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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM L. CRAWFORD II, an
individual; MINDSHADOW
ENTERTAINMENT LLC., a
corporation,

Plaintiffs,

vs.

MIDWAY GAMES INC., a
corporation; MIDWAY HOME
ENTERTAINMENT INC., a
corporation; MIDWAY
AMUSEMENT GAMES, LLC, a
corporation; and DOES 1-100,
inclusive,

Defendants.

Case No. 2:07-cv-00967-FMC-JCx

ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT

This matter is before the Court on Defendants' Motion for Summary Judgment on Plaintiffs' First Claim for Relief (docket no. 129), filed September 26, 2008, and Defendants' Motion for Summary Judgment on Plaintiffs' Second Claim for Relief (docket no. 143), filed November 3, 2008. The Court has considered the moving, opposition, and reply documents submitted in connection with these motions. The Court deems the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for December 1, 2008, is

1 removed from the Court's calendar. For the reasons and in the manner set forth
2 below, the Court hereby GRANTS Defendants' Motion for Summary Judgment on
3 Plaintiffs' First Claim for Relief and GRANTS Defendants' Motion for Summary
4 Judgment on Plaintiffs' Second Claim for Relief.

5 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

6 This case arises out of Plaintiff Crawford's creation of a movie screenplay and
7 Defendants' development and subsequent sale of a video game. Plaintiffs'
8 screenplay was originally titled, "Psi-Ops," and was later renamed "Area 23."
9 Plaintiffs also published websites to promote the screenplay with the following
10 URLs: "Psy-Ops.net," "PsyOps-themovie.com," "Area23movie.com," and
11 "mindshadowonline.com." Defendants' video game was initially titled,
12 "ESPionage," but was later renamed to "Psi-Ops: The Mindgate Conspiracy."

13 The following facts surrounding the development of Plaintiffs' screenplay,
14 Plaintiffs' websites, and Defendants' video game are not in dispute:

15 In March of 1998, Plaintiff Crawford created his first draft of the "Psi-Ops"
16 screenplay, and registered it with the U.S. Copyright Office on March 26, 1998.
17 (Crawford Decl. ¶¶ 1-2.) Crawford selected the name Psi-Ops because it was the
18 name of an actual military organization. (Baravetto Decl. ¶ 5, Ex. D at 61, Tr. at
19 107:15-108:6.) In January of 2000, Crawford formed the entity, Mindshadow
20 Entertainment, LLC to promote the Psi Ops project and screenplay. (Crawford
21 Decl. ¶ 10.) Between 1998 and 2001, Plaintiffs Crawford and Mindshadow
22 attempted to promote the screenplay and develop it into a movie. (Baravetto
23 Decl. ¶¶ 5, 6, Ex. D at 70, Tr. at 309:3-6 & Ex. E at 73, Tr. at 97:23-25.) In
24 March of 2001, Crawford changed the name of the screenplay to "Area 23," and
25 registered it with the Copyright Office, but the contents of the screenplay
26 remained largely unchanged. Between 2001 and 2004, Plaintiffs continued to
27 promote the project and develop the Area 23 screenplay into a movie. *Id.*
28 Plaintiffs invested substantial time, money, and effort in promoting the Psi-Ops

1 project, including for example: (1) constructing websites such as Psy-Ops.net
2 (1999), Psy-Ops-themovie.com (late 2000), and Area23movie.com (2001);¹ (2)
3 sending copies of the screenplay to various third parties; and (3) attending
4 conventions to distribute, market, promote, and pitch the screenplay. (Crawford
5 Decl. ¶ 7.) Despite these efforts, the screenplays were not developed into a movie
6 and were not purchased by any other entity. (Baravetto Decl. ¶¶ 6, 7, 12, 13, Ex.
7 E at 75, Tr. at 104:9-21 & Ex. F at 81, 88, Tr. at 91:24-92:22, 169:8-25 & Ex. K
8 at 136, 152, 155 & Ex. L at 167-168, 190, 192.)

9 In approximately September of 2001, Defendants began development of the
10 video game which would later be called “Psi-Ops: The Mindgate Conspiracy.” The
11 video game was premised upon the idea that in the near future, governments would
12 employ secret agents that possessed psionic powers. (Baravetto Decl. ¶¶ 8, 14, Ex.
13 G at 91, Tr. 48:5-7 & Ex. M at 204-06, 222-24, 240-42.) The Midway development
14 team researched psychic powers documented in various non-fiction books and
15 videos.² (*Id.*; Murray Decl. ¶ 2, Ex. A at 7-10, Tr. 28:8-29:9, 35:8-37:3.) A few
16 months into the research process, Midway hired Brian Babendererde as a freelance
17 writer to write the storyline for the video game, a process that covered sixteen
18 months. *Id.* After the basic storyline was written, the Midway product development
19 team further developed characters for the game and assigned them psionic powers.
20 *Id.* At the 2003 E3 Expo for video games, Midway unveiled a prototype of the game
21 under the title, “ESPionage,” but later renamed it because feedback from market
22 testing suggested that consumers did not immediately recognize the psychic element
23

24 ¹ Plaintiffs subsequently obtained a copyright registration for its
25 “Area23movie.com” website on February 1, 2008. (Baravetto Decl. ¶ 2, Ex. A.)

26 ² Plaintiffs argue that part of Defendants’ research extracted information from
27 Plaintiffs’ website, “PsyOpstheMovie.com.”
28

1 of the game. (Murray Decl. ¶ 3, Ex. B at 21, Tr. 84:5-13.) In part, the new name
2 was selected because the Midway development team discovered a former U.S.
3 Military program called “Psi-Ops.” (Murray Decl. ¶ 2, Ex. A at 7, 9, Tr. 28:19-20,
4 35:19-36:4.) The final version of the video game was released in May of 2004.
5 (Baravetto Decl. ¶ 14, Ex. M at 204-06, 222-24, 240-42.)

6 Concerning the level of access Defendants may have had to Plaintiffs’ work,
7 it is undisputed Plaintiffs have submitted the screenplay to approximately fifty (50)
8 individuals and entities. However, the following facts surrounding Defendants’
9 access to the screenplay and websites are disputed, and are presented in the light
10 most favorable to the nonmoving party:

11 In May of 2001, Plaintiff Crawford attended the E3 Expo and approached the
12 Midway video game booth, in an effort to promote his screenplay to Midway. He
13 spoke briefly with a Midway representative and submitted a card or piece of paper
14 with his name and his website printed on it, “Psi-Ops.net/Mindshadow.” During his
15 brief conversation with the Midway representative, he indicated that Midway may
16 be interested in his screenplay and project. (Baravetto Decl. ¶ 5, Ex. D at 65-66, Tr.
17 181:13-185:16.)

18 In or about the year 1999, Plaintiff Crawford submitted his screenplay to
19 Susan Levine, Director of Development at Threshold Entertainment, in an effort to
20 market the screenplay. During this time period, Threshold Entertainment had
21 business dealings with Midway. Specifically, Threshold worked with Midway to
22 develop one of its video games into the film, “Mortal Kombat.” (Crawford Decl. ¶¶
23 21-22; Fogel Decl. ¶ 9, Ex. 6 at 3.) In or about the year 2002, Plaintiff Mindshadow
24 received media coverage for the Psi-Ops project in various trade magazines such as,
25 “Star Wars Insider,” “Indie Slate,” and “TV Zone.” (Crawford Decl. ¶ 24.) Between
26 2000 and 2004, Plaintiffs’ various internet websites were open to general viewing
27 from the public.

28 Defendants deny that they copied, relied upon, or had any access to Plaintiffs’

1 screenplay or websites.

2 The following description of the storyline for Plaintiffs' screenplay, "Psi-
3 Ops," is a summary of the screenplay submitted to the Court (Baravetto Decl. ¶ 18,
4 Ex. Q). Its contents are not in dispute:

5 The premise of Plaintiffs' screenplay is that the United States government has
6 formed a team of special agents that are endowed with powerful psychic abilities to
7 fight terrorists and other threats to national security. The team is called the
8 Paranormal Sanctions and Investigations Unit ("Psi Unit"), and is headed by
9 executive director Anson Dekker. To combat a particularly ominous threat, Dekker
10 recruits Justin Diaz, a Gulf War veteran and former Navy Seal, to lead a team of
11 fellow soldiers with psionic powers. Justin Diaz has the power of telepathy, the
12 power to scan and read the minds of others. Dekker recruits Gavi Peres, a female
13 soldier in her late twenties from an Israeli special forces unit, who possesses the
14 power of telekinesis, the ability to move objects with her mind. Another member of
15 the team is Ryan Echohawk, a Native American in his late twenties who has the
16 telepathic ability to control another person's actions. Dekker also recruits Rachel
17 LeVeaux, a woman in her late twenties of Creole descent who is a clairvoyant – a
18 person who "reads" objects, events and energies to gather information about what
19 happened in the past. Ewan MacAuley is of Irish descent and begins the story as a
20 terrorist who holds the British Consulate under siege in a hostage situation.
21 However, Ryan Echohawk arrives at the scene to subdue MacAuley and delivers him
22 to Dekker, who recruits him as an additional member of the team. MacAuley
23 possesses the power of pyrokinetics, the ability to control and manipulate fire with
24 his mind.

25 The Psi-Ops team is directed to combat the villain named Edison Kane, also
26 known as "The Wiper," and his group of terrorists. The Wiper's organization is
27 "The Fist of Allah," an Islamic extremist group. The Wiper is a telepath who has the
28 ability to erase and absorb the memories of his targets, as well as kill them. The

1 Wiper's grand scheme is to create an enormously powerful weapon by combining
2 four different weapons together, known as the "4 Horsemen of the Apocalypse."
3 The Wiper and his terrorist group obtain three of the four weapons, but is unable to
4 obtain the fourth without additional assistance. In an attempt to obtain the fourth
5 weapon, a deadly Gulf War nerve gas, The Wiper captures Justin Diaz's girlfriend,
6 Dr. Sharda Mendez, as a hostage, and demands that the Psi-Ops team retrieve the
7 nerve gas from a military compound in Cuba.

8 While part of the Psi-Ops team ventures to Cuba to retrieve the nerve gas,
9 Ryan Echohawk decides to splinter from the group and believes he can confront The
10 Wiper individually. In addition, Rachel LeVeaux is forced to stay in the United
11 States to use her clairvoyant powers to decipher the true identity of The Wiper and
12 his potential vulnerabilities. LeVeaux learns that the evil intentions of The Wiper
13 is actually that of Colonel Shakir, a former commander of the Iraqi Army, who is
14 currently occupying the body of The Wiper. To neutralize and overcome Colonel
15 Shakir's extraordinary powers, the Psi-Ops team discovers that they must separate
16 the body of The Wiper from Colonel Shakir's evil grip. To successfully do so,
17 members of the Psi-Ops team reconvene and combine their psychic powers to enter
18 The Wiper and Colonel Shakir's mind. After separating their identities, The Wiper
19 helps the Psi-Ops team battle and defeat Colonel Shakir.

20 The following description of the storyline for Defendants' video game, "Psi-
21 Ops: The Mindgate Conspiracy," is a summary of the Game Storyline Overview
22 contained in Midway's Game Design Document (Murray Decl. ¶ 9, Ex. H at 145-
23 159.) The parties do not dispute that Midway's Game Design Document provides
24 an accurate and detailed description of the video game:³

25
26
27 ³ On November 21, 2008, the Court requested from Defendants a copy of the
28 Psi-Ops video game to assist the Court with its analysis. However, the Court finds

1 The premise of the video game is that the United States is investigating the use
2 of paranormal abilities to aid in their espionage programs. The American program
3 is known as Project Mindgate. Project Mindgate came under intense public scrutiny
4 when a villain known as the General used the program and its agents in various
5 unsanctioned ways. Rather than face prosecution, the General left Mindgate and
6 formed an underground organization called "The Movement." The General recruited
7 thousands of disenfranchised agents from around to world to aid The Movement and
8 its quest to overturn existing governments. Personally, the General is using The
9 Movement to obtain an ancient artifact known as "The Monolith," which will greatly
10 increase his power.

11 The video game begins with a raid on an oil refinery led by the main character
12 in the game, Nick Scryer. The video game player acts through Scryer and directs his
13 movements throughout the game. The raid on the oil refinery is part of a plan by
14 Project Mindgate to successfully infiltrate The Movement. Scryer is given
15 reconstructive surgery and has his memory erased in order to evade recognition or
16 detection by The Movemant's telepaths. The Movement regularly captures field
17 agents and brainwashes them to fight for The Movement. The Movement captures
18 Scryer but cannot convince him to fight for them. Instead, a double agent for Project
19 Mindgate, Sara Blake, approaches Nick Scryer and informs him that he is also a
20 Project Mindgate secret agent whose mission is to defeat The Movement from within
21 its walls. Sara informs Scryer that she originally infiltrated the terrorists to find her
22 sister, who joined the General's cause and has not been heard from since. As Scryer
23

24 that it would be improper to consider additional evidence that was not submitted to
25 the Court via Defendants' Motions for Summary Judgment. The Court therefore has
26 not considered the copy of the video game delivered to the Court on November 24,
27 2008.
28

1 progresses through the game, his memory and powers are slowly returned to him
2 through Sara Blake and others, as they remind him of his past, his identity, and the
3 different psionic powers he possesses. By the end of the game, Scryer can perform
4 telekinesis, remote viewing, mind drain, mind control, pyrokinesis, and aura
5 viewing.

6 The game requires Scryer to chase the General from one base to another and
7 prevent the General from obtaining The Monolith or its ingredients. At the end of
8 nearly every base, the General narrowly escapes and leaves one of his more
9 competent henchmen to deal with Scryer. Scryer's adventures take him to the Black
10 Sea, Hong Kong, the Himalayas, and an Alien Base. In the scenes leading up to the
11 final battle against the General, Scryer and Sara Blake discover that her sister is
12 solidly on the General's side. The evil sister captures Scryer and immobilizes him
13 with her telepathic powers, forcing Scryer to watch the General complete his final
14 plans to reconstruct an ancient piece of machinery that will activate The Monolith.
15 As the General is about to acquire his immense power, Sara comes to the rescue by
16 shooting her sister with a sniper gun, which frees Scryer from the sister's mental
17 grip. Scryer then battles the General as he activates The Monolith and becomes
18 steadily more powerful, which requires Scryer to deal with an ever increasing level
19 of difficulty. After a "knock down PSI power battle," Scryer causes the General's
20 machine to backfire and implode, destroying the General and shattering the Monolith
21 into multiple pieces. Scryer and Sara embrace and realize that the power of the
22 Monolith cannot be trusted with any government. They escape with one of the
23 shards of the Monolith and are chased by men in black.

24 II. LEGAL STANDARD

25 Summary judgment is appropriate if there is no genuine issue of material fact
26 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
27 56(c). The moving party bears the initial responsibility of informing the court of the
28 basis of its motion, and identifying those portions of "pleadings, depositions,

1 answers to interrogatories, and admissions on file, together with the affidavits, if
2 any,' which it believes demonstrate the absence of a genuine issue of material fact."
3 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265
4 (1986) (quoting Fed. R. Civ. P. 56(c)). Where the nonmoving party will have the
5 burden of proof at trial, the movant can prevail merely by pointing out that there is
6 an absence of evidence to support the nonmoving party's case. *See id.*; *see also*
7 *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000)
8 ("In order to carry its burden of production, the moving party must either produce
9 evidence negating an essential element of the nonmoving party's claim or defense
10 or show that the nonmoving party does not have enough evidence of an essential
11 element to carry its burden of persuasion at trial."). If the moving party meets its
12 initial burden, the nonmoving party must then set forth, by affidavit or as otherwise
13 provided in Rule 56, "specific facts showing that there is a genuine issue for trial."
14 Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct.
15 2505, 91 L. Ed. 2d 202 (1986).

16 The substantive law governing a claim determines whether a fact is material.
17 *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987);
18 *see also Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006)
19 ("Material facts are those which may affect the outcome of the case.") (internal
20 citations omitted). In judging evidence at the summary judgment stage, the Court
21 does not make credibility determinations or weigh conflicting evidence and draws
22 all reasonable inferences in the light most favorable to the nonmoving party. *T.W.*
23 *Elec. Serv.*, 809 F.2d at 630-31; *see also Brookside Assocs. v. Rifkin*, 49 F.3d 490,
24 492-93 (9th Cir. 1995). The evidence presented by the parties must be admissible.
25 Fed. R. Civ. P. 56(e). Mere disagreement or the bald assertion that a genuine issue
26 of material fact exists does not preclude the use of summary judgment. *Harper v.*
27 *Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

28 III. DISCUSSION

1 Defendants move for summary judgment of Plaintiffs' first two causes of
2 action for copyright infringement. The first claim for relief is directed at the alleged
3 infringement of Plaintiff Crawford's Screenplay while the second claim for relief is
4 directed at the alleged infringement of Plaintiff Crawford and Mindshadow's Psi-
5 Ops Movie Websites. With both claims, the product accused of infringement is
6 Defendants' video game, "Psi-Ops: The Mindgate Conspiracy."

7 A. First Claim – Screenplays

8 A plaintiff bringing a claim for copyright infringement must demonstrate "(1)
9 ownership of a valid copyright, and (2) copying of constituent elements of the work
10 that are original." *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).
11 It is undisputed in this case that Plaintiffs are the owners of the copyrights in the two
12 screenplays, as well as the various websites created to promote the screenplays. The
13 remaining issue is whether Defendants copied anything that was original to
14 Plaintiffs' work. "Absent direct evidence of copying, proof of infringement involves
15 fact-based showings that the defendant had 'access' to the plaintiff's work and that
16 the two works are 'substantially similar.'" *Three Boys Music Corp. v. Bolton*, 212
17 F.3d 477, 481 (9th Cir. 2000) (citing *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir.
18 1996)). Plaintiffs have not submitted any direct evidence that Defendants copied
19 Plaintiffs' work.

20 1. Reasonable access

21 Proof of access requires "an opportunity to view or to copy plaintiff's work."
22 *Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d
23 1157, 1172 (9th Cir. 1977). This is often described as providing a "reasonable
24 opportunity" or "reasonable possibility" of viewing the plaintiff's work. *Three Boys*
25 *Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (citing 4 Melville B.
26 Nimmer & David Nimmer, *Nimmer on Copyright*, § 13.02[A], at 13-19 (1999)).
27 Reasonable access is also defined as "more than a bare possibility." *Id.* (citing *Jason*
28 *v. Fonda*, 526 F. Supp. 774, 775 (C.D. Cal. 1981), *aff'd*, 698 F.2d 966 (9th Cir.

1 1982)). The Ninth Circuit has adopted Nimmer’s additional explanation of
2 reasonable access: “Of course, reasonable opportunity as here used, does not
3 encompass any bare possibility in the sense that anything is possible. Access may
4 not be inferred through mere speculation or conjecture. There must be a reasonable
5 possibility of viewing the plaintiff’s work – not a bare possibility.” *Id.* (citing 4
6 Nimmer, § 13.02[A], at 13-20). “Circumstantial evidence of reasonable access is
7 proven in one of two ways: (1) a particular chain of events is established between the
8 plaintiff’s work and the defendant’s access to that work (such as through dealings
9 with a publisher or record company), or (2) the plaintiff’s work has been widely
10 disseminated.” *Id.*

11 In this case, Plaintiff Crawford has testified that he approached Midway
12 during an E3 Expo and submitted a card or piece of paper with the address of his
13 website. The websites are also generally available to the public. However, there is
14 no evidence that any of Midway’s employees or executives actually viewed
15 Plaintiffs’ websites. Plaintiffs also testify about having submitted a copy of the
16 screenplay to Threshold Entertainment, a business partner with Midway during the
17 relevant time period. Again, there is no evidence showing that Threshold shared
18 Plaintiffs’ screenplay with Midway or that Midway employees and executives
19 viewed the screenplay. As to the second method of showing reasonable access by
20 way of widespread dissemination, Plaintiffs have submitted their screenplay to fifty
21 (50) entities. The Court considers the circulation of fifty copies to be substantial, but
22 by no means widespread. Though access to Plaintiffs’ screenplay was certainly
23 possible, the Court finds there to be minimal evidence supporting a reasonable
24 possibility of access.

25 2. Substantial similarity

26 In the Ninth Circuit, substantial similarity is inextricably linked to the issue
27 of access. In what is known as the “inverse ratio rule,” the Ninth Circuit requires “a
28 lower standard of proof of substantial similarity when a high degree of access is

1 shown.” *Three Boys Music Corp. v. Bolton*, 212 F.3d 447, 485 (9th Cir. 2000).
2 “Furthermore, in the absence of any proof of access, a copyright plaintiff can still
3 make out a case of infringement by showing that the songs were ‘strikingly similar.’”
4 *Id.* “When the issue is whether two works are substantially similar, summary
5 judgment is appropriate if no reasonable juror could find substantial similarity of
6 ideas and expression.” *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072,
7 1076 (9th Cir. 2006) (quoting *Kouf v. Walt Disney Pictures & Television*, 16 F.3d
8 1042, 1045 (9th Cir. 1994)).

9 The substantial-similarity test contains an extrinsic and intrinsic component.
10 At summary judgment, courts apply only the extrinsic test; the intrinsic test, which
11 examines an ordinary person's subjective impressions of the similarities between two
12 works, is exclusively the province of the jury. *Id.* at 1077(citing *Shaw v. Lindheim*,
13 919 F.2d 1353, 1360-61 (9th Cir. 1990)). A “plaintiff who cannot satisfy the
14 extrinsic test necessarily loses on summary judgment, because a jury may not find
15 substantial similarity without evidence on both the extrinsic and intrinsic tests.”
16 *Kouf*, 16 F.3d at 1045.

17 Extrinsic analysis is objective in nature. “[I]t depends not on the responses of
18 the trier of fact, but on specific criteria which can be listed and analyzed.” *Krofft*,
19 562 F.2d at 1164. The extrinsic test focuses on “articulable similarities between the
20 plot, themes, dialogue, mood, setting, pace, characters, and sequence of events” in
21 the two works. *Kouf*, 16 F.3d at 1045 (citations omitted). In applying the extrinsic
22 test, the court “compares, not the basic plot ideas for stories, but the actual concrete
23 elements that make up the total sequence of events and the relationships between the
24 major characters.” *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985).

25 “[P]rotectable expression includes the specific details of an author’s rendering
26 of ideas.” *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002). However, scenes
27 à faire, which flow naturally from generic plot-lines, are not protectable. *See id.*
28 Courts “must take care to inquire only whether ‘the protectable elements, standing

1 alone, are substantially similar.” *Cavalier v. Random House*, 297 F.3d 815, 822
2 (9th Cir. 2002) (quoting *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996)
3 (emphasis in original)). In so doing, “a court must filter out and disregard the
4 non-protectable elements in making its substantial similarity determination.” *Id.*
5 (citing *Shaw*, 919 F.2d at 1361).

6 Copyright law only protects expression of ideas, not the ideas themselves. 17
7 U.S.C. § 102(b). For example, in *Kouf*, the Ninth Circuit found no substantial
8 similarity even though the works at issue both “involve[d] a life struggle of kids
9 fighting insurmountable dangers, because “[g]eneral plot ideas are not protected by
10 copyright law. . . .” *Kouf*, 16 F.3d at 1045 (quoting *Berkic*, 761 F.2d at 1293). “It
11 is well established that, as a matter of law, certain forms of literary expression are
12 not protected against copying.” *Berkic*, 761 F.2d at 1293. Familiar stock scenes and
13 themes that are staples of literature are not protected. *Id.* at 1294. In *Berkic*, the
14 court rejected finding substantial similarity based on scenes such as “depictions of
15 the small miseries of domestic life, romantic frolics at the beach, and conflicts
16 between ambitious young people on one hand, and conservative or evil bureaucracies
17 on the other.” *Id.* Scenes-a-faire, or situations and incidents that flow necessarily
18 or naturally from a basic plot premise, cannot sustain a finding of infringement. *Id.*
19 In *Williams*, for example, the court found no infringement because the common
20 elements of electrified fences, automated tours, dinosaur nurseries, and uniformed
21 workers were scenes-a-faire that flowed from the concept of a dinosaur zoo.
22 *Williams*, 84 F.3d at 589.

23 In this case, Plaintiffs argue that the Court must temper its analysis of
24 substantial similarity with the fact that the works at issue were created for different
25 media – a screenplay for a movie and a storyline for a video game. (Opp’n at 10.)
26 The Court recognizes that movies and video games are inherently different media
27 and separate forms of entertainment. There will undoubtedly be differences between
28 them, even when one infringes upon the other. Nonetheless, the Court finds few, if

1 any, similarities between the works at issue that are protectable. For the most part,
2 the works only share the general idea that the United States government has created
3 a special program aimed at employing soldiers or special agents that possess
4 paranormal or psionic powers. These agents are charged with the task of espionage
5 and combat against threats to national and international security. A particularly large
6 threat emerges when the evil villain attempts to harness extraordinary power or an
7 extraordinary weapon. Beyond this unprotectable general premise, it is difficult to
8 identify other similarities in ideas, let alone similarities in the expression of those
9 ideas.

10 Plaintiffs' Opposition relies heavily upon the declaration and expert opinion
11 of Linda Seger, an author, consultant, and teacher of screenwriting. In reaching her
12 opinion, Ms. Seger reviewed Plaintiffs' screenplay and watched or played
13 approximately 1 to 1.5 hours of the video game, and skimmed other materials from
14 various websites. In her analysis, Ms. Seger compares the plot, theme, characters,
15 dialogue, setting, pace, mood, and sequence of events in the two works and
16 concludes that they are substantially similar. Though an expert's opinion is often
17 helpful and can be considered by the Court, the Court does not find Ms. Seger's
18 report to be persuasive. The Court finds that much of the report compares the two
19 works in a general and high level manner. More specific details referenced in the
20 report are often inaccurate or mischaracterized.

21 For example, in its comparison of the plot, Ms. Seger's report identifies the
22 paranormal abilities common to both works, and eight features of the storyline that
23 are arguably similar. (Seger Decl. at 13-14.) However, the paranormal abilities
24 revealed in the two works are by no means novel and their mere usage cannot be
25 protected. Prior works such as *X-Men*, *Babylon 5*, *Star Wars*, *Hellboy*, *Scanners*,
26 *Brain Boy*, *Firestarter*, *Psi World*, *Akira*, and *The Tomorrow People* have equipped
27 their characters with the same or very similar paranormal powers. (Baravetto Decl.
28 ¶¶ 23-32, Exs. V-AE.) The other similarities identified – a training period for the

1 protagonist, an indication that the protagonist is not ready, the idea that powers drain
2 with use, the appearance of halos, the movement of characters inside the mind, the
3 usage of auras, a supply room containing canisters, and a backstory about a character
4 who has not resolved her past – are either general unprotectable similarities or are
5 inaccurately characterized. For instance, the video game’s protagonist, Nick Scryer,
6 undergoes a training period to redevelop his paranormal powers, but Justin Diaz, the
7 leader of the team in the screenplay, is capable of performing his psionic power
8 when first introduced to the reader. Furthermore, unlike Nick Scryer, Justin Diaz’s
9 memory is not erased and he does not need to remember who he is or what he has
10 been sent to accomplish.

11 More important, the Court finds the two plots to be clearly different and most
12 likely developed independently from each other. In the screenplay, the U.S.
13 government actively recruits individuals from all walks of life, each of whom
14 possesses a specific psionic power. One of them is chosen as the team leader, but
15 each character in the team is important and plays an active role in the mission against
16 the terrorists. In contrast, the video game’s plot does not require the protagonist to
17 actively recruit individuals to join his team. The main character, Nick Scryer, is
18 largely responsible for fighting his enemies alone. Though Nick Scryer meets other
19 characters with psionic powers along the way, the other characters are positioned
20 primarily to assist the protagonist with his battles. The Court also finds the
21 remainder of the two storylines to be clearly distinguishable.

22 The characters involved are also clearly distinguishable. As previously
23 discussed, Justin Diaz and Nick Scryer, the two most likely candidates for the
24 protagonist, have different backgrounds. In addition, Justin Diaz and the other
25 members of his team, each possess only one specific psionic power. Only when Diaz
26 combines his power with Rachel LeVeaux’s are they able to defeat the antagonist.
27 On the other hand, Nick Scryer of the video game possesses multiple psionic powers,
28 and relearns additional powers as the game progresses. Plaintiffs argue that other

1 major characters share significant similarities: (1) The Wiper-The General; (2)
2 Colonel Shakir-Edgar Barret; (3) Ryan Echohawk-Jov Leonov; (4) Ewan MacAuley-
3 Marlena Kessler; (5) Dr. Sharda Mendez-Dr. Kimiko Jones; and (6) Rachel
4 LeVeaux-Sara Blake. (Seeger Decl. at 16-20.) These comparisons are inapposite.

5 Unlike The General, The Wiper is not a former agent of the U.S. government
6 who became disenfranchised and formed a revolutionary movement. The Wiper
7 turned into a villain only because he attempted to scan the memory of Colonel
8 Shakir, an Iraqi commander during the Gulf War, who was a more powerful psychic.
9 Colonel Shakir subsequently overpowered The Wiper, displaced his mental
10 functions, and took control of The Wiper's body. Plaintiffs' comparison of Colonel
11 Shakir and Edgar Barret is therefore misplaced because Colonel Shakir is the true
12 antagonist who must be defeated in the screenplay while Edgar Barret is a supporting
13 villain in the video game. The Ryan Echohawk-Jov Leonov and Ewan MacAuley-
14 Marlena Kessler comparisons are faulty because Ryan Echohawk and Ewan
15 MacAuley are key members of the protagonist's team whereas Jov Leonov and
16 Marlena Kessler are supporting villains. Moreover, these characters share little in
17 common beyond the supernatural powers they possess.

18 Furthermore, Dr. Sharda Mendez is Justin Diaz's doctor and girlfriend who
19 becomes captured as a hostage and does little to assist the protagonist's team. In
20 contrast, Dr. Kimiko Jones has been working for the antagonist's Movement, but
21 now regrets her support for The Movement, and decides to assist Nick Scryer in his
22 mission against the evildoers. Finally, Rachel LeVeaux is not Sara Blake. Though
23 both share a dark childhood that is revealed later in the storyline, LeVeaux's past
24 involves horrific child abuse experienced by LeVeaux and her childhood best friend.
25 On the other hand, the video game reveals that it is Sara Blake's sister, Tonya, who
26 murdered their parents because they did not support their children's paranormal
27 powers. Sara Blake is also the protagonist's romantic partner while LeVeaux is not.

28 Plaintiffs summarily argue that the two works share similar themes involving

1 good versus evil, using one's special powers for good or evil, power, control,
2 manipulation, and preventing a villain from obtaining the kind of ultimate power that
3 could destroy the world. (Seger Decl. at 20.) These general themes are prevalent in
4 countless other science fiction, action, and adventure stories. Without additional
5 specificity, they cannot be protectable. In addition, the two works explore these
6 themes in significantly different ways, as revealed in their distinguishable storylines.
7 Plaintiffs identify a list of settings that are arguably common to both works,
8 including a military hospital, hospital bed, interrogation room, computer room,
9 helicopter, corridor, airplane, underground area, military bunker, detainment room,
10 holding area, mindscape, silo, technical research building, and research facility.
11 (Seger Decl. at 21-22.) Once again, these features are commonly found in the
12 context of science fiction, action, and adventure. Moreover, the details of these
13 settings and the events occurring within them do not invoke a sense of similarity.

14 The mood and pace of the two works are also quite different, as the screenplay
15 reads like a conventional military or espionage operation while the video game
16 resembles a fantasy world with jellyfish monsters, invisible buildings, and invisible
17 enemies. The dialogue of the screenplay is darker, contains more profanity, and is
18 more sinister than the language employed in the video game. The sequence of events
19 is also markedly different, as the screenplay repeatedly shifts from one scene to
20 another and back again, while things are happening at the same time. The video
21 game, on the other hand, unfolds linearly, interspersed with just the occasional
22 flashback into a character's past.

23 In light of the clear differences between Plaintiffs' screenplay and Defendants'
24 video game, the Court fails to find protectable elements of the screenplay embodied
25 in the video game. Though Plaintiffs have copyrighted a screenplay directed at the
26 government's use of psionic agents to fight terrorists, Plaintiffs cannot exclude all
27 works based upon a similar general premise, as copyright law protects only the
28 expression of ideas, not the ideas themselves. 17 U.S.C. § 102(b). Accordingly, the

1 Court concludes that no reasonable juror can find that Plaintiffs' screenplay and
2 Defendants' video game are substantially similar in the expression of their ideas.
3 Defendants' Motion for Summary Judgment on Plaintiffs' First Claim for Relief is
4 granted.

5 B. Second Claim – Websites

6 Defendants' second Motion for Summary Judgment, challenging Plaintiffs'
7 Claim based on infringement of their websites, was filed November 3, 2008. No
8 Opposition was timely filed to that Motion, nor did Plaintiffs seek leave of Court to
9 extend the time to respond to the Motion. Rather, on November 26, Plaintiffs
10 unilaterally filed their late Opposition.

11 Rather than reject the Opposition, the Court has examined it to determine
12 whether evidence in support of the Opposition would compel a different result from
13 the one reached in connection with Plaintiffs' first claim for infringement of the
14 screenplay. In particular, the Court considered the question of access to the websites.
15 If Plaintiffs provided evidence of direct access, rather than a mere "reasonable
16 opportunity" for access, a different result might be compelled. However, Plaintiffs
17 rely on two opportunities for access with respect to the websites: (1) that their
18 website link was delivered to defendants at the E3 2001 Convention, and (2) that
19 their websites are widely available. Under the circumstances, no different treatment
20 is afforded to Plaintiffs' second claim than applied to the first claim.

21 In the same vein as the first cause of action, Plaintiffs contend that
22 Defendants' video game infringes upon the information revealed via Plaintiffs'
23 various websites. Plaintiffs' websites serve to promote and disseminate information
24 about Plaintiffs' screenplays. The websites contain descriptions of each main
25 character involved in the screenplay accompanied with a photo or sketch of their
26 appearance, a summary of the script, and short biographies of the production team.
27 However, Plaintiffs do not contend that the websites disclose any additional
28 information related to the storyline, plot, or characters involved in the screenplays.

1 The only additional content provided by the websites are images, music, and other
2 sounds, heard for example, when the website browser clicks a particular icon. As the
3 Court has found there to be no infringement against the screenplays, there can
4 similarly be no infringement against the information disclosed on the websites that
5 represents a subset of the information disclosed in the original screenplays.

6 Turning to the images displayed on the websites, the Court finds there to be
7 few similarities between the images displayed on the websites and the images used
8 in the video game. Plaintiffs have only submitted a handful of images connected to
9 Midway's video game, and does not point to any specific image that it believes
10 infringes a specific image displayed on the website. Plaintiffs merely argue that the
11 video game's images are similar in color scheme to the color scheme employed on
12 the websites. However, Plaintiffs have submitted all of their images in black and
13 white. In any event, any such similarity would not amount to infringement. Turning
14 to the sounds played on the websites, Plaintiffs contend in their Opposition that
15 Defendants misappropriated the sounds. However, Plaintiffs' Complaint does not
16 specifically allege that the website sounds are protectable or have been infringed by
17 Defendants' video game. Furthermore, Plaintiffs have not submitted to the Court
18 any of the music or sounds used in the video game claimed to infringe upon the
19 websites. Given the overwhelming evidence that Defendants' video game does not
20 infringe upon Plaintiffs' screenplay or the contents of the websites, Plaintiffs have
21 failed to demonstrate that a genuine issue of material fact exists with respect to
22 infringement.

23 Accordingly, the Court concludes that no reasonable juror can find that
24 Plaintiffs' websites and Defendants' video game are substantially similar in the
25 expression of their ideas. Defendants' Motion for Summary Judgment on Plaintiffs'
26 Second Claim for Relief is granted.

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28 //

1 Plaintiffs' only remaining claim is one for an Accounting. Because Plaintiffs
2 are not entitled to prevail on their infringement claims, they are not entitled to the
3 equitable remedy of an accounting.

4
5 **IV. CONCLUSION**

6 For the foregoing reasons, the Court hereby **GRANTS** Defendants' Motions
7 for Summary Judgment. (docket nos. 129 and 143).

8 Defendants are directed to provide a Judgment for the Court's signature within
9 20 days from the date of this Order.

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11
12 **IT IS SO ORDERED.**

13 Dated: December 2, 2008

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FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT