write a script based on a stringer more than *thirty years ago* in the mid-1980s, inspired by the work of Arthur “Weegee” Fellig. [Appx.Vol.III:498, 500, 503, 507, 531, 536; Supp.Appx.Vol.I:151-52.] Mr. Gilroy’s early work on *Nightcrawler* is documented in date-verified records from computer files from 1986 and 1990. [Appx.Vol.III:546-51; Supp.Appx.Vol.I:151-52, 157-227, 228-241.] Significantly, these records from three decades ago contain nearly all of the elements that Dutcher claims Mr. Gilroy copied from *Falling*, including:

- A stringer (first a photographer, then a videographer) who works at night, listens to a police scanner to hear about crimes and accidents, tries to arrive before police, and obtains photos/video footage to sell to news outlets.
- Competition with rival stringers and negotiations with news outlets.
- A suicide victim who jumps off a building, but the stringer arrives too late to record it.
- A climactic murder scene in which the stringer arrives before the cops and just as the murders are occurring; takes photos/footage of the scene; finds a dying victim still alive who “hold[s] out his bleeding hand,” but the stringer fails to render any assistance; and the stringer sells his work for “the highest payday [he] has ever had.”

[*Id.*; see also Appx.Vol.III:500, 503; Supp.Appx.Vol.I:108-109.]

Between paying studio jobs, Mr. Gilroy continued to work on the *Nightcrawler* idea on and off over the next twenty years. He took a significant hiatus after the release of *The Public Eye* (1992), starring Joe Pesci, which also featured a stringer who uses police scanners to learn about crime scenes, takes

violent photographs, and sells them to newspapers. Because Mr. Gilroy, like most screenwriters, strives to create original works, the release of *The Public Eye* dampened Mr. Gilroy's enthusiasm for the *Nightcrawler* project for some time. [Supp.Appx.Vol.I:152.]

In 2005, however, NPR aired a story about real-life stringers entitled “*Searching Out Mayhem with Video ‘Nightcrawlers’*” detailing the often violent and dangerous work of stringers in Los Angeles. As NPR summarized the story: They've been called the nightcrawlers of Los Angeles television—freelance videographers who chase shootings, fires, accidents and homicides to sell later to local television news stations.

The shooters, armed with cameras and police scanners, prowl the nocturnal Los Angeles metro area. Each siren wail or 911 call could be the sound of their next windfall—a choice piece of videotape can earn the shooter up to \$10,000 a single night—but it's also a dangerous way to make a living.

[Supp.Appx.Vol.I:153, 242-243; *see also* conventionally filed audio story.]

The NPR story rekindled Mr. Gilroy's interest in the *Nightcrawler* project, and he returned to writing treatments in 2005 and 2006. Shortly after hearing the story, Mr. Gilroy's 2005 notes describe an idea for “Weegie-like video news-chaser” who is “[a]lways there first.... Arrives at a crime scene where a shooting victim is still alive. Next moment, the guy is dead.” [Appx.Vol.III:523-24, 553-54; Supp.Appx.Vol.I:153.] Another date-verified document from 2006 contains the following notable elements:

- The protagonists become stringers after happening upon a scene and observing others doing it (much like Lou Bloom in *Nightcrawler*).
- The use of police scanners and navigators to race around Los Angeles at night using increasingly super-charged vehicles and better technology.
- Intense competition among different stringer crews, including sabotage.
- Sale of a tape for \$10,000.
- A main stringer character who is a violent sociopath.

[Supp.Appx.Vol.I:153, 244-265.]

Over the next several years, again between paying jobs, Mr. Gilroy continued to experiment with various ideas, including multiple adolescent protagonists who use chaos theory to predict accidents and crimes. But he ultimately returned to the idea of a single protagonist, as he had started in the 1980s, this time as a sociopath anti-hero. [Appx.Vol.III:517-18, 528-30, 555-670; Supp.Appx.Vol.I:153-154, 266-287, Vol.II:328-435, Vol.III:476-546, Vol.IV:587-702, Vol.V:743-853.]

In 2012, Mr. Gilroy began transforming his hundreds of pages of notes and research into a screenplay. [Supp.Appx.Vol.I:154, Vol.VI:894-1013, Vol.VII:1054-1181, Vol.VIII:1222-1243.] He worked extensively on the screenplay in Fall of 2012 while he was in London with his wife, Rene Russo, who was filming *Thor*. [Appx.Vol.III:503-04; Supp.Appx.Vol.I:155, Vol.VIII:1244-1353, Vol.IX:1394-1527, Vol.X:1568-1658.] Mr. Gilroy completed the final script on October 9, 2012, and ultimately sold it to Bold, which produced *Nightcrawler*

the following year. [Appx.Vol.III:543-44; Supp.Appx.Vol.I:155, Vol.X:1659-1683, Vol.XI:1724-1882, Vol.XII:1923-2065.]

None of the foregoing is subject to any credible dispute. It is documented in *thousands of pages* of notes, treatments, and scripts from Mr. Gilroy's computers, all of which have been date-verified back to the 1980s, [Supp.Appx.Vol.I:157-227], and show the meticulous progression of the *Nightcrawler* idea from conception to completion. Mr. Gilroy's sworn testimony is that he wrote "every word, every comma" of the screenplay. [Appx.Vol.III:505; Supp.Appx.Vol.I:155.]

Had Mr. Gilroy known about *Falling* when he was working on *Nightcrawler* in the mid-2000s, perhaps it would have dampened his enthusiasm like *The Public Eye* did in 1992. But hardly anyone knew about *Falling* because it was never commercially released. It was essentially a niche LDS-themed film that Dutcher was unable to sell and screened only a handful of times in Utah and California beginning in 2008. [Supp.Appx.Vol.I:133-140.] It is undisputed that neither Mr. Gilroy nor anyone connected to him had even heard of Dutcher, much less seen *Falling*, prior to the initiation of this action. [Appx. Vol.III:540; Supp.Appx.Vol.I:105, 110, 133-135, 155.]

Prior Stringer Works

As the district court noted, "*Falling* is not the first work to portray stringers in action." [Appellant's Addendum ("Add.") 31.] In conducting its filtration

analysis and determining *scènes à faire* on summary judgment, the district court had before it multiple other works involving stringers, all of which predate *Falling*, (the “Prior Stringer Works”). Those works, which have been conventionally filed with this Court, “contain[] all of the significant stringer themes that Plaintiff claims are independent creations in *Falling*.¹” [Id.] They include:

***The Public Eye (1992)*.** This film stars Joe Pesci as a crime scene photographer named Bernstein, based on real-life stringer “Weegee,” who uses police scanners and obtains graphic photographs to sell to the local newspaper. The film builds to a climax in which Bernstein, like Eric in *Falling*, hides in the shadows of a restaurant and photographs a shooting but makes no attempt to help any of the victims. Bernstein then arranges to publish the photographs and, like Eric, finds himself on the other end of the camera when he makes front page news.

***Prime Time Murder (1992)*.** In this film, an experienced stringer named Frank discovers a serial killer is murdering homeless people in Los Angeles. While this film is a mystery rather than a morality tale, *Prime Time Murder* contains numerous references to religion. Many scenes take place in a Christian mission, Frank has a conversation about religion, the director of the charitable mission is revealed to be the killer, and the final scene involves a discussion of the biblical passage “do unto others as you would have others do unto you.”

Stringer (1999). This film follows an aspiring director named Filo who works for a sketchy middleman named Wolko, played by Burt Reynolds. On his first assignment, Filo records a man trapped inside a burning vehicle while firefighters are attempting to save him, and he later struggles, like Eric in *Falling*, with the morality of his job. Over time, Filo relinquishes his morality in favor of obtaining more sensational and lucrative footage. In a significant murder scene, Filo races to a grocery store after hearing a police scanner report shots fired, films a dying man, and fails to render aid. The film ends when Filo kidnaps his estranged girlfriend, records himself shooting her, turns the camera on himself, and shoots himself after telling viewers to “enjoy the show.”⁶

The Ghouls (2004). In this low-budget horror film, a stringer named Eric discovers there are ghouls living in the sewers of Los Angeles. In the opening sequence, Eric films a brutal stabbing and makes no effort to help the victim. Eric then taunts a competitor just arriving on scene that “you are a day late and a dollar short, my friend,” and sells his footage to the local news. Eric later witnesses an assault without rendering aid, fantasizes about putting a gun in his mouth, and finds footage of a rape/murder that he sells for a lucrative payday.

⁶ The similarities between *Falling* and *Stringer* are truly uncanny. For a full breakdown, see Appx. Vol.III:461-70. Of course, no one contends Dutcher copied *Stringer* in making *Falling*, which is precisely the point.

Searching Out Mayhem with Video “Nightcrawlers” (NPR 2005). This story on real-life stringers in Los Angeles describes the profession in detail and follows several stringers as they track accident and crime scenes, compete with other stringers, and try to sell their footage to local news stations. The broadcast specifically references a \$10,000 payout.

Stringers: LA (truTV 2007-2008). This twelve-episode reality television series showcases the work of real-life stringers in Los Angeles. The series shows multiple stringers driving around, listening to police scanners, getting past crime tape, and recording sensational footage such as car chases, fires, police shootings, etc., to sell to the local news.

2. Relevant Procedural History

Dutcher initiated this action on February 19, 2015, alleging a single claim for copyright infringement against Bold (the producer of *Nightcrawler*) and Open Road, NBCUniversal, and USHE (distributors of *Nightcrawler*).⁷ [Supp.Appx.Vol.I:40-63.] Dutcher then filed a Motion for Preliminary Injunction seeking to enjoin the further distribution of *Nightcrawler*. Defendants filed a Motion to Dismiss for Failure to State a Claim. The district court denied both motions and allowed the case to proceed to discovery. [Appx.Vol.I:45-260.]

⁷ USHE was added by later amendment. [Appx.Vol.II:347-54.]

Following discovery, in early 2018, Defendants filed two motions for summary judgment—one on the issue of access/striking similarity, and one on the issue of substantial similarity. [Appx.Vol.I:438-670, Vol.II:671-733.] In cursory rulings made without oral argument, the district court denied both motions without elaboration, stating simply that it found fact issues for trial. [Add. 21-22; Supp.Appx.Vol.XIV:2444-2445.]

As trial approached, Defendants filed a motion in limine to preclude argument to the jury about which elements of *Falling* were legally protected—a determination properly made by the court. [Appx.Vol.VI:1350-55.] In considering this motion, the district court concluded that Dutcher was wrong in asserting that the court was powerless to filter unprotected elements from a subject work in determining whether a reasonable jury could find substantial similarity. The district court reconsidered its earlier denial of Defendants' motion for summary judgment on substantial similarity, conducted the requisite filtration analysis, and concluded that no reasonable jury could find that *Nightcrawler* is substantially similar to the *protected* elements of *Falling*. [Add. 25-26.] The district court granted summary judgment to Defendants, rejected serial challenges by Dutcher to vacate that decision, and dismissed the case. [Add. 27-36.]

Dutcher attempts to make much of the fact that the district court changed its mind when reconsidering its earlier rulings that substantial similarity was an issue

for the jury. This is a red herring. It is settled law that “district courts generally remain free to reconsider their earlier interlocutory orders” at any time prior to final judgment. *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1225 (10th Cir. 2007); *accord Fed. R. Civ. P. 54(b)*. A district court is not forever bound to conclusions it reaches early in a case, regardless of how the briefing or evidence may develop.

Moreover, with respect to the motion to dismiss ruling, the district court did not have before it the other stringer-related works that were central to its ultimate conclusion that Dutcher’s alleged similarities were simply *scènes à faire*. It only had Dutcher’s assertion that he was the first to create a work about a stringer, which was incorrect.

As for the district court’s subsequent summary judgment ruling that it later reconsidered, the district court originally seemed to accept Dutcher’s incorrect assertion that the court could not assess whether the elements in *Falling* Dutcher claimed were copied were protected as a matter of law. When the issue arose again before trial, and at Defendants’ invitation, the court apparently took a closer look at the dozens of copyright cases cited in Defendants’ prior summary judgment motion in which courts have done exactly that. [Appx.Vol.VII:1443-1446.] In

doing so, the district court got the law right, and the fact that it was the result of reconsideration does nothing to establish error on appeal.⁸

SUMMARY OF THE ARGUMENT

The district court correctly concluded that no reasonable jury could find *Nightcrawler* is substantially similar to protected elements of *Falling*. In determining that certain elements of *Falling* that Dutcher claimed were copied were unprotected as a matter of law, either because they were *scènes à faire* or otherwise, the district court engaged in the filtration analysis this Court has said is proper in copyright cases. The district court's conclusion that any similarity related only to those unprotected elements was likewise correct.

The district court's dismissal also can be affirmed on the alternative ground that there was no evidence of copying as a factual matter. Prior to this action, Dan Gilroy had never heard of Dutcher or seen his obscure film *Falling*. There was no competent evidence of access below, and *Falling* and *Nightcrawler* are not strikingly similar.

On either ground, the district court's decision should be affirmed.

⁸ Cf. *Towler v. Sayles*, 76 F.3d 579, 581-85 (4th Cir. 1996) (affirming district court's directed verdict to defendants following jury verdict on substantial similarity issue regarding film *Passion Fish*).

ARGUMENT

The Copyright Act protects “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). To fairly weigh the interests of authors and the public, copyright protection extends only to “the components of a work that are original to the author and possess at least some minimal degree of creativity,” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 348 (1991), not to the ideas underlying the original expression. See *Blehm v. Jacobs*, 702 F.3d 1193, 1200 (10th Cir. 2012). Stated more directly, “copyright laws do not protect *ideas*, but only *particular expressions of ideas*,” *Arden v. Columbia Pictures Indus., Inc.*, 908 F. Supp. 1248, 1249 (S.D.N.Y. 1995) (emphasis added), or “the original or unique *way* that an author expresses those ideas,” *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986) (emphasis added).

The reason for this balance is that copyright law recognizes “society’s competing interests in the free flow of ideas [and] information.” *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984). To prohibit the use of ideas would stifle creativity and disrupt the public interest balance. See *Blehm*, 702 F.3d at 1201.

Mindful of this public interest balance, infringement may be established only where a valid copyright exists and the second work actually copied *protectable* elements of the first work. See *La Resolana Architects v. Reno, Inc.*, 555 F.3d

1171, 1177 (10th Cir. 2009) (emphasis added). For purposes of this appeal, Defendants do not dispute that Dutcher has a valid copyright in *Falling*. The only question is whether copying of protected elements occurred.

The “copying element of an infringement claim has two components.” *Blehm*, 702 F.3d at 1199. “First, a plaintiff must demonstrate that the defendant copied the plaintiff’s work ‘as a factual matter.’” *Id.* (citation omitted). This is often referred to as the “access” element. *Id.* Second, even if access is adequately shown, “the plaintiff must establish ‘substantial similarity’ between the allegedly infringing work and the elements of the copyrighted work that are legally protected.” *Id.* (citation omitted).

Because the district court’s decision rested on the second component—lack of substantial similarity—this brief addresses that issue first. But it is equally clear from the record that Dutcher also failed to satisfy the access element, and the district court’s decision may also be affirmed on that alternative ground.

I. The District Court Correctly Concluded That No Reasonable Jury Could Find *Nightcrawler* is Substantially Similar to Protected Elements of *Falling*.

“The mere fact that a work is copyrighted does not mean that every element of the work may be protected.” *Feist*, 499 U.S. at 348. Even if copied verbatim, unprotected elements “cannot serve as the basis for ultimate liability for copyright infringement.” *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 833

(10th Cir. 1993). “[L]iability for copyright infringement can only attach where **protected elements** of a copyrighted work are copied.” *Madrid v. Chronicle Books*, 209 F. Supp. 2d 1227, 1237 (D. Wyo. 2002) (emphasis added).

Among elements of a work that are not protectable by copyright are “ideas, concepts, and principles.” *Gates Rubber*, 9 F.3d at 836. “[W]here the protected work and the accused work express the same idea, the similarity that inevitably stems solely from the commonality of the subject matter is not proof of unlawful copying.” *Country Kids ‘N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1285 (10th Cir. 1996). Similarly unprotectable is “material in the public domain.” *Madrid*, 209 F. Supp. 2d at 1241. In any substantial similarity analysis, courts must “filter out all unoriginal elements of a [work], including those elements that are found in the public domain.” *Gates Rubber Co.*, 9 F.3d at 837-38.

Of particular significance here, copyright also does not protect what is referred to as *scènes à faire*. That doctrine “excludes from copyright protection material that is ‘standard,’ ‘stock,’ or ‘common’ to a particular topic, or that ‘necessarily follows from a common theme or setting.’” *Autoskill Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1494 (10th Cir. 1993), overruled on other grounds, *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011). This doctrine eliminates not only stock elements, such as the “familiar figure of the Irish cop” in police fiction, *Walker*, 784 F.2d at 50, but also “thematic

concepts or scenes which necessarily must follow from certain similar plot situations.” *Smith v. Weinstein*, 578 F. Supp. 1297, 1302 (S.D.N.Y. 1984).

“Thus, courts comparing works must first distill the protectable elements of the copyrighted work—i.e., determine what aspects constitute protectable expression.” *Blehm*, 702 F.3d at 1200. A court may find non-infringement and dismiss a copyright claim on summary judgment “where the similarity between the works concerns only non-copyrightable elements of the plaintiff’s work or no reasonable jury could find the two works to be substantially similar.” *Madrid*, 209 F. Supp. 2d at 1239.

That is precisely what the district court did here. It reviewed both films and “the contents of previous works submitted by Defendants,” the Prior Stringer Works. [Add. 31.] That review revealed the elements Dutcher claims were copied necessarily flowed from the “significant stringer themes that Plaintiff claims are independent creations in *Falling*. ” [Id.] On that basis, the district court concluded that, “[a]bsent unprotected material, particularly the *scenes a faire* that are consistently found in the Prior Stringer Films, no reasonable jury could find that *Nightcrawler* is substantially similar to *Falling*. ” [Id. 33.]

Although the organization of his brief is unclear, Dutcher makes four basic arguments why he believes the district court’s analysis was wrong. First, he claims the district court is powerless to determine whether certain elements are protected

as a matter of law, and must send that issue to the jury. Second, he argues the district court erred in applying this Court’s “abstraction-filtration-comparison” test to determine what was protected. Third, he argues the district court’s *scènes à faire* analysis was flawed and should not have considered any of the Prior Stringer Works. Fourth, he argues *Nightcrawler* and *Falling* are substantially similar. Each argument fails.

A. The District Court Properly Filtered Unprotected Elements of *Falling* as a Matter of Law.

The vast majority of Dutcher’s brief rests on the assertion that a district court cannot determine as a matter of law which elements of a copyrighted work are legally protected. According to Dutcher, any time a plaintiff believes the works are similar, the issue is contested and must go to the jury.

There is no support for Dutcher’s assertion. If that were the law, no copyright case would ever be decided on summary judgment. Yet this Court has affirmed dismissals as a matter of law based on lack of substantial similarity after the district court properly filtered unprotected elements. *See Blehm*, 702 F.3d at 1200-01; *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1138-46 (10th Cir. 2016); *Fisher v. United Feature Syndicate, Inc.*, 203 F.3d 834 (2000) (unpublished).

Other courts have confirmed that “the filtration analysis is a matter of law for the Court, rather than for the jury.” *Harbor Software, Inc. v. Applied Sys., Inc.*, 925 F. Supp. 1042, 1046 (S.D.N.Y.1996). As one court explained:

The decision of what constitutes “protected expression” must be made by the court as a legal matter. Once this determination is made, the question of whether two works are substantially similar (and corresponding application of the ordinary observer test) is a matter for the trier of fact[.]

TMTV, Corp. v. Mass Prods., Inc., 345 F. Supp. 2d 196, 211 (D.P.R. 2004) (citation omitted), *aff'd*, 645 F.3d 464 (1st Cir. 2011); *Peter F. Gaito Architecture, LLC v. Simone Dev. Co.*, 602 F.3d 57, 63 (2d Cir. 2010) (“[W]e have repeatedly recognized that, in certain circumstances, it is entirely appropriate for a district court to resolve [substantial similarity] as a matter of law[.]”); *Kendall Holdings, Ltd. v. Eden Cryogenics LLC*, 630 F. Supp. 2d 853, 865 (S.D. Ohio 2008) (role of filtration is for court; trier of fact then assesses similarity of protected elements).

In the overwhelming majority of copyright cases involving film and literary works—many involving challenges to well-known films and television series—courts regularly grant summary judgment in favor of defendants on substantial similarity grounds after filtering out unprotected elements as a matter of law.⁹ Indeed, courts routinely dismiss claims even earlier at the motion to dismiss

⁹ See, e.g., *Madrid*, 209 F. Supp. 2d at 1230-46 (*Monster's Inc.*); *O'Neill v. Dell Pub. Co., Inc.*, 630 F.2d 685, 686-90 (1st Cir. 1980) (novel); *Williams v. Crichton*, 84 F.3d 581, 582-91 (2d Cir. 1996) (*Jurassic Park*); *Walker*, 784 F.2d at 46-51 (*Fort Apache: The Bronx*); *Nash v. CBS, Inc.*, 899 F.2d 1537, 1538-43 (7th Cir. 1990) (*Simon and Simon*); *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1078-81 (9th Cir. 2006) (*Six Feet Under*); *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994) (*Honey, I Shrunk the Kids*); *Berkic v. Crichton*, 761 F.2d 1289, 1293-94 (9th Cir. 1985) (*Coma*); *Litchfield v. Spielberg*, 736 F.2d 1352, 1356-57 (9th Cir. 1984) (*E.T.—the Extraterrestrial*);

stage on the basis that “no discovery or fact-finding is typically necessary” when making substantial similarity determinations because “what is required is only a ... comparison of the works[.]” *Montgomery v. Holland*, __ F. Supp. 3d __, No. 17-CV-3489, 2019 WL 4748056, at *5 (S.D.N.Y. Sept. 30, 2019).¹⁰

Beal v. Paramount Pictures Corp., 20 F.3d 454, 460-64 (11th Cir. 1994) (*Coming to America*); *Muller v. Twentieth Century Fox Film Corp.*, 794 F. Supp. 2d 429, 444-48 (S.D.N.Y. 2011) (*AVP: Alien v. Predator*); *Blakeman v. The Walt Disney Co.*, 613 F. Supp. 2d 288, 306-15 (E.D.N.Y. 2009) (*Swing Vote*); *Mallery v. NBC Universal, Inc.*, No. 07 CIV. 2250, 2007 WL 4258196, at *6-8 (S.D.N.Y. Dec. 3, 2007) (unpublished) (*Heroes*); *Chivalry Film Prods. v. NBC Universal, Inc.*, No. 05 Civ. 5627 (GEL), 2006 WL 3780900 (S.D.N.Y. Dec. 22, 2006) (unpublished) (*Meet the Parents* and *Meet the Fockers*); *Hogan v. DC Comics*, 48 F. Supp. 2d 298, 310-11 (S.D.N.Y. 1999) (comic book); *Arden*, 908 F. Supp. at 1249-63 (*Groundhog Day*); *Robinson v. Viacom Int'l, Inc.*, No. 93 CIV. 2539, 1995 WL 417076, at *7-11 (S.D.N.Y. July 13, 1995) (unpublished) (*Hi Honey! I'm Home*); *Sinicola v. Warner Bros., Inc.*, 948 F. Supp. 1176, 1177, 1184-91 (E.D.N.Y. 1996) (*Out for Justice*); *Denker v. Uhry*, 820 F. Supp. 722, 724-36 (S.D.N.Y. 1992) (*Driving Miss Daisy*); *Smith v. Weinstein*, 578 F. Supp. 1297, 1301-04 (S.D.N.Y. 1984) (*Stir Crazy*); *Knowles v. Spin Master, Inc.*, Case No. CV 18-5827 PA (JCx), 2019 WL 4565102, at *1, 6-8 (C.D. Cal. September 17, 2019) (unpublished) (*Rusty Rivets*); *Shame on You Productions, Inc. v. Banks*, 120 F. Supp. 3d 1123, 1123-24, 1151-69 (C.D. Cal. 2015) (*Walk of Shame*); *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1048-52, 1059-72 (C.D. Cal. 2010) (*Desperate Housewives*); *Sheldon Abend Revocable Tr. v. Spielberg*, 748 F. Supp. 2d 200, 208-10 (S.D.N.Y. 2010) (*Disturbia*); *Gable v. NBC*, 727 F. Supp. 2d 815, 838-48 (C.D. Cal. 2010) (*My Name is Earl*); *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1111-12 (E.D.N.Y. 1985) (*Raiders of the Lost Ark*); *Vallejo v. Narcos Prods. LLC*, Case No. 18-23462-CIV-SMITH, 2019 WL 5867970, at *1- (S.D. Fla. Nov. 9, 2019) (unpublished) (*Narcos*); *DuBay v. King*, 366 F. Supp. 3d 1330, 1350 (M.D. Fla. 2019) (novel); cf. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930) (seminal opinion by Judge Learned Hand dismissing claim as a matter of law).

¹⁰ See, e.g., *Esplanade Prods., Inc. v. Walt Disney Co.*, 768 F. App'x 732 (9th Cir. 2019) (unpublished) (*Zootopia*); *Sawicky v. AMC Networks Inc.*, 753 F. App'x

The important role district courts play as gatekeepers in filtering unprotected elements is so fundamental that in *Murray Hill Publications v. Twentieth Century Fox Film Corp.*, 361 F.3d 312 (6th Cir. 2004), the Sixth Circuit reversed a \$1.5 million jury verdict involving the film *Jingle All The Way* because the district court **failed** to filter out unprotected elements before sending the case to the jury. After conducting that filtration analysis itself, the court concluded that no reasonable jury could have found the works were substantially similar as to protected elements and directed judgment in favor of defendants. See *id.* at 321-26.¹¹

To be sure, this Court has observed that filtering unprotected elements from protected expression is the most difficult part of any substantial similarity inquiry, *Gates Rubber*, 9 F.3d at 834, and “drawing the line between what is protected and

501, 501 (9th Cir. 2019) (unpublished) (*Growing Up Hip Hop*); *Montgomery*, 2019 WL 4748056, at *1-18 (*Rosemary’s Baby*); *Abdin v. CBS Broadcasting, Inc.*, No. 18 Civ. 7543, 2019 WL 4572676, at *1-6 (S.D.N.Y. Sept. 20, 2019) (unpublished) (*Star Trek: Discovery*); *Shull v. TBTF Productions Inc.*, No. 18 Civ. 12400, 2019 WL 5287923, at *1-14 (S.D.N.Y. Oct. 4, 2019) (unpublished) (*Billions*); *Castro v. Cusak*, 15-cv-6714 (ENV) (LB), 2019 WL 3385218, at *1, 7-10 (E.D.N.Y. July 26, 2019) (unpublished) (*Empire*); *Williams v. A&E Television Networks*, 122 F. Supp.3d 157, 159-65 (S.D.N.Y. 2015) (*Married at First Sight*); *Acker v. King*, 46 F. Supp. 3d 168, 175 (D. Conn. 2014) (Stephen King novel); *Allen v. Scholastic Inc.*, 739 F. Supp. 2d 642, 664 (S.D.N.Y. 2011) (*Harry Potter and the Goblet of Fire*); *Hoff v. Walt Disney Pictures*, Case No. EDCV 19-00665 AG (KKx), 2019 WL 6329368, at *1-5 (C.D. Cal. August 19, 2019) (unpublished) (*Zootopia*); *Silas v. Home Box Office, Inc.*, 201 F. Supp. 3d 1158, 1173-83 (C.D. Cal. 2016), aff’d 713 F. App’x 626 (9th Cir. 2018) (*Ballers*).

¹¹ For more comprehensive explanatory parentheticals for many of the cases cited above, see Appx.Vol.IV:727-33.

what is not will seem arbitrary.” *Blehm*, 702 F.3d at 1201 (quotations omitted).

But as Judge Learned Hand observed, “that is no excuse for not drawing it.” *Id.* (quoting *Nichols*, 45 F.2d at 122).

In examining the record and determining that the similarities Dutcher alleged were unprotected ideas and *scènes à faire*, the district court was not only well within its proper role—it was fulfilling its fundamental duty in copyright cases to determine what is protected as a matter of law.

B. The District Court’s Use of the Abstraction-Filtration-Comparison Test Was Proper.

Dutcher also asserts that the district court erred by applying this Court’s “abstraction-filtration-comparison” test. Dutcher argues that that test only applies to computer software cases, and the district court instead should have applied the “ordinary observer” test.

This argument is simply confused. There is no independent “ordinary observer” test separate from the abstraction-filtration-comparison test. They are part of the same test. The ordinary reasonable observer standard is simply the lens through which a substantial similarity comparison is conducted *after* a court has filtered out unprotected elements of a given work, using either the abstraction-filtration-comparison test or whatever other filtration method the court believes is appropriate. *See, e.g., Blehm*, 702 F.3d at 1200, 1202 (“courts comparing works must first distill the protectable elements of a copyrighted work—i.e., determine

what aspects constitute protectable expression” and then “determine whether the protected elements are substantially similar to the accused works” as viewed through the eyes of an ordinary reasonable observer).

The district court found the abstraction-filtration-comparison framework helpful for distilling the protected elements of *Falling*. In using that test for a motion picture, it was not alone. The Wyoming district court did the same thing when analyzing Pixar’s *Monster’s Inc.* See *Madrid*, 209 F. Supp. 2d at 1241. But nothing of importance turns on the name of the test. Whatever the test is called, this Court has made clear that “our goal is the same: separating unprotectable ideas from protectable expression.” *Blehm*, 702 F.3d at 1201 n.4; see also *Jacobsen v. Deseret Book Co.*, 287 F.3d 936 n.5 (10th Cir. 2002). As the Eleventh Circuit explained:

It is essential that one keep in mind that the approaches adopted by the other circuits merely are a means to a very important end: filtering out all unprotectable material. Sometimes parties become so engrossed in disputing what “test” should be applied that they lose sight of what the tests were designed to accomplish in the first place. To paraphrase a sage observer, “if you don’t know where you’re goin’, when you get there you’ll be lost.”

Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1545 n.27 (11th Cir. 1996).

As this Court noted in *Savant Homes*, “[t]he district court’s ostensible application of the AFC [abstraction-filtration-comparison] test involved no more than what every substantial similarity analysis must entail: identifying a work’s

protectable elements and determining whether there is substantial similarity between the accused work and those elements.” [809 F.3d at 1144 n.10](#). The district court did exactly that here, then applied the ordinary reasonable observer test in determining that “no reasonable fact-finder could determine that *Nightcrawler* is substantially similar to the protectable elements of *Falling*.” [Add. 33-34.] That is precisely how this Court has said the analysis should proceed.¹²

C. The District Court’s *Scènes à Faire* Analysis Was Correct.

Though he scatters them throughout his brief, Dutcher makes several arguments attacking the district court’s *scènes à faire* analysis. Dutcher’s primary argument is that the district court erred in considering the Prior Stringer Works because they are obscure, and therefore there is no “stringer genre.”

Contrary to Dutcher’s assertion, the six different films involving stringers (including *Falling* and *Nightcrawler*), the twelve episodes of *Stringers: LA*, and the fact that a stringer is a real-life profession that has been documented in books,

¹² Dutcher also cursorily argues that the abstraction-filtration-comparison test violates the Copyright Act by taking the issue of originality from the jury, and that this Court should abandon *Gates Rubber* and its progeny. [Br. at 54-58.] This is not a serious argument. It is tantamount to asserting that the district court can never make legal determinations about what is protected as a matter of law, forcing every infringement case to a jury, contrary to both this Court’s precedent and all of the extensive authority cited above. And in any event, Dutcher never raised that argument below, so it is unpreserved here. See [United States v. Leffler](#), 942 F.3d 1192, 1196 (10th Cir. 2019).

television shows, and news stories is more than enough to inform what elements, scenarios, and actions are common to a story about a stringer protagonist. But ultimately, whether there is an established “stringer genre” is irrelevant. When determining whether elements are unprotected *scènes à faire*, the question is not whether there is an established genre, but whether the material “necessarily follows from a common theme or setting,” *Autoskill Inc.*, 994 F.2d at 1494, “inevitably stems … from the commonality of the subject matter,” *Country Kids*, 77 F.3d at 1284, or involves “sequences of events that necessarily result from the choice of a setting or situation,” *Blakeman.*, 613 F. Supp. 2d at 605. The Prior Stringer Works before the district court, as well as Mr. Gilroy’s own independent creation materials containing the same elements, were sufficient to make that assessment.

Dutcher also argues that the Prior Stringer Works are irrelevant because he barely remembers *The Public Eye* and never saw the others. But that too is beside the point. Indeed, it cuts the other way—the fact that other works have many of the same elements as *Falling* despite Dutcher having never seen them only underscores why those elements necessarily follow from a story about a stringer.

Dutcher next asserts that *scènes à faire* is an affirmative defense, citing an unpublished district court decision and two cases from other circuits. While this Court has never directly spoken to this issue, it has been clear that “to establish copyright infringement, *plaintiff* must prove … that the defendant copied

protectable elements of the copyrighted work.” *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1370 (10th Cir. 1997) (emphasis added); *see also Gates Rubber*, 9 F.3d at 832. Such proof necessarily requires demonstration that the allegedly copied elements are not *scènes à faire*, and thus protected. Ultimately, however, nothing hinges on this issue. The district court made its decision on summary judgment, not a motion to dismiss, and Defendants pled *scènes à faire* as an affirmative defense. [Appx.Vol.IV:886.] Even if Defendants bore the burden of proving *scènes à faire*, they satisfied it by submitting the Prior Stringers Works and Mr. Gilroy’s independent creation materials to the court.

Finally, Dutcher asserts *scènes à faire* is a question of fact that should be decided by the jury, citing *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004). But that is not what *Swirsky* says. It says that it “is inappropriate to grant summary judgment on the basis of *scènes à faire without independent evidence*, unless the allegation of *scènes à faire* is uncontested.” *Id.* at 850 (emphasis added). Here, the district court had independent evidence. And like Dutcher’s broader argument that all similarity cases must go to the jury, his specific assertion that a district court cannot assess and filter *scènes à faire* as a matter of law is incorrect and has been

rejected by this Court and numerous others. *See Fisher*, 203 F.3d at 834 (affirming grant of motion to dismiss based on *scènes à faire*); *see also supra* nn. 9-10.¹³

D. The District Court’s Substantial Similarity Conclusion Was Correct.

Finally, Dutcher challenges the district court’s conclusion that there are no substantial similarities between *Nightcrawler* and protected elements of *Falling*. But after properly filtering out unprotected elements, there is no question the district court correctly entered summary judgment in favor of Defendants.

1. Illustrative Example.

This Court could pick any one of the forty cases Defendants cite in footnotes 9 and 10 above to see why the district court got it right here, but *Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996), is illustrative. There, the plaintiff claimed the novel and film *Jurassic Park* infringed on his *Dinosaur World* books, which take place in a man-made animal dinosaur park where ordinary people can “visit,

¹³ The other two cases Dutcher cites for the argument that originality is always a jury question are even worse for him. Dutcher quotes *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1517 (1st Cir. 1996), [Br. at 39], but omits the following bolded language: “**While we do not dispute that** the question of originality can be a question of fact for the jury, **it is not necessarily so....** **[C]ourts clearly may determine the question of originality and, in turn, copyrightability so long as they do so in accord with the familiar rules governing summary judgment[.]**” And in *Brighton Collectibles v. RK Texas Leather Mfg.*, No. 10-CV-419-GPC, 2012 WL 6553403, at *9 (C.D. Cal. Dec. 13, 2012), the court likewise held that “[s]ubstantial similarity is a fact-specific inquiry, but it ‘may often be decided as a matter of law.’” (Citation omitted).

tour, and observe the creatures in a natural but hi-tech controlled habitat.” *Id.* at 582-83. Both works share common ideas and elements, such as a brother and sister who are chased by packs of carnivorous dinosaurs after an electric fence fails, and a boy who becomes lost after taking an automated tour of the park. *See id.* at 583-87.

Access to the plaintiff’s books was presumed, so the case “turn[ed] upon the second part of the [infringement] test: whether, in the eyes of the average lay observer, the *Jurassic Park* works are substantially similar to the protectible expression in the *Dinosaur World* books.” *Id.* at 587. Walking through the abstractions common to literary works—e.g., theme, characters, plot, sequence, pace, and setting—and filtering out unprotected elements, the Second Circuit affirmed that no reasonable jury could find the works were substantially similar.

Id. at 588.

Beginning with themes, the court reasoned the two works were similar only as to the unprotectable idea of a dinosaur zoo. “Once one goes beyond this level of abstraction, the similarity in themes disappears. The *Jurassic Park* works involve genetic engineering, ego, greed, and the consequences of man’s hubris in believing that nature can be controlled,” which the court recognized were absent from the *Dinosaur World* books. *Id.* at 589.

The court likewise reasoned the shared setting of a dinosaur zoo park “with electrified fences, automated tours, dinosaur nurseries, and uniformed workers” were “classic *scenes à faire* that flowed from the uncopyrightable concept of a dinosaur zoo.” *Id.*

Regarding characters, the court recognized that both works featured siblings, including brothers who were dinosaur enthusiasts, and characters who “spend the night in the dinosaur zoo and escape from dangerous dinosaurs by helicopter through the combined wit of the children and adults.” *Id.* Nevertheless, these similarities did “not suggest infringement” because “[w]hen one looks beyond the superficial similarities of the characters, many differences emerge, including the motivations for the characters’ trip to the dinosaur parks, the skills and credentials of the characters, and their interpersonal relationships” such that “no reasonable observer would find substantial similarity.” *Id.*

As for plot and sequence, the plaintiff pointed to several specific similarities, such as dinosaurs escaping from paddock fences and characters escaping pack-hunting dinosaurs through the intervention of another dinosaur and a helicopter.

Id. n.3. Although the scenes “appear[ed] similar in their abstract description,” they “prove[d] to be quite dissimilar once examined in any detail.” *Id. at 590.* For example, the dinosaurs were not purposefully hunting the humans in the plaintiff’s books as the velociraptors did in *Jurassic Park*. *Id.* Similarly, in plaintiff’s books

the intervening dinosaur was “unsuspecting, non-threatening but well-armored, whereas the tyrannosaurus rex in the movie is itself a marauding beast that has terrorized the characters throughout much of the action.” *Id.*

Consequently, when the court analyzed how the scenes were expressed after filtering out unprotected idea elements, the court concluded that no lay observer would find substantial similarities between the protectable material from the works and affirmed summary judgment in favor of defendants. *See id.*¹⁴

¹⁴ Dutcher relies on *Latele Television C.A. v. Telemundo Communications Group*, No. 12-225390-CIV, 2013 WL 1296314 (S.D. Fla. Mar. 27, 2013), as supporting his sequence of events argument. But *Latele* was decided on a motion to dismiss, and the court inexplicably accepted the plaintiff’s comparisons described in the complaint “at face value” rather than reviewing the works themselves, contrary to clear governing law. *See id.* at *8.

Similarly, *Metcalf v. Bochco*, 294 F.3d 1069, (9th Cir. 2002), was decided on a motion to dismiss without the benefit of independent creation evidence or other works containing many of the same sequence of elements. Courts have since interpreted *Metcalf* narrowly and been reluctant to expand it without a striking overlap between nonprotectable elements. *See 8th Wonder Entm’t, LLC v. Viacom Int’l, Inc.*, Case No. 2:14-cv-01748-DDP-JCG, at *8 (C.D. Cal. Nov. 21, 2016) (collecting cases limiting *Metcalf*).

Finally, Dutcher’s citation to *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990), overlooks that after the Ninth Circuit decided that case, *Feist* clarified the law to such a degree that on remand, the trial court set aside a jury verdict and granted a motion for judgment as a matter of law in favor of defendant. *Shaw v. Lindheim*, 809 F. Supp. 1393, 1400, 1402 (C.D. Cal. 1992).

2. Application to *Falling* and *Nightcrawler*.

The district court here engaged in similar analysis and correctly concluded that no reasonable jury could find *Falling* and *Nightcrawler* substantially similar in terms of protectable elements.

Beginning with characters, the district court correctly observed that any similarities between Eric and Lou were due to their profession as stringers, as evidenced by other pre-existing stringer works. The actual ways in which Eric and Lou are expressed as characters—a lapsed Mormon missionary versus a murderous sociopath—could not be more different. [Add. 33.]¹⁵

The same is true of plot similarities, which the district court correctly concluded were *scènes à faire*. While *Falling* and *Nightcrawler* contain elements common to works about stringers, such as characters driving the streets listening to police scanners, being drawn into dangerous situations, and obtaining progressively more graphic footage, the plots themselves are “quite different.” [Add. 31.] *Falling* is a religiously-themed morality tale told in flashback about the consequences of losing one’s faith. *Nightcrawler* is a story told in linear fashion about a sociopath who takes advantage of a ruthless capitalist system to achieve business success. Nothing about either plotline is remotely the same.

¹⁵ A more detailed discussion of the differences between the various characters is available at Appx.Vol.IV:703-06.

As for dialogue, the district court correctly held that the well-known journalism phrase “if it bleeds, it leads” is the type of clichéd language that is not subject to copyright protection. [Add. 32; Appx.Vol.IV:710]; *see, e.g., Lumos, Inc. v. LifeStrength, LLC*, 2014 WL 4355451, No. 2:12-CV-1196-TC, at *9 (D. Utah Sept. 3, 2014). Likewise, the fact that competitors taunt Eric and Lou about being late is nothing more than an acknowledgement that, at its core, the stringer profession is a competitive race to arrive first on the scene. That idea “necessarily follow[s] from the common theme” of what stringers do. *Arden*, 908 F. Supp. at 1259.¹⁶

Dutcher’s primary argument is that the district court erred in failing to recognize that the sequence of the films contain allegedly vast numbers of similarities which purportedly “occurred in the same order and served the same purpose” in the story. [Br. at 33]. Upon even cursory examination, however, it is readily apparent that the generic sequence points Dutcher claims constitute a protected sequence of events are either not really similar or are unprotected elements that one would expect to see in a film about stringers. Indeed, Dutcher admitted to the district court that “without the murder scene, *Nightcrawler* would

¹⁶ The same element is present in *Ghouls* (04:12-04:38) and Mr. Gilroy’s 1986 notes. [Supp.Appx.Vol.I:228-238.]

be nearly indistinguishable from [the reality television series] *Stringers LA.*”

[Appx.Vol.VII:1522.]

For example, Dutcher relies on events that share no similarities whatsoever (e.g., equating “Eric finds Hector’s dead body” to “Lou follows the driver as he gets the second gangster, follows them to a restaurant”) or that are exact opposites (e.g., comparing “[t]he gangsters have been looking for Eric” to “Lou has been looking for the gangsters” and “[t]he murderers track Eric down” to “Lou tracks the murderers down”). [Appx.Vol.IV:1535-36.] Dutcher also relies on elements that constitute the very definition of *scènes à faire* —such as that the first instinct of a character whose profession is to capture sensational footage would be to “go for [his] camera,” begin “filming immediately” to catch sensational footage, “hide” so as not to interrupt what is unfolding, and “zoom” to obtain more lucrative footage to sell. [Appx.Vol.IV:1530-31.] This type of sequence is not protectable.

As for the murder scenes, the district court correctly concluded that the two scenes “have different settings, major differences in characters, and contribute differently to the overall plot.” [Add. 32.] In *Falling*, the scene occurs in broad daylight, in the alley of a public street in a rundown part of town, and the murder involves a single victim stabbed with a knife. Eric is on the scene by sheer happenstance, not by choice. [Add. 34; *Falling* at 28:02-30:29.]

In *Nightcrawler*, the murder scene occurs in full dark, at a private residence in an affluent part of town, and the murder involves multiple victims killed with firearms. Lou is intentionally on the scene after racing there and does not tape the murderers shooting the victim, only the shots from outside the home. Lou comes across a victim during his search of the home and briefly records him while he purportedly take his last breath. [Add. 34; *Nightcrawler* at 01:02:00-01:02:58].¹⁷ Those scenes are not substantially similar.

Incidentally, even if Dutcher were granted a protected monopoly over the general sequence of events he describes, this Court may affirm the district court on the alternative basis that it is undisputed Dan Gilroy independently conceived of the same general idea years *before* Dutcher wrote *Falling*:¹⁸

1999 Falling Script	Dan Gilroy 1986 Nightcrawler Notes
Eric is [] late [to a suicide jumper] and misses getting marketable footage	Hunch is late to a suicide jumper and misses getting marketable footage
Eric arrives at a murder scene before police and witnesses the murder	Hunch arrives at a murder scene before the police and witnesses the murder
Eric does not call the police despite having the ability to do so	No mention of Hunch calling the police
Eric records the murder as it happens	Hunch arrives just as the murders occur
Eric comes upon a murder victim who is just moments from dying	Hunch comes upon a murder victim who is just moments from dying

¹⁷ The same idea of a stringer taping a dying man without rendering assistance appears in other stringer works as well. See, e.g., *Stringer* at 37:18-40:12.

¹⁸ Compare Supp.Appx.Vol.I:93-96 with Supp.Appx.Vol.I:228-238.

[The victim reaches out his hand to Eric for help.]	[The victim reaches out his hand to Hunch for help.]
Eric videotapes the victim's last moments instead of offering aid or comfort	Hunch photographs the victim's last moments instead of offering aid or comfort
Eric sells the murder recording for \$20,000	Hunch sells his pictures to the newspaper and gets "the highest payday Hunch[] has ever had."

The "purpose of the substantial-similarity analysis is to answer the question whether the defendant copied the work of the plaintiff." *Murray Hill*, 361 F.3d at 326. Where a defendant "owns a prior work containing the same elements, he has no reason, beyond the illicit thrill of copyright infringement, to copy wrongfully from another what he could legally copy from himself. Therefore, where an element occurs both in the defendant's prior work and the plaintiff's prior work, no inference of copying can be drawn." *Id.*

Finally, the district court correctly rejected Dutcher's assertion that the generic lists of comparisons compiled by two of his experts created a fact issue and prohibited the district court from engaging in its own independent analysis and substantial similarity comparison of the two films. As the Sixth Circuit has recognized:

The question of substantial similarity can usually be decided on the basis of the works themselves and rarely, if ever, involves questions of credibility, the peculiar province of the jury. [And] while judges "may not be qualified literary critics, they are fitted by training and experience to compare literary works and determine whether they evidence substantial similarity."

Murray Hill Publ'ns, 361 F.3d at 321 (quotation omitted).

Moreover, the question of whether works are substantially similar is judged by the lens of the ordinary observer, not a supposed literary expert. *See Blehm*, 702 F.3d at 1202. Unlike other types of copyright cases involving technical works, like the software code and music cases on which Dutcher relies, numerous courts have recognized that for literary works, “the jury is capable of recognizing and understanding the similarities between the works without the help of an expert.” *Shame on You*, 120 F. Supp. 3d at 1147; accord, e.g., *Denker*, 820 F. Supp. at 729, *aff'd*, 996 F.2d 301 (2d Cir. 1993); *Mowry v. Viacom Int'l, Inc.*, No. 03Civ.3090(AJP), 2005 WL 1793773 (S.D.N.Y. July 29, 2005), at *10; *Webb v. Stallone*, 910 F. Supp. 2d 681, 689 n.4 (S.D.N.Y. 2012); cf. *La Resolana*, 555 F.3d at 1181 (excluding lay witness testimony because “it was the responsibility of the district court to decide, for itself, whether the plans were substantially similar”).¹⁹

¹⁹ Regardless, even if this Court were to conclude that expert testimony is relevant to the issue of substantial similarity in this context, Dutcher's two experts employed an unreliable methodology that failed to filter unprotected elements before comparing the two works. They indiscriminately compared every element of the two films, whether or not the similarities were unprotected ideas, *scènes à faire*, or independently created by Dan Gilroy before *Falling* existed, conceded they had no understanding of the legal tests for substantial similarity, and made no effort to review other public domain works involving stringers. [Supp.Appx.Vol.XIII:2106-2310.] This Court can affirm the district court's rejection of those expert reports on that alternative ground.

Long ago, Judge Learned Hand observed that “[u]pon any work ... a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out,” such that there reaches “a point in this series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his ideas ... apart from their expression.” *Nichols*, 45 F.2d at 121. Were generalized plot sequences protectable, as Dutcher urges here, this Court could easily find that *Star Wars* infringes on *The Wizard of Oz* because in both films:

- the main character lives with an aunt and uncle in a rural environment;
- the main character journeys on a quest far from home;
- both characters employ a method of air transportation that propels the character through the sky at a tremendous speed;
- the main character meets and is accompanied by a character made of metal;
- the character also meets and is accompanied by a character completely covered in hair;
- the main character must seek out a wise older man for help;
- the villain rules over a kingdom;
- the villain’s subjects are terrified of the villain;
- the villain dresses completely in black;
- the villain wears memorable and distinctive headgear;

- the quest requires the team of heroes to infiltrate the villain’s stronghold;
- the main character eventually meets a wise old man who provides good advice;
- the team of heroes work together to dispatch the villain in the climax; and
- the main characters are decorated as heroes in a ceremony at the end.

Of course, *Star Wars* is not substantially similar to *The Wizard of Oz* any more than *Nightcrawler* is substantially similar to *Falling*. The district court correctly rejected Dutcher’s attempt to claim a monopoly on sequences of events that naturally flow out of a work about a stringer protagonist.

II. The District Court’s Decision Can Be Affirmed on the Alternative Ground of No Copying as a Factual Matter Because There is No Evidence of Access and the Films Are Not Strikingly Similar.

In addition to the distinct lack of substantial similarity, the district court’s decision can be affirmed on the alternative ground that there is no competent evidence Dan Gilroy copied *Falling*.

As noted above, the first component of a copyright infringement claim is that the defendant copied the plaintiff’s work ‘as a factual matter.’” *Blehm, 702 F.3d at 1199*. In the absence of direct proof of copying, which Dutcher never offered, a plaintiff can indirectly prove copying in one of two ways: (1) by providing sufficiently specific proof that the defendant “had access to the

copyrighted work,” *Country Kids*, 77 F.3d at 1284; or (2) by showing that the two works are so “strikingly similar” that access is legally inferred. *La Resolana*, 555 F.3d at 1179. Dutcher’s claim fails on both counts.

A. There is No Non-Speculative Evidence of Access.

In order to establish access, a plaintiff must show the defendant had a reasonable opportunity to view or copy the allegedly infringed work. *La Resolana*, 555 F.3d at 1178. “Access may not be inferred through mere speculation or conjecture.”” *Id.* (citation omitted). “[E]vidence that only creates a bare possibility that the defendant had access is not sufficient.”” *Id.* (quoting *Mag Jewelry Co. v. Cherokee, Inc.*, 496 F.3d 108, 117 (1st Cir. 2007)); *see also Gal v. Viacom Int’l, Inc.*, 518 F. Supp. 2d 526, 538 (S.D.N.Y. 2007).

A plaintiff may establish proof of access either by showing that the infringed work has been widely published (which is not true of *Falling*) or “access through third parties connected to both a plaintiff and a defendant.” *Hofmann v. Pressman Toy Corp.*, 790 F. Supp. 498, 506 (D. N.J. 1990). To prove access through third parties, a plaintiff “must offer significant, affirmative, and probative evidence” of access. *Gal*, 518 F. Supp. 2d at 538 (citation omitted). Again, speculation does not suffice—particularly where, like here, Mr. Gilroy has testified unequivocally that he never heard of Dutcher or his work prior to this lawsuit. [Appx.Vol.III:540; Supp.Appx.Vol.I:155.] “Courts have rejected efforts by plaintiffs to establish

access in the face of such sworn testimony unless there is probative evidence to the contrary.” *Id.* at 539.

Where a plaintiff seeks to establish access through a chain of intermediaries, he must establish a sufficiently strong nexus between the defendant and the intermediary to raise a reasonable possibility of access. *See Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984). In order to show this “close relationship linking the intermediary and the alleged copier,” *id.* at 1357, the two must occupy positions where it would be natural for information possessed by one to be imparted to the other, such as where an intermediary is “in a position to provide suggestions or comments with respect to the defendant’s work.” *Id.* At minimum, “the dealings between the plaintiff and the intermediary and between the intermediary and the alleged copier must involve some overlap in subject matter to permit an inference of access.” *Id.* at 1358. A speculative “chain of hypothetical transmittals” is insufficient. *Id.* at 1355.²⁰

²⁰ See also *Bernal*, 788 F. Supp. 2d at 1054 (rejecting claims of access regarding *Desperate Housewives* because plaintiff raised only a “*theoretical possibility*” that “amount[ed] to nothing more than pure speculation”); *Meta-Film*, 586 F. Supp. at 1356-58 (plaintiff who submitted her work to a director with connection to executive involved in *Animal House* failed to establish access where the executive did not make any creative contributions to the film); *Mowry*, 2005 WL 1793773 at *5-7 (plaintiff who distributed his screenplay in the entertainment industry failed to establish access where he had no evidence that anyone who received his screenplay passed it on to creators of *The Truman Show*); *Cox v. Abrams*, No. 93 CIV 6899, 1997 WL 251532 at *4 (S.D.N.Y. May 14, 1997) (plaintiffs failed to establish

Before the district court, Dutcher advanced nothing more than a speculative chain of hypothetical transmittals of his obscure, unreleased film that bordered on conspiracy theories. Every single witness in each alleged chain unequivocally denied Dutcher's accusations.

For example, Dutcher posited that acclaimed screenwriter Neil LaBute might have passed a copy of *Falling* to Hollywood producer Steven Soderbergh, who might have passed it to Tony Gilroy and/or Jennifer Fox, who might have passed it to Dan Gilroy. But all of these individuals unequivocally deny having seen *Falling*, much less having provided that work to Dan Gilroy.

[Supp.Appx.Vol.I:105, Vol.XIII:2345-2354, Vol.XIII:2313-2336.]

Dutcher also posited that *Falling* might have made its way to Dan Gilroy through a chain of stringers who appeared on the reality series *Stringers: LA*, some of whom consulted on *Nightcrawler*. Again, however, Dutcher adduced no evidence that *Falling* changed hands with any of them. To the contrary, all four testified under oath that they never saw or heard about *Falling* until after the initiation of this lawsuit, and none met Mr. Gilroy or had anything to do with *Nightcrawler* until after he had already completed his *Nightcrawler* script.

access where defendants all swore under oath that they never heard of the plaintiffs or her manuscript prior to creating *Regarding Henry*).

[Supp.Appx.Vol.XIII:2311-2312, Vol.XIV:2395-2443; *see also*

Supp.Appx.Vol.XIII:2322-2323.]²¹

In the absence of any evidence suggesting that Dan Gilroy had a reasonable opportunity to view or copy *Falling*, the only way for Dutcher to establish access is to show that *Falling* and *Nightcrawler* are so strikingly similar that access should be inferred—something he cannot do.

B. *Nightcrawler* and *Falling* are Not Strikingly Similar.

The striking similarity bar is exceptionally high. *See Webb*, 910 F. Supp. 2d at 687. As this Court has explained, “[s]triking similarity exists when ‘the proof of similarity in appearance is so striking’” and inexplicable that even the ““possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded.”” *La Resolana*, 555 F.3d at 1179 (citation omitted) (emphasis added).

When evaluating whether two works are strikingly similar, this Court has made clear that one must compare the two works as a whole. *See, e.g., Gates Rubber*, 9 F.3d at 833 n.7; *La Resolana*, 555 F.3d at 1179. Unlike a substantial similarity analysis, “[t]o show striking similarity, the works ‘must be so *identical*

²¹ Dutcher’s reliance on a third expert, Gerald McMenamin, for the proposition that some unknown person other than Dan Gilroy wrote the *Nightcrawler* screenplay is similarly unavailing because even if it were true (which it is not), Dutcher has come forward with no evidence that such unknown, unidentified person had access to *Falling*.

as to preclude any reasonable possibility of independent creation.’ Mere multiple similarities are insufficient and the relevance of a similarity is diminished if the similarity consists of … otherwise non-protectable elements.” *Webb*, 910 F. Supp. 2d at 687 (citation omitted).

Consequently, the question is not whether two works are sufficiently similar that *some* reasonable juror might conclude any similarities were the result of copying. To establish striking similarity, Dutcher must prove that *no* reasonable juror could conclude that any similarities between *Nightcrawler* and *Falling* were the result of independent creation, prior common source, or coincidence. See *La Resolana*, 555 F.3d at 1180.

Given this extraordinarily high threshold, it is not surprising that courts have found striking similarity in very “few instances,” particularly when addressing literary and film works, and only where the works at issue are “*identical*” to the plaintiff’s work “in virtually every detail.” *Hofmann*, 790 F. Supp. at 509.²²

Here, Dutcher cannot show that no reasonable juror could conclude that any similarities between *Falling* and *Nightcrawler* possibly resulted from independent creation, prior common source, or coincidence for at least three reasons.

²² See, e.g., *Webb*, 910 F. Supp. 2d at 683-89; *Mowry*, 2005 WL 1793773, at *5-12; *Gal*, 518 F. Supp. 2d at 538-44.

First, there is overwhelming evidence (most of which predates *Falling*) that Mr. Gilroy independently created *Nightcrawler*. It is enshrined in thousands of pages of date-verified documents stretching back more than three decades.

Second, stories about stringers are not new. The profession has inspired numerous other works, all of which share similarities with *Nightcrawler* and *Falling*. This includes *Stringer*, a film released almost a decade before Dutcher's film and which is so comparable to *Falling* that it shares more than thirty similarities—from protagonists with significant others who share aspirations of making it big in the Hollywood entertainment industry, to scenes in which the protagonists assault their love interests, to scenes in which both protagonists record a dying man taking his last breaths without offering aid to the victim.²³

Finally, a reasonable jury could conclude any similarities between the two films might be the result of coincidence. When two works address the same subject matter, it is not surprising that they might share certain similarities. The near uncanny similarity between *Stringer* and *Falling* evidences as much.

It was Dutcher's burden to establish striking similarity by proving that no reasonable juror could conclude Mr. Gilroy independently created *Nightcrawler*, or that any similarities with *Falling* are the result of independent creation, prior

²³ A graphical side-by-side comparison of the numerous similarities shared by *Falling* and *Stringer* is available at Appx.Vol.III:461-70.

common sources or coincidence. The uncontested record evidence makes that an impossible burden.

III. The District Court Did Not Abuse Its Discretion in Denying Dutcher’s Motion to Compel.

Dutcher’s brief ends with a cursory argument that the district court should have granted his motion to compel documents regarding compensation paid to Defendants’ expert Robert Gale. Dutcher barely develops this argument, fails to provide any context for it from the record, cites no evidence regarding Gale’s alleged “extensive relationship with NBCUniversal,” [Br. at 65], and offers no explanation for why the order played any role in the district court’s summary judgment ruling (it did not). The argument is therefore inadequately briefed, and this Court should disregard it.

Should it choose to examine the argument on the merits, this Court “will reverse a district court only if it ‘exceeded the bounds of permissible choice,’” which means “its ‘decision is either based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifest a clear error of judgment.’” *Regan-Touhy*, 526 F.3d at 647 (citations omitted). As the district court’s order explains, Dutcher’s motion sought to compel documents regarding agreements that do not exist, and “the court cannot order Defendants to produce documents that do not exist.” [Add. 13.] That conclusion was not an abuse of discretion.

CONCLUSION

For all of the foregoing reasons, the district court's decision should be affirmed. Defendants request costs on appeal.

ORAL ARGUMENT

Defendants respectfully request oral argument because counsel believes that oral argument will materially assist this Court in resolving the issues presented on appeal.

RESPECTFULLY SUBMITTED this 6th day of January 2020.

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CERTIFICATE OF COMPLIANCE

**Certificate of Compliance with Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,959 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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DATED this 6th day of January 2020.

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PARR BROWN GEE & LOVELESS, P.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of January 2020, I filed the foregoing **BRIEF OF APPELLEES** via the Court's CM/ECF system, which served the following:

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