

Metro-Goldwyn-Mayer v. American Honda Motor Co.
900 F. Supp. 1287 (C.D. Cal. 1995)

David V. Kenyon, District Judge

I. Introduction

This case arises out of Plaintiffs Metro-Goldwyn-Mayer's and Danjaq's claim that Defendants American Honda Motor Co. and its advertising agency Rubin Postaer and Associates, violated Plaintiffs' "copyrights to sixteen James Bond films and the exclusive intellectual property rights to the James Bond character and the James Bond films" through Defendants' recent commercial for its Honda del Sol automobile.

Premiering last October 1994, Defendants' "Escape" commercial features a young, well-dressed couple in a Honda del Sol being chased by a high-tech helicopter. A grotesque villain with metal-encased arms¹ jumps out of the helicopter onto the car's roof, threatening harm. With a flirtatious turn to his companion, the male driver deftly releases the Honda's detachable roof (which Defendants claim is the main feature allegedly highlighted by the commercial), sending the villain into space and effecting the couple's speedy get-away.

Plaintiffs move to enjoin Defendants' commercial pending a final trial on the merits, and Defendants move for summary judgment.

II. Factual Background

In 1992, Honda's advertising agency Rubin Postaer came up with a new concept to sell the Honda del Sol convertible with its detachable rooftop. For what was to become the commercial at issue, Rubin Postaer vice-president Gary Yoshida claims that he was initially inspired by the climax scene in "Aliens," wherein the alien is ejected from a spaceship still clinging onto the spacecraft's door. From there, Yoshida and coworker Robert Coburn began working on the storyboards for the "Escape" commercial. As the concept evolved into the helicopter chase scene, it acquired various project names, one of which was "James Bob," which Yoshida understood to be a play on words for James Bond. Yoshida Depo. at 45. In addition, David Spyra, Honda's National Advertising Manager, testified the same way, gingerly agreeing that he understood "James Bob to be a pun on the name James Bond."

While the commercial was initially approved by Honda in May 1992, it was put on hold because of financing difficulties. Actual production for the commercial did not begin until after July 8, 1994, when Honda reapproved the concept. Defendants claim that, after the initial May 1992 approval, they abandoned the "James Bob" concept, whiting out "James" from the title on the commercial's storyboards because of the implied reference to "James Bond." However, Plaintiffs dispute this assertion, pointing to the fact that when casting began on the project in the summer of 1994, the cast-

¹ Defense counsel argued at the hearing that the villain's arms were normal and merely gloved. The Court's review of the commercial indicates that at the very least, the gloves contained some sort of metal in them as indicated by the scraping and clanging sounds made by the villain as he tries to get into, and hold onto, the Honda's roof.

ing director specifically sent requests to talent agencies for "James Bond"-type actors and actresses to star in what conceptually could be "the [*1292] next James Bond film."²

With the assistance of the same special effects team that worked on Arnold Schwarzenegger's "True Lies," Defendants proceeded to create a sixty- and thirty-second version of the Honda del Sol commercial at issue: a fast-paced helicopter chase scene featuring a suave hero and an attractive heroine, as well as a menacing and grotesque villain.

The commercial first aired on October 24, 1994, but was apparently still not cleared for major network airing as late as December 21, 1994. Plaintiffs first viewed the film during the weekend of December 17 and 18, 1994; they demanded that Defendants pull the commercial off the air on December 22; Defendants refused on December 23; and Plaintiffs filed this action on December 30, 1994. After a brief telephone conference with this Court on January 4, 1995, the Court allowed Plaintiffs to conduct expedited discovery in this matter.

On January 15, 1995, in an effort to accommodate Plaintiffs' demands without purportedly conceding liability, Defendants changed their commercial by: (1) altering the protagonists' accents from British to American; and (2) by changing the music to make it less like the horn-driven James Bond theme. This version of the commercial was shown during the Superbowl, allegedly the most widely viewed TV event of the year.

Plaintiffs filed the instant motion for preliminary injunction on January 23, 1995, and Defendants filed their summary judgment motion on February 21, 1995.

III. Legal Analysis

A. Plaintiffs' Preliminary Injunction Motion

1. The Preliminary Injunction Standard

In the Ninth Circuit, "[a] preliminary injunction may be granted if the moving party shows either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits." *Senate of State of California v. Mosbacher*, 968 F.2d 974, 977 (9th Cir. 1992). In essence, this test requires looking at two key elements in deciding whether an injunction should issue: the relative merits of the claim, and the relative harms to be suffered by the parties.

2. Merits Of Plaintiff's Copyright Infringement Claim

² Defendants respond that this decision was solely the casting director's, and that the director was actually instructed to look for "The Avengers"-type actors. This assertion is belied by the fact that: (1) even if this is true, Defendant Rubin Postaer must have had knowledge about this because they were in charge of the overall project; (2) Plaintiffs' "Avengers" experts, Brian Clemens and David Rogers, state in their declarations that the Honda characters bear no resemblance to the "Avengers" but closely mimic "James Bond"; and (3) during his deposition, Yoshida kept on referring to the Honda protagonist as "James," which suggests that Rubin Postaer never really abandoned the concept.

The required showing of likelihood of success on the merits is examined in the context of injuries to the parties and the public, and is not reducible to a mathematical formula. To satisfy the "merits" prong of the preliminary injunction standard, Plaintiffs must show a "reasonable probability," at one end of the spectrum, or "fair chance," on the other, of success on the merits. Of course, a lesser showing of probability of success requires a greater showing of harm, and vice-versa.

A claim for copyright infringement requires that the plaintiff prove (1) its ownership of the copyright in a particular work, and (2) the defendant's copying of a substantial, legally protectable portion of such work. "An author can claim to 'own' only an original manner of expressing ideas or an original arrangement of facts." The plaintiff need only show that the defendant copied the protectable portion of its work to establish a prima facie case of infringement.

a. Plaintiffs' Ownership Of The Copyrights

Plaintiffs claim that the Honda commercial: (1) "infringes Plaintiffs' copyrights in the James Bond films by intentionally copying numerous specific scenes from the films;" and (2) "independently infringes Plaintiffs' copyright in the James Bond character as expressed and delineated in those films."

Neither side disputes that Plaintiffs own registered copyrights to each of the sixteen films which Plaintiffs claim "define and delineate the James Bond character." However, Defendants argue that because Plaintiffs have not shown that they own the copyright to the James Bond character in particular, Plaintiffs cannot prevail. Specifically, Defendants claim that James Bond has appeared in two films in which Plaintiffs hold no copyright -- "Casino Royale" and "Never Say Never Again" -- and therefore, Plaintiffs cannot have exclusive rights to the James Bond character.

It appears that Defendants misconstrue Plaintiffs' claim. First, Plaintiffs do not allege that Defendants have violated Plaintiffs' copyright in the James Bond character itself, but rather in the James Bond character as expressed and delineated in Plaintiffs' sixteen films. To the extent that copyright law only protects original expression, not ideas, Plaintiffs' argument is that the James Bond character as developed in the sixteen films is the copyrighted work at issue, not the James Bond character generally. See, e.g., *Anderson v. Stallone*, 1989 U.S. Dist. LEXIS 11109, 11 U.S.P.Q.2D (BNA) 1161, 1989 WL 206431, *6 (C.D. Cal. 1989) (holding that Rocky characters as developed in three "Rocky" movies "constitute expression protected by copyright independent from the story in which they are contained"). Second, there is sufficient authority for the proposition that a plaintiff who holds copyrights in a film series acquires copyright protection as well for the expression of any significant characters portrayed therein. See, e.g., *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517, 1521 n.5 (S.D.N.Y. 1988) ("Because New Line has valid copyrights in the Nightmare [on Elm Street film] series, it is clear that it has acquired copyright protection as well for the character of Freddy.") (emphasis added). And third, the Sam Spade case, 216 F.2d at 949-50, on which Defendants' rely, is distinguishable on its facts because Sam Spade dealt specifically with the transfer of rights from author to film producer rather than the copyrightability of a character as developed and expressed in a series of films.

Accordingly, Plaintiffs will likely satisfy the "ownership" prong of the test.

b. What Elements Of Plaintiffs' Work Are Protectable Under Copyright Law

Plaintiffs contend that Defendants' commercial infringes in two independent ways: (1) by reflecting specific scenes from the 16 films; and (2) by the male protagonist's possessing James Bond's unique character traits as developed in the films.

Defendants respond that Plaintiffs are simply trying to gain a monopoly over the "action/spy/police hero" genre which is contrary to the purposes of copyright law. Specifically, Defendants argue that the allegedly infringed elements identified by Plaintiffs are not protectable because: (1) the helicopter [*1294] chase scene in the Honda commercial is a common theme that naturally flows from most action genre films, and the woman and villain in the film are but stock characters that are not protectable; and (2) under the Ninth Circuit's Sam Spade decision, the James Bond character does not constitute the "story being told," but is rather an unprotected dramatic character.

(1) Whether Film Scenes Are Copyrightable

In their opening brief, Plaintiffs contend that each of their sixteen films contains distinctive scenes that together comprise the classic James Bond adventure: "a high-thrill chase of the ultra-cool British charmer and his beautiful and alarming sidekick by a grotesque villain in which the hero escapes through wit aided by high-tech gadgetry." Defendants argue that these elements are naturally found in any action film and are therefore unprotected "scenes-a-faire."³

Both sides provide expert testimony to support their claims that such scenes are distinctive or generic, and both sides question the qualifications -- and hence, the testimony -- of the others' experts. Indeed, there is a notable difference in the backgrounds of the parties' experts. Plaintiffs' impressive array of James Bond experts includes: (1) Lee Pfeiffer, a writer and James Bond expert whose 1992 book is entitled "The Incredible World of 007" -- he has appeared on many radio and television programs as a James Bond expert; (2) Richard B. Jewell, a professor at the USC School of Cinema-Television who recently taught a course on James Bond films in the Spring of 1994; (3) Mark Cerulli, a writer/producer at HBO who has written articles and film reviews of many of the Bond films; (4) Drew Casper, a professor and film historian at the USC School of Cinema-Television; and (5) Irwin Coster, president of Coster Music Research Enterprises, Inc. Defendants' less-impressive expert list includes: (1) Arnold Margolin, a writer and producer, who considers himself to be "conversant with the genre to which James Bond and his films belong," because he

³ Situations, incidents, or events that naturally flow from a common theme, or setting or basic plot premise are "scenes-a-faire." See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902, 75 L. Ed. 795, 51 S. Ct. 216 (1931); 3 M. & D. Nimmer, *Nimmer on Copyright*, § 13.03[B][4], at 13-80-82 (1994) (discussing scenes-a-faire doctrine). In *Universal City Studios v. Film Ventures International, Inc.*, 543 F. Supp. 1134, 1141 (C.D. Cal. 1982), this Court granted a preliminary injunction to the copyright holders of "Jaws" finding that they were likely to prevail on the issue of intrinsic substantial similarity against the movie "Great White," another shark-attack film. In so doing, the Court rejected the defendants' characterization of the plaintiffs' expression of ideas as unprotectable scenes-a-faire: "The Court rejects Defendants' overly expansive view of that which falls within the unprotected sphere of general ideas and scenes a faire, and instead adopts Plaintiffs' characterization of that which constitutes the expression of ideas." *Id.* at 1141. It appears that in this case, as in *Universal*, Defendants are attempting to claim that all elements of the commercial are unprotected, and therefore, the commercial as a whole is non-infringing. This Court rejected this approach in *Universal*, and does so here as well.

has been a fan of Bond films since 1959 and has written several screenplays in the "spy film" genre; and (2) Hal Needham, a movie director responsible for the "Cannonball Run" and "Smokey and the Bandit" comedy film series.

Plaintiffs' experts describe in a fair amount of detail how James Bond films are the source of a genre rather than imitators of a broad "action/spy film" genre as Defendants contend. Specifically, film historian Casper explains how the James Bond films represented a fresh and novel approach because they "hybridized the spy thriller with the genres of adventure, comedy (particularly, social satire and slapstick), and fantasy. This amalgam . . . was also a departure from the series' literary source, namely writer Ian Fleming's novels." Casper also states: "I also believe that this distinct melange of genres, which was also seminal . . . created a protagonist, antagonist, sexual consort, type of mission, type of [*1295] exotic setting, type of mood, type of dialogue, type of music, etc. that was not there in the subtype of the spy thriller films of that ilk hitherto." In addition, Professor Jewell and Lee Pfeiffer describe the aforementioned elements in more detail and how these are in essence copied by the Honda commercial.⁴

Based on Plaintiffs' experts' greater familiarity with the James Bond films, as well as a review of Plaintiffs' James Bond montage and defense expert Needham's video montage of the "action/spy" genre films, it is clear that James Bond films are unique in their expression of the spy thriller idea. A filmmaker could produce a helicopter chase scene in practically an indefinite number of ways, but only James Bond films bring the various elements Casper describes together in a unique and original way.

Thus, the Court believes that Plaintiffs will likely succeed on their claim that their expression of the action film sequences in the James Bond films is copyrightable as a matter of law.⁵

(2) Whether James Bond Character Is Copyrightable

The law in the Ninth Circuit is unclear as to when visually-depicted characters such as James Bond can be afforded copyright protection. In the landmark Sam Spade case, Warner Bros., 216 F.2d at 950, the Ninth Circuit held that the literary character Sam Spade was not copyrightable because he did not constitute "the story being told." The court opined: "It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright."

⁴ In response, Defendants' expert Needham suggests that the three 1960s British television series "The Avengers," "The Saint," and "Danger Man" are precursors of the Bond films and that the Bond films copy from them. Furthermore, expert Margolin goes through an extrinsic test analysis of the differences between Plaintiffs' films and the Honda commercial.

In rebuttal, Plaintiffs present the declarations of: (1) Brian Clemens, who produced many episodes of "The Avengers" and "Danger Man," as well as having worked on "The Saint"; and (2) David Rogers, a leading authority on "The Avengers" and Patrick McGoohan, the star of "Danger Man." Both experts state that no part of the Honda commercial resembles either the "The Avengers," "Danger Man," or "The Saint," and that the commercial is a copy of a James Bond film.

⁵ Of course, these film sequences would be only "scenes-a-faire" without James Bond. It is Bond that makes a James Bond film as the following section bears out.

Two subsequent Ninth Circuit decisions have cast doubt on the continued viability of the Sam Spade holding as applied to graphic characters. In *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978), cert. denied, 439 U.S. 1132, 59 L. Ed. 2d 94, 99 S. Ct. 1054 (1979), the circuit panel held that several Disney comic book characters were protected by copyright. In acknowledging the Sam Spade opinion, the court reasoned that because "comic book characters . . . are distinguishable from literary characters, the [Sam Spade] language does not preclude protection of Disney's characters." The *Air Pirates* decision may be viewed as either: (1) following Sam Spade by implicitly holding that Disney's graphic characters constituted the story being told; or (2) applying a less stringent test for the protectability of graphic characters. One rationale for adopting the second view is that, "as a practical matter, a graphically depicted character is much more likely than a literary character to be fleshed out in sufficient detail so as to warrant copyright protection." However, as one district court warned, "this fact does not warrant the creation of separate analytical paradigms for protection of characters in the two mediums."

A second Ninth Circuit opinion issued in 1988 did little to clarify *Air Pirates'* impact on the Sam Spade test. In *Olson v. National Broadcasting Co.*, 855 F.2d 1446, 1451-52 n.6 (9th Cir. 1988), the court cited with approval the Sam Spade "story being told" test and declined to characterize this language as [*1296] dicta. Later in the opinion, the court cited the *Air Pirates* decision along with Second Circuit precedent,⁶ recognizing that "cases subsequent to [the Sam Spade decision] have allowed copyright protection for characters who are especially distinctive." Olson also noted that "copyright protection may be afforded to characters visually depicted in a television series or in a movie." However, later in the opinion, the court distanced itself from the character delineation test applied by these other cases, referring to it as "the more lenient standard[] adopted elsewhere."

There have been no Ninth Circuit cases on the protectability of visually-depicted characters since Olson, and therefore, it behooves this Court to analyze James Bond's status under the Sam Spade/Olson/Ninth Circuit "story being told" test, as well as under the *Air Pirates*/Second Circuit "character delineation" test.

Predictably, Plaintiffs claim that under either test, James Bond's character as developed in the sixteen films is sufficiently unique and deserves copyright protection, just as Judge Keller ruled that Rocky and his cohorts were sufficiently unique. Plaintiffs point to various character traits that are specific to Bond -- i.e. his cold-bloodedness; his overt sexuality; his love of martinis "shaken, not stirred;" his marksmanship; his "license to kill" and use of guns; his physical strength; his sophistication -- some of which, Plaintiffs' claim, appear in the Honda commercial's hero.

On the other hand, Defendants assert that, like Sam Spade, James Bond is not the "story being told," but instead "has changed enormously from film to film, from actor to actor, and from year to year." Moreover, Defendants contend that even if Bond's character is sufficiently delineated, there is so little character development in the Honda commercial's hero that Plaintiffs cannot claim that Defendants copied more than the broader outlines of Bond's personality.

Reviewing the evidence and arguments, the Court believes that James Bond is more like Rocky than Sam Spade -- in essence, that James Bond is a copyrightable character under either the Sam

⁶ The Second Circuit has adopted an alternate test for determining whether dramatic characters are protectable under copyright law. In the landmark case of *Nichols*, 45 F.2d at 121, the court held that copyright protection is granted to a character if it is developed with enough specificity so as to constitute protectable expression. This has been viewed to be a less stringent standard than Sam Spade's "story being told" test.

Spade "story being told test" or the Second Circuit's "character delineation" test. Like Rocky, Sherlock Holmes, Tarzan, and Superman, James Bond has certain character traits that have been developed over time through the sixteen films in which he appears. Contrary to Defendants' assertions, because many actors can play Bond is a testament to the fact that Bond is a unique character whose specific qualities remain constant despite the change in actors. Indeed, audiences do not watch Tarzan, Superman, Sherlock Holmes, or James Bond for the story, they watch these films to see their heroes at work. A James Bond film without James Bond is not a James Bond film. Moreover, as discussed more specifically below, the Honda Man's character, from his appearance to his grace under pressure, is substantially similar to Plaintiffs' Bond.

Accordingly, the Court concludes that Plaintiffs will probably succeed on their claim that James Bond is a copyrightable character [*1297] under either the "story being told" or the "character delineation" test.

c. Defendants' Alleged Infringement

After identifying the scope of Plaintiffs' copyrightable work, the Court must focus on whether Defendants copied Plaintiffs' work. Since direct evidence of actual copying is typically unavailable, the plaintiff may demonstrate copying circumstantially by showing: (1) that the defendant had access to the plaintiff's work, and (2) that the defendant's work is substantially similar to the plaintiff's.

(1) Access

To demonstrate access, the plaintiff must show that the defendant had "an opportunity to view or to copy plaintiff's work." Access may not be inferred through mere "speculation or conjecture." There must be a reasonable possibility to view plaintiff's work, not just a bare possibility.

In this case, Plaintiffs contend that Defendants conceded access during the telephone conference with the Court on January 4, 1995. Defendants raise access as an issue, arguing that the inventor of the Honda commercial, Gary Yoshida, states in his declaration that he has never watched more than a few minutes of any one James Bond film, and that he got the idea for the commercial from the climax scene in "Aliens."

The Court notes that: (1) Yoshida's admission that he has at least viewed portions of the James Bond films on television; (2) the "Honda man's" having been referred to as "James Bob"; and (3) the casting director's desire to cast "James Bond"-type actors and actresses, are factors sufficient to establish Defendants' access to Plaintiffs' work. Moreover, the sheer worldwide popularity and distribution of the Bond films allows the Court to indulge a presumption of access.

Thus, the Court concludes that Plaintiffs will probably succeed on their claim that Defendants had access to Plaintiffs' work.

(2) [**26] Substantial Similarity Test

The Ninth Circuit has established a two-part process for determining "substantial similarity" by applying both the "extrinsic" and "intrinsic" tests. *Krofft*, 562 F.2d at 1164-65. "The [Krofft] test permits a finding of infringement only if a plaintiff proves both substantial similarity of general ideas under the 'extrinsic test' and substantial similarity of the protectable expression of those ideas

under the 'intrinsic test.'" This "idea-expression" dichotomy is particularly elusive to courts and the substantial similarity test necessarily involves decisions made on a case-by-case basis.

(a) Extrinsic Test

The "extrinsic" test compares specific, objective criteria of two works on the basis of an analytic dissection of the following elements of each work -- plot, theme, dialogue, mood, setting, pace, characters, and sequence of events. Evidence is usually supplied by expert testimony comparing the works at issue. Because the extrinsic test relies on objective analytical criteria, "this question may often be decided as a matter of law."

Here, both Plaintiffs' and Defendants' experts go through specific analyses of the similarities in ideas between the James Bond films and the Honda commercial. Plaintiffs contend that the commercial illegally copies specific protected portions of the James Bond films and the James Bond character itself. Defendants claim that the commercial depicts a generic action scene with a generic hero, all of which is not protected by [*1298] copyright. Alternatively, Defendants argue that they did not copy a substantial portion of any one James Bond work to be liable for infringement as a matter of law.

Viewing Plaintiffs' and Defendants' videotapes and examining the experts' statements, Plaintiffs will likely prevail on this issue because there is substantial similarity between the specific protected elements of the James Bond films and the Honda commercial: (1) the theme, plot, and sequence both involve the idea of a handsome hero who, along with a beautiful woman, lead a grotesque villain on a high-speed chase, the male appears calm and unruffled, there are hints of romance between the male and female, and the protagonists escape with the aid of intelligence and gadgetry; (2) the settings both involve the idea of a high-speed chase with the villain in hot pursuit; (3) the mood and pace of both works are fast-paced and involve hi-tech effects, with loud, exciting horn music in the background; (4) both the James Bond and Honda commercial dialogues are laced with dry wit and subtle humor; (5) the characters of Bond and the Honda man are very similar in the way they look and act -- both heroes are young, tuxedo-clad, British-looking men with beautiful women in tow and grotesque villains close at hand; moreover, both men exude uncanny calm under pressure, exhibit a dry sense of humor and wit, and are attracted to, and are attractive to, their female companions.

In addition, several specific aspects of the Honda commercial appear to have been lifted from the James Bond films:

(1) In "The Spy Who Loved Me," James Bond is in a white sports car, a beautiful woman passenger at his side, driving away down a deserted road from some almost deadly adventure, when he is suddenly attacked by a chasing helicopter whose bullets he narrowly avoids by skillfully weaving the car down the road at high speed. At the beginning of the Honda commercial, the Honda man turns to his companion and says, "That wasn't so bad"; to which the woman replies, "Well, I wouldn't congratulate yourself quite yet" -- implying that they had just escaped some prior danger. Suddenly, a helicopter appears from out of nowhere and the adventure begins.

(2) In "Dr. No.," the villain has metal hands. In the Honda commercial, the villain uses his metal-encased hands to cling onto the roof of the car after he jumps onto it.

(3) In "Goldfinger," Bond's sports car has a roof which Bond can cause to detach with the flick of a lever. In the Honda commercial, the Honda del Sol has a detachable roof which the Honda man uses to eject the villain.

(4) In "Moonraker," the villainous henchman, Jaws, sporting a broad grin revealing metallic teeth and wearing a pair of oversized goggles, jumps out of an airplane. In the Honda commercial, the villain, wearing similar goggles and revealing metallic teeth, jumps out of a helicopter.

(5) In "The Spy Who Loved Me," Jaws assaults a vehicle in which Bond and his female sidekick are trying to make their escape. In the Honda commercial, the villain jumps onto the roof of the Honda del Sol and scrapes at the roof, attempting to hold on and possibly get inside the vehicle.

(6) In "You Only Live Twice," a chasing helicopter drops a magnetic line down to snag a speeding car. In the Honda commercial, the villain is dropped down to the moving car and is suspended from the helicopter by a cable.⁷

[*1299] In sum, the extrinsic ideas that are inherent parts of the James Bond films appear to be substantially similar to those in the Honda commercial.

(b) Intrinsic Test

The "intrinsic" test asks whether the "total concept and feel" of the two works is also substantially similar. This is a subjective test that requires a determination of whether the ordinary reasonable audience could recognize the Defendants' commercial as a picturization of Plaintiffs' copyrighted work.

Because this is a subjective determination, the comparison during the intrinsic test is left for the trier of fact. This would involve showing the Honda commercial to the members of the jury so that they may compare the same with the sixteen Bond films at issue. Viewing the evidence, it appears likely that the average viewer would immediately think of James Bond when viewing the Honda commercial, even with the subtle changes in accent and music.

As in this Court's Jaws opinion, Universal, 543 F. Supp. at 1141, the Court finds that Defendants' attempt to characterize all of the alleged similarities between the works as scenes-a-faire to be unavailing. There are many ways to express a helicopter chase scene, but only Plaintiffs' Bond films would do it the way the Honda commercial did with these very similar characters, music, pace, and mood.⁸ Plaintiffs are therefore likely to prevail on the "intrinsic test."

(3) Independent Creation

After the plaintiff has satisfied both the "access" and "substantial similarity" prongs of the test, the burden then shifts to the defendant to show that the defendant's work was not a copy but rather was independently created.

⁷ Plaintiffs identify a seventh similarity that is less compelling, but nonetheless interesting: In "Diamonds Are Forever," Sean Connery, playing James Bond, wears a toupee to cover his, by then, balding pate, a fact widely reported in the media and repeated in the Bond literature. In the Honda commercial, once the car's roof flies off flinging the villain into the air, the woman remarks, "Don't you just love the wind through your hair?," to which the man replies, "What I have left."

⁸ During the hearing, defense counsel pointed out several differences -- the fact that the "Honda man" was blonder than Bond, the fact that the commercial was more "sepia" in tone than the Bond films, etc. -- that appear to this Court to be largely immaterial differences that would not be immediately apparent to the average viewer.

Defendants claim that their commercial was independently created, as evidenced from the Yoshida declaration stating that he was inspired not by James Bond, but by "Aliens." Moreover, Defendants claim that their intent is irrelevant in determining whether their commercial infringes or not.

Plaintiffs raise two points in response: (1) there is other evidence before the Court to suggest that Honda never abandoned the idea of using James Bond as the basis for its commercial -- for example, the casting director's notes, Yoshida's reference in his deposition to the Honda Man as "James," etc.; and (2) this evidence of intent is relevant to counter Defendants' claim of independent creation.

For the reasons discussed above, Defendants' evidence is neither very strong nor credible; it is highly unlikely that Defendants will be able to show that they created their commercial separate and apart from the James Bond concept. Accordingly, Plaintiffs should prevail on this issue.

(4) The Fair Use Doctrine

Finally, as a separate defense to copyright infringement, Defendants claim that their use of Plaintiffs' work is protected under the fair use doctrine, which protects parodies, for example. Under the Supreme Court's recent decision in *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994), a subsequent work may not infringe on an original upon examining the following four-prong statutory factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational [*1300] purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential for, or value of, the copyrighted work. The Court shall analyze each factor in turn below.

First, the Court must look to whether Defendants' use is of a commercial nature and whether, and to what extent, the infringing work is transformative of the original. In *Campbell*, the Supreme Court noted that a purported parody would not be protected if it is "commentary that has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh . . ." Here, Plaintiffs contend that the Honda ad is completely commercial in its nature and does not comment on the earlier Bond films. Defendants claim that their commercial is a parody on the action film genre, and further, is more than simply a commercial because of its artistic merit. On balance, Plaintiffs should prevail on this issue -- the Supreme Court in *Campbell* notes that "the use . . . of a copyrighted work to advertise a product, even in parody, will be entitled to less indulgence under the first factor of the fair use enquiry, than the sale of the parody for its own sake"

Second, the Court must recognize that "some works are closer to the core of intended copyright protection than others," and thus are more deserving of protection. *Campbell*, 114 S. Ct. at 1175 & cases cited therein (e.g. fictional works are closer to the core than fact-based works). Plaintiffs view their films as just such core-predictable work, while Defendants see their work as generic, spy thriller fare. Again, Plaintiffs should prevail on this issue because their work has created its own unique niche in the larger "action film" genre.

Third, the Court must look to the quantitative and qualitative extent of the copying involved. A parodist may appropriate only that amount of the original necessary to achieve his or her purpose.

The amount that may be used diminishes the less the purpose is to critique the original and the more that the parody serves as a substitute for the original. Plaintiffs claim that the Honda commercial is a total appropriation; Defendants describe the two versions of their commercial as "de minimis" appropriation, if at all. Plaintiffs should prevail on this issue: as mentioned above, the brevity of the infringing work when compared with the original does not excuse copying.

And fourth, the Court must measure "the effect of the use upon the potential market for or value of the copyrighted work." The task is to distinguish between "biting criticism [that merely] suppresses demand [and] copyright infringement [which] usurps it." Where the appropriation involves "mere duplication for commercial purposes," market harm is presumed. Plaintiffs allege that "one of the most commercially lucrative aspects of the copyrights is their value as lending social cachet and upscale image to cars" and that Defendants' commercial unfairly usurps this benefit. Defendants counter that Plaintiffs present no evidence that their commercial will dissuade viewers from watching the Bond films. Plaintiffs should win on this issue as well; it is likely that James Bond's association with a low-end Honda model will threaten its value in the eyes of future upscale licensees.

It is clear from the foregoing discussion that Plaintiffs will likely succeed on this issue [*1301] and Defendants will be unable to show fair use or parody.

3. Balance Of Relative Harms

It is well-settled in this circuit that once a copyright holder has shown a likelihood of success on the merits based on access and substantial similarity, irreparable injury is presumed, warranting a preliminary injunction. Irreparable injury is presumed because the copyright owner's right to exploit its work is unique.

As discussed above, Plaintiffs have established a likelihood of success on the merits and therefore, the Court presumes irreparable injury. Moreover, the Court notes that Plaintiffs have shown they have been specifically harmed by the continued airing of Defendants' commercial in two ways: (1) prolonged lost licensing revenue (purportedly in the millions of dollars); and (2) dilution of the copyrights' long-term value. The latter is especially true given Plaintiffs' own deal with BMW for a special movie tie-in in conjunction with Plaintiffs' release of the first James Bond movie in six years, "Goldeneye" -- a fact undisputed by Defendants. Indeed, the Court can very well imagine that a majority of the public, upon viewing the Honda commercial and a future BMW ad, would come to the conclusion that James Bond was endorsing two automobile companies. Such a scenario would drastically decrease the long-term value of Plaintiffs' James Bond franchise.

In response, Defendants assert that aside from the fact that Plaintiffs will not prevail on the merits of their claim, the balance of equities tips in Defendants' favor for three reasons: (1) Plaintiffs have waited too long before seeking an injunction -- Defendants began airing the commercial on October 24, 1994, Plaintiffs did not complain until mid-December 1994 and did not move for a preliminary injunction until January 23, 1995; (2) Plaintiffs have waived their rights to equitable relief by not objecting to the use of the Bond character in "Cannonball Run," "Casino Royale," and "Never Say Never Again"; and (3) unlike Plaintiffs' speculative losses, Defendants have already poured in over \$ 6 million into the Honda commercial (\$ 2 million in production costs plus \$ 4 mil-

lion in media placement) and stand to lose much more because of the seasonal sales of the Honda del Sol, should the injunction issue.

All three of Defendants' arguments fail because: (1) Plaintiff's counsel states in his declaration that the commercial was not approved by any of the major networks as of December 21, 1994, and therefore, Plaintiffs' discovery of the commercial during the weekend of December 17-18, 1994 was reasonable; (2) Plaintiffs did not equitably waive their rights in the James Bond character as to "Cannonball Run" (an obvious parody), "Casino Royale" (Ian Fleming had sold the rights to "Casino Royale" before Plaintiffs acquired their movie rights to make their 16 films and Plaintiffs do not claim that the James Bond character in "Casino Royale" is the same as theirs), and "Never Say Never Again" (Plaintiffs tried to assert their rights in a British court, but the court allowed for the release of "Never Say Never Again" as a remake of Plaintiffs' "Thunderball"); and (3) the amount of Defendants' alleged loss, while relevant to determining the size of the bond Plaintiffs must post, does not change the Court's conclusion that the injunction should issue based on its finding that Plaintiffs are likely to prevail on their copyright claim. ****