

APPENDIX

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHOSH YONAY, an individual;
YUVAL YONAY, an individual,
Plaintiffs-Appellants,

v.

PARAMOUNT PICTURES CORPORATION,
Defendant-Appellee.

No. 24-2897

D.C. No. 2:22-cv-03846-PA-GJS

OPINION

Appeal from the United States District Court
for the Central District of California

Percy Anderson, District Judge, Presiding

Argued and Submitted June 3, 2025
Pasadena, California

Filed January 2, 2026

Before: Andrew D. Hurwitz, Eric D. Miller,
and Jennifer Sung, Circuit Judges.

Opinion by Judge Miller

OPINION

MILLER, Circuit Judge:

Shosh and Yuval Yonay own the copyright in “Top Guns,” a 1983 magazine article by Ehud Yonay about the United States Navy Fighter Weapons School, popularly known as “Top Gun.” They sued Paramount Pictures Corporation, alleging that its 2022 movie *Top Gun: Maverick* infringed that copyright. “Top Guns” and *Maverick* do share some similarities because they both depict the Navy’s real fighter-pilot training program. But copyright plaintiffs must show more than an allegedly infringing work’s general similarity to their own. They must show that what is similar is their original expression. Because *Maverick* does not share substantial amounts of the original expression of “Top Guns,” we affirm the district court’s grant of summary judgment for Paramount.

I

In 1983, *California Magazine* published “Top Guns,” an 11-page article by Ehud Yonay about the Fighter Weapons School, later renamed the Strike Fighter Tactics Instructor Program, a Navy program that teaches advanced air-combat tactics. (We refer to Ehud Yonay as “Yonay” and to Shosh and Yuval Yonay, Yonay’s heirs and the plaintiffs here, as “the Yonays.”) The article discusses the history, culture, and setting of the Top Gun program and vividly describes the experience of flying F-14 aircraft. It focuses on two lieutenants, callsigns “Yogi” and “Possum,” describing their decisions to become fighter pilots and their experiences in naval aviation and the Top Gun program. The article is written in a style that the Yonays refer to as “‘New Journalism,’ where writers use extensive imagery and subjective expression to present facts with the colorful voice of fiction.” A representative pas-

sage is one of the article's first descriptions of Yogi and Possum flying:

From where they sit, however, it's not their silver rocket that's rocking but the entire vast blue dome of sea and sky. There are no ups or downs up here, no rights or lefts, just a barely perceptible line separating one blue from another, and that line is spinning and racing like mad in the distance. Yogi was still in junior high school when he realized that flying straight and level might be okay for some people, but if you like yanking and banking—the feeling of riding inside one of those storm-in-a-bottle souvenirs—then there's just one place for you, and that's the cockpit of a fighter plane.

Shortly after “Top Guns” was published, Yonay granted Paramount all rights to the article. In return, Paramount paid Yonay a fixed sum of money and agreed to credit him in any movies “produced by [Paramount] hereunder and substantially based upon or adapted from” the article.

In 1986, Paramount released the feature-length movie *Top Gun*, whose credits state that it was “[s]uggested by” Yonay's article. *Top Gun* enjoyed great commercial success and was the top-grossing movie of 1986.

The film follows two Navy lieutenants, callsigns “Maverick” and “Goose,” through their experience at Top Gun. Maverick competes with another lieutenant, callsign “Iceman,” to be the top trainee. After Goose dies in an accident while Maverick is flying, a guilt-ridden Maverick considers quitting. But he continues in the program, eventually graduating with his class. He and Iceman are then deployed for a dangerous mission. Maverick shoots down three enemy aircraft, befriends Iceman, and makes peace with his guilt over Goose's death.

After Yonay died in 2012, his widow Shosh and his son Yuval became the owners of the copyright in “Top Guns.” In 2020, they terminated Yonay’s agreement with Paramount by invoking 17 U.S.C. §203(a)(3), which allows an author’s heirs to terminate certain copyright grants made during his lifetime.

Two years later, in 2022, Paramount released *Top Gun: Maverick*, a sequel to the original movie. *Maverick* picks up decades after *Top Gun* left off. The eponymous pilot is now a captain, while Iceman, now an admiral, commands the U.S. Pacific Fleet. After *Maverick* crashes an experimental hypersonic jet, Iceman sends him back to Top Gun to train a group of program graduates for a mission to destroy a foreign enemy’s uranium-enrichment plant. One of those graduates is Goose’s son, callsign “Rooster,” who resents *Maverick* because *Maverick* blocked his application to the Naval Academy in an effort to protect him from suffering his father’s fate.

The pilots train by flying on a course that simulates the topography surrounding the uranium plant, but none of the trainees can complete the course while flying quickly enough to avoid attack by enemy aircraft. Iceman dies of cancer, and *Maverick*, inspired by Iceman, takes an unauthorized flight through the course and demonstrates that it is possible to complete the mission in time. Based on that performance, *Maverick* is selected to lead the mission, and he decides that he will lead one flight team and Rooster will lead the other. While all of that is going on, *Maverick* pursues a romance with Penny Benjamin (mentioned in the original *Top Gun* when *Maverick*’s commanding officer noted his “history of high-speed passes over five air-control towers and one admiral’s daughter”).

During the mission, *Maverick* protects Rooster from enemy missiles but is shot down in the process. Just when

an enemy helicopter is about to shoot Maverick on the ground, Rooster returns, saves Maverick by destroying the helicopter, and is himself shot down. Maverick and Rooster, now both on foot, steal an F-14 from an enemy air base and begin flying back to their aircraft carrier. On the way, however, they are intercepted by enemy aircraft. They appear to be doomed, but one of the other Top Gun graduates flies in and saves the day. The three return to the carrier in triumph, with Maverick and Rooster having resolved their differences. At the end of the movie, Maverick and Penny fly Maverick's personal plane into the sunset.

Like its predecessor, *Maverick* was a major commercial success. Paramount did not compensate the Yonays or credit Yonay in the film.

After *Maverick*'s release, the Yonays sued Paramount in the Central District of California, asserting claims for copyright infringement and breach of contract. The district court denied a motion to dismiss but later granted Paramount's motion for summary judgment. The court concluded that "Top Guns" and *Maverick* are not "substantially similar," as required to establish copyright infringement. While the works have "some similarities," the court explained, those similarities are "based on unprotected elements" like facts about the Top Gun program, "general plot ideas, [and] familiar stock scenes and themes."

In resolving the copyright claim, the district court excluded the proffered opinion of the Yonays' literary expert, Henry Bean, finding that Bean had "fail[ed] to filter out the elements of the Article and [*Maverick*] that are not protected by copyright law (i.e., facts), which renders his opinions unhelpful and inadmissible." The court denied a motion to exclude Paramount's expert, Andrew Craig, a

former Top Gun instructor who described the factual accuracy of “Top Guns.” Craig’s opinions, the court reasoned, could help the factfinder “filter out the unprotected, factual elements of the Article and [*Maverick*] to assess whether they are substantially similar.”

As to the contract claim, the district court construed the agreement to include two conditions for crediting Yonay in a movie produced by Paramount: that the movie was (1) produced under the agreement and (2) “substantially based upon or adapted from” the article. Because *Maverick* was not produced under the agreement, the court concluded, Paramount was not required to credit Yonay.

The Yonays appeal. We review the district court’s grant of summary judgment de novo. *See Teradata Corp. v. SAP SE*, 124 F.4th 555, 572 (9th Cir. 2024).

II

To establish copyright infringement, plaintiffs must show that (1) they own a valid copyright in a work and (2) the defendant copied original aspects of the work. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Only the second element is at issue in this case, and really only part of it: Paramount argues that the Yonays have not shown that anything copied from the article was original—in other words, that they have not shown “unlawful appropriation.” *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc).

Copyright protection does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. §102(b). “Thus, a defendant incurs no liability if he copies only the ‘ideas’ or ‘concepts’ used in

the plaintiff’s work.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018), *overruled in part on other grounds by Skidmore*, 952 F.3d at 1068-69. And, of particular relevance here, copyright law also does not protect the facts set forth in a work, so a defendant is not liable for copying them. *Feist*, 499 U.S. at 346-48; *accord Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (“No author may copyright his ideas or the facts he narrates.”). “[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” *Feist*, 499 U.S. at 349-50.

To show unlawful appropriation, plaintiffs must therefore demonstrate that the works in question share “substantial similarity in *protectable* expression,” not merely in facts, ideas, or concepts. *Skidmore*, 952 F.3d at 1064 (emphasis added). To do so, they must satisfy both an extrinsic test and an intrinsic test. *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018). The extrinsic test “assesses the objective similarities of the two works.” *Rentmeester*, 883 F.3d at 1118. The intrinsic test is subjective and tests “for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.” *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 637 (9th Cir. 2008) (quoting *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994)). Because “the intrinsic test is reserved exclusively for the trier of fact,” only the extrinsic test is relevant at the summary-judgment stage. *Williams*, 895 F.3d at 1119.

“[W]hen applying the extrinsic test, a court must filter out and disregard the non-protectible elements.” *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). For literary works, “[t]he test focuses on articulable similarities between the plot, themes, dialogue, mood, setting,

pace, characters, and sequence of events in two works.” *Id.* (quoting *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994)).

But even if none of the artistic elements in those categories reveals substantial similarity, works can be substantially similar if they share the “selection and arrangement” of those elements—or, in other words, “the *particular* way in which the artistic elements form a coherent pattern, synthesis, or design.” *Skidmore*, 952 F.3d at 1074; see *Hanagami v. Epic Games, Inc.*, 85 F.4th 931, 943 (9th Cir. 2023). For a “selection-and-arrangement” claim to succeed, the elements themselves need not be protectable. Rather, “a copyright plaintiff may argue ‘infringement . . . based on original selection and arrangement of unprotected elements.’” *Skidmore*, 952 F.3d at 1074 (omission in original) (quoting *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002)); see also *Metcalf*, 294 F.3d at 1074 (“The particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element.”).

We first evaluate the Yonays’ arguments about individual elements of the works and then consider their argument based on selection and arrangement.

A

The Yonays contend that there are similarities in each of the categories of elements described in our cases: plot, sequence of events, characters, dialogue, themes, mood, setting, and pace. We agree with the district court that the Yonays cannot show meaningful similarities in any of those categories.

Before considering the individual categories, however, we observe a problem that pervades the Yonays’ arguments: Although “Top Guns” contains much original, pro-

tected expression—most notably, its vivid phrasing and innovative structure—none of that expression appears in *Maverick*. The Yonays identify similarities between the article and the film only by describing both works at such a high level of abstraction that the similarities do not involve protected expression. Their claim of substantial similarity fails because what is protected is not similar, and what is similar is not protected.

Plot and Sequence of Events: We are not sure it is accurate to characterize “Top Guns” as having a “plot” in the conventional sense—it is a nonfiction work, and the portions of the article that describe specific events do so in a nonlinear way that is repeatedly interrupted by historical and descriptive digressions. The article describes the various planes used by Navy fighter pilots, recounts how pilots learn to fly, explains the origin of the Top Gun program, and includes detailed descriptions of a flight simulator and Yonay’s own experience in a fighter plane. To the extent there is a plot, it is Yogi and Possum’s journey: They complete flight school and meet while going through fighter-pilot training; they are deployed on an aircraft carrier; they are sent to Top Gun as students and proceed through the school’s curriculum; and they graduate and are deployed again.

Maverick, by contrast, has a traditional plot with exposition, climax, and denouement. Apart from a short flashback that shows scenes from the original *Top Gun*, the entire story is presented in chronological order. *Maverick* begins as a test pilot and then is sent to Top Gun as an instructor. Dramatic tension builds as *Maverick* and Rooster argue with each other, the pilots are unable to complete the training course, and *Maverick* and Penny pursue a romantic relationship. The plot culminates in the successful completion of the mission, *Maverick* and

Rooster’s escape from enemy territory, their reconciliation, and Maverick and Penny’s flight into the sunset.

Maverick includes many significant plot elements that are absent from “Top Guns.” The movie has a main character who returns to Top Gun to train younger pilots to complete a specific mission, rather than the general training that normally characterizes the program; it includes a romantic subplot; and around a quarter of the movie shows the actual mission being carried out. Conversely, “Top Guns” contains historical and technical discussions of numerous subjects not addressed in *Maverick*, such as the flight simulators used to train pilots and the origins of the Top Gun program.

The Yonays argue that those differences are irrelevant to the analysis of substantial similarity. We agree with the general proposition that “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936) (L. Hand, J.). But a plot is simply “the ‘sequence of events’ by which the author expresses his ‘theme’ or ‘idea.’” *Shaw v. Lindheim*, 919 F.2d 1353, 1363 (9th Cir. 1990) (quoting 3 Melville B. Nimmer, *Nimmer on Copyright* §13.03[A] (1989)), *overruled in part on other grounds by Skidmore*, 952 F.3d at 1068-69. The more that events are added to or subtracted from that sequence, the less that the plots can reasonably be described as similar, even if there is some overlap. *Cf. Woodland v. Hill*, 136 F.4th 1199, 1211 n.4 (9th Cir. 2025) (noting that “courts may identify differences in the works to explain why there is no substantial similarity”).

At oral argument, the Yonays emphasized that *Maverick* “lift[s] certain things” from “Top Guns,” including the fact that the F-14 “swings back its wings so that it can . . . do a short takeoff”—a feature that becomes relevant to

the plot when Maverick and Rooster take off in a stolen F-14 to escape enemy territory. But the F-14 is a real plane with variable-sweep wings. See *Jane's All the World's Aircraft 1983-84*, at 392 (John W.R. Taylor ed., 1983) (noting that “[t]he configuration of the F-14 includes variable geometry wings” with “20° of leading-edge sweep in the fully forward position and 68° when fully swept”). The evocative language that “Top Guns” uses to describe the aircraft’s design—that its “wings can sweep back for fast flying or open to the sides like an eagle’s for landing or just for cruising around”—does not appear in *Maverick*. And the basic facts of the design do not enjoy copyright protection. See *Feist*, 499 U.S. at 349 (“No matter how original the format, however, the facts themselves do not become original through association.”).

The Yonays also contend that both works “journey through what it takes to be the best of the best in fighter aviation by following the demanding, intense lives of fighter pilots.” It is true that both “Top Guns” and *Maverick* depict fighter pilots training at Top Gun and then being deployed. But that similarity is a factual one: Top Gun is a real program in which the best fighter pilots undergo a demanding, intense training regimen and are then deployed.

The Yonays describe various other alleged plot similarities, such as “focus[ing] on a small, elite group of pilots who are bound together by their shared experiences and sacrifices in a high-stakes environment,” “emphasiz[ing] the importance of rigorous training,” and “capitaliz[ing] on the fighter jocks’ ‘frat-house’ culture.” But even if those similarities exist, they involve only unprotected ideas, not protected expression.

Characters: No character described in “Top Guns” appears in *Maverick*. In both works, of course, many of the

characters are Top Gun instructors and trainees. But in a work about Top Gun, using instructors and trainees as characters is hardly original. In any event, the characters in the article are real people, and “[a] character based on a historical figure is not protected for copyright purposes.” *Corbello v. Valli*, 974 F.3d 965, 976 (9th Cir. 2020).

The Yonays point to the article’s “expressive characterizations” of the real Top Gun trainees. They highlight, for example, its description of the trainees in a bar: “[T]hese supremely healthy young males are standing around in twos and threes and talking about” a training flight while ignoring the dancing women “waving right in front of their eyes.” Those descriptive phrases are entitled to copyright protection: Although ideas and facts themselves are not protectable, “the specific details of an author’s rendering of ideas” and facts are. *Corbello*, 974 F.3d at 975 (quoting *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006)). But none of the quoted phrases appears in *Maverick*. The Yonays instead argue that *Maverick* copied general traits from the article’s characters—for example, that the film depicts pilots as “men’s men” who are “jocular, confident, competitive . . . , good-humored and deeply committed.” Like the Yonays’ asserted plot similarities, those traits are too general to be protectable. See *Biani v. Showtime Networks, Inc.*, 153 F.4th 957, 965 (9th Cir. 2025).

Dialogue: It is unclear that any of the dialogue in “Top Guns” is protectable, given that the article presents all of that dialogue as real statements of real Top Gun instructors and trainees. See *Corbello*, 974 F.3d at 978 (“[E]lements of a work presented as fact are treated as fact.”). Regardless, none of the dialogue in “Top Guns” appears in *Maverick*—with the exception of the two-word

phrase “fight’s on,” something that real fighter pilots say before beginning training exercises.

Faced with the lack of similarity in dialogue, the Yonays again resort to abstraction, arguing that “the characters in both Works speak in a way that is at once droll, idiomatic, techy, and charmingly unguarded.” Assuming that description to be accurate, it is too general to be protectable.

Theme, Mood, Setting, and Pace: While the Yonays articulate similarities beyond the plot, characters, and dialogue in the works, we have never held that elements outside of those categories, on their own, can give rise to substantial similarity. See 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §13D.19[D] (2025) (“[M]ood, setting, and pace, standing alone, would not seem able to attract [copyright] protection.”). Either way, the Yonays’ arguments about theme, mood, setting, and pace should by now sound familiar. They point, for example, to the colorful language that “Top Guns” uses to describe the Navy base: “At night the darkened base could be mistaken for an old *From Here to Eternity* set,” and “it looks like a small desert town out of the 1950s.” But in *Maverick*, no one compares the Navy base to a movie set or a desert town. The Yonays assert that those comparisons reveal shared themes of “post-WWII nostalgia” and “romanticism of a simpler era,” but nostalgia for a simpler time is an unprotectable idea—as are the other purportedly shared themes and moods, such as “the anachronism of fighter aviation,” “that success comes down to the pilot, rather than his aircraft,” “ideological rifts in the Navy,” “‘Western’ gunslinger themes,” “the constant threat of death and violence,” and the contrast between “freedom” in the sky and “restless[ness]” on the ground.

As for setting, “Top Guns” described Naval Air Station Miramar, which at the time was the location of the Top Gun program, while *Maverick* takes place at Naval Air Station North Island. Despite that difference, the Yonays argue that because both bases are in San Diego, the works “feature the same topography, including the desert, Pacific Ocean, and beaches of California.” Those geographic similarities, however, are simply features of the original location of the real program.

The Yonays’ arguments about pace fare no better. They say that “Top Guns” and *Maverick* share an “alternation between the aerial ballet, at once lyrical and violent, juxtaposed against quiet, reflective scenes on the ground.” Assuming that description to be accurate, alternation between scenes in flight and scenes on the ground reflects nothing more than the reality that fighter pilots in training do not spend 100 percent of their time in the air but also spend time on the ground reviewing past flights or preparing for future ones. Those facts about pilot training are not protectable.

B

Given the lack of similarity in protectable elements, the Yonays understandably focus on a selection-and-arrangement argument. “[A] selection and arrangement copyright protects . . . the *particular* way in which the artistic elements form a coherent pattern, synthesis, or design.” *Skidmore*, 952 F.3d at 1074. We consider selection-and-arrangement arguments because of the possibility that the original expression a defendant has copied from a plaintiff cannot be categorized as one, or even a combination, of plot, themes, dialogue, mood, setting, pace, characters, or sequence of events. But although “[t]he particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable ele-

ment,” *Metcalf*, 294 F.3d at 1074, that particular sequence must be original, *see Feist*, 499 U.S. at 349. To assert a selection-and-arrangement argument, a copyright plaintiff must identify “a combination of . . . elements . . . numerous enough” and with a “selection and arrangement original enough that their combination constitutes an original work of authorship.” *Skidmore*, 952 F.3d at 1074 (quoting *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003)). Then, the plaintiff must show that the defendant’s selection and arrangement is substantially similar to the plaintiff’s. *Id.* at 1075.

The Yonays assert that the district court erred by “compar[ing] the Works’ selection and arrangement of *only* ‘unprotected elements,’” because “selection and arrangement analysis must consider *all* elements, protected and unprotected.” We agree that an original selection and arrangement could include both protectable and unprotectable elements, and in such cases, a court should compare the selection and arrangement of all the elements. But to the extent the Yonays are arguing that a plaintiff can prevail under a selection-and-arrangement theory simply by showing that the two works share many similar elements, whether unprotectable or protectable, their argument reveals a misunderstanding of the extrinsic test.

As we have explained, a court applying the extrinsic test must filter out the unprotected elements. “‘Filtering’ and ‘selection and arrangement’ are not truly distinct tests.” *Hanagami*, 85 F.4th at 942 n.11. Both ask whether the defendant has copied something other than unprotectable elements. Filtering means that in addition to identifying the “articulable similarities” in the specific objective elements of the works in question, *Cavalier*, 297 F.3d at 822 (quoting *Kouf*, 16 F.3d at 1045), a court must also “determine whether the similar elements are protectable or

unprotectable,” *Mattel, Inc. v. MGA Ent., Inc.*, 616 F.3d 904, 913 (9th Cir. 2010). Only then can it be assured that “the *protectable elements, standing alone*, are” what is “substantially similar.” *Corbello*, 974 F.3d at 975 (quoting *Funky Films*, 462 F.3d at 1077).

To be sure, protectable expression can be, and often is, composed of smaller, unprotectable elements. A plot, for instance, is simply a combination of events. *See Shaw*, 919 F.2d at 1363. Although no discrete event that makes up a plot is itself protectable, a court cannot simply ignore all the unprotectable events, or it would be unable to identify the plot. In other words, even after a court filters out unprotectable elements, it may still consider those elements to the extent that they are constituent parts of protectable categories of expression.

Selection-and-arrangement analysis works the same way. A selection and arrangement of elements can be original and protectable, whether or not the elements themselves are protectable. When comparing two works’ selection and arrangement of elements, a court cannot blind itself to the elements, but similarities in those elements alone—no matter their quantity or importance to the work—cannot demonstrate unlawful appropriation. Instead, to be substantially similar, the works must share a “pattern, synthesis, or design” that is both “particular” and “coherent.” *Skidmore*, 952 F.3d at 1074.

The Yonays identify no such shared pattern of expression here. As with their argument about individual elements, the Yonays identify multiple factual similarities between the works when discussing selection and arrangement: for example, that “only the best of the best get invited back to Top Gun as instructors,” that “pilots live in a communal world,” that the program involves “grueling training,” and that lieutenants “carous[e] at the bar, which

has a big brass bell and where those who break ‘house rules’ must buy a round for everyone.” But those are unprotectable facts about the Top Gun program, and a copyright plaintiff “cannot establish substantial similarity by reconstituting the copyrighted work as a combination of unprotectable elements and then claiming that those same elements also appear in the defendant’s work, in a different aesthetic context.” *Skidmore*, 952 F.3d at 1075; *see also Corbello*, 974 F.3d at 974 n.2 (rejecting a selection-and-arrangement theory where the works depicted shared factual elements “from different perspectives, with different characterizations of the people involved, in different media, and communicating a different overall message”).

The Yonays attempt to articulate patterns that the works share, but the patterns they describe are not the original expression in Yonay’s copyrighted article. For example, they point out that “[r]ather than offer an encyclopedic narration of the naval base’s operations, Yonay focused on the personal backgrounds and idiosyncrasies of ambitious fighter pilots to engage his audience and humanize” the characters in “Top Guns.” They assert that Yonay “patterned contradictory character elements to engage his audience and enhance his Story: e.g., pilots are fierce, but playful; regimented, but irreverent; macho, but sensitive.” And they say that, in both works, “passages of idyllic flying over the beach in Southern California are juxtaposed suddenly and violently with gut-wrenching climbs, dives, and dogfights,” causing “beauty and terror” to “spring from each other.”

Those abstract ideas are not the article’s original expression. Showing characters’ backgrounds and personalities, giving them contradictory traits, and displaying action in aesthetically pleasing places have all been done before. And even if they had not, the Yonays “cannot claim

an exclusive right to ideas or concepts at that level of generality, even in combination. Permitting [them] to claim such a right would withdraw those ideas or concepts from the ‘stock of materials’ available to other artists, thereby thwarting copyright’s ‘fundamental objective’ of ‘foster[ing] creativity.’” *Rentmeester*, 883 F.3d at 1123 (second alteration in original) (first quoting 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §13.03[B][2][a] (2017); and then quoting *Warner Bros. Inc. v. American Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983)); see also *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.) (“Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. . . . [B]ut there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.”).

In the face of a lack of substantial similarity, the Yonays emphasize that “Top Guns” contains significant amounts of original expression. But the expressive nature of the article shows merely that the work receives full copyright protection and that the substantial-similarity standard applies—in contrast, for example, to “paint[ing] a red bouncy ball on blank canvas,” where “there’s only a narrow range of” possible expression, so “a work must be ‘virtually identical’ to infringe.” *Mattel*, 616 F.3d at 914 (quoting *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446-47 (9th Cir. 1994)). The question under the extrinsic test is whether the expression in *Maverick* is substantially similar to the original expression in “Top Guns,” and it is not.

III

We next evaluate the Yonays' challenge to the district court's decision to exclude their expert and allow Paramount's expert. The proponent of expert testimony must demonstrate that, among other things, "the testimony is the product of reliable principles and methods" and "will help the trier of fact." Fed. R. Evid. 702; *see generally Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). We review the district court's application of that standard for abuse of discretion. *See United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir. 2000). We see none.

The Yonays sought to introduce a report from Henry Bean, a screenwriter and film professor who opined that *Maverick* is substantially similar to "Top Guns." The district court determined that Bean's testimony would be unhelpful because he "fail[ed] to filter out the elements of the [works] that are not protected by copyright law." Indeed, in his report and deposition, Bean disclaimed any effort to filter unprotectable elements, taking the position that there was "maybe nothing in" the article "that was . . . an unprotectable element." He believed that "to the extent" the article "conveys facts, those facts are expressed with the feeling of fiction" and that nothing in the article "constitutes a naked 'fact,' unfiltered through Yonay's sensibility." He also stated that while, "in an intuitive way," he "was doing some" filtering, he "was not sitting there thinking, well, this goes in the protected bucket and that goes in the unprotected bucket." The Yonays emphasize Bean's post-deposition declaration that he "believe[s] that [he] considered the expression of facts as opposed to the underlying facts themselves" and that he "tried as best as [he] could to compare the elements of the works at issue that are protectable, while disregarding those that are

not,” but the district court was not required to credit those qualifier-heavy statements in assessing the reliability of his methodology.

That is particularly so because Bean’s general approach was reflected in the specifics of his report, which focused heavily on similarities in unprotectable elements. Bean devoted much of his report to highlighting similar facts, such as the presence of a brass bell hung in a bar near the real-life location of Top Gun, the fact that Top Gun training is difficult, the fact that the best Top Gun students are invited back as instructors, the appearance of a plane’s radar screen, and the effect on pilots of g-forces.

Bean also highlighted similarities in abstract ideas. For instance, Bean wrote that Yonay gave Yogi and Possum “a problem . . . they will have to overcome” by opening “Top Guns” with their failure in a training flight. So too, he asserted, does Maverick have to overcome Goose’s death. He explained that “Top Guns” and *Maverick* are similar in that “both follow the recurring theme of the ‘redemption’ of a hero who is thwarted by his limitations (internal and external) but finally overcomes them and triumphs.” If an author could lay claim to the concept of a protagonist’s overcoming obstacles to achieve his goal, someone should have told Homer. *See The Odyssey* 1.1-.7 (Emily Wilson trans., W.W. Norton & Co. 2018) (describing “a complicated man” and “the pain he suffered” in achieving his goal of returning home). The district court did not abuse its discretion when it determined that Bean’s focus on unprotectable elements made his findings of similarity unhelpful.

The Yonays further argue that, having excluded Bean, the district court erred by granting summary judgment on substantial similarity without the aid of literary experts. But the Yonays’ failure to proffer an admissible literary

expert was no one's fault but their own. Where, as here, copyright plaintiffs have not produced evidence creating a material dispute over substantial similarity, a court need not give them another chance to find an expert for trial.

Even if the district court had allowed Bean's testimony, it would not have created a material factual dispute. As district courts in this circuit have correctly recognized, "the existence of dueling expert reports does not necessarily present a triable issue of fact for the jury" on substantial similarity. *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1062 (C.D. Cal. 2010); *see, e.g., Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1179-80 (9th Cir. 2003) (affirming summary judgment for the defendant on substantial similarity in the face of dueling expert reports), *overruled on other grounds by Skidmore*, 952 F.3d 1051; *accord Gray v. Hudson*, 28 F.4th 87, 97-103 (9th Cir. 2022). Here, Bean's report does not point out any similarities that would cause us to revise our conclusion that *Maverick* and "Top Guns" do not share substantial protectable expression.

For its part, Paramount proffered expert reports from Andrew Craig, a Navy Reserve officer and former Top Gun instructor who opined that the article's portrayal of the program is factually accurate. The Yonays argue that Craig's opinions were "a mere conduit for hearsay" and were unhelpful because they spoke to the "nonissue" of whether the facts in "Top Guns" were copyrightable. But "experts are entitled to rely on hearsay in forming their opinions." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 873 (9th Cir. 2001). And although neither party disputes that facts are unprotectable, it was reasonable for the district court to perceive a need for expert assistance to "filter out the unprotected, factual elements of the Ar-

ticle.” The district court therefore did not abuse its discretion by considering Craig’s reports.

IV

Finally, we consider whether Paramount breached its 1983 agreement with Yonay by not crediting him in *Maverick*. The relevant provision of the agreement requires Paramount to credit Yonay in “the film of any motion picture photoplay that may be produced by it hereunder and substantially based upon or adapted from [the article] or any version or adaptation thereof, substantially incorporating the plot, theme, characterizations, motive and treatment of said work or any version or adaptation thereof.” The agreement thus requires Paramount to credit Yonay in a film if two separate conditions are satisfied: (1) the film must be “produced by [Paramount] hereunder,” and (2) it must be “substantially based upon or adapted from” either the article or “any version or adaptation” of the article; that is, it must “substantially incorporat[e] the plot, theme, characterizations, motive and treatment of” the article or “any version or adaptation” of it.

Paramount did not breach the agreement because the first condition was not satisfied. The most natural meaning of the phrase “produced . . . hereunder” is “produced using the rights conferred by this agreement.” See *Black’s Law Dictionary* 870 (12th ed. 2024) (defining “hereunder” as “[i]n accordance with this document”); accord *Webster’s Third New International Dictionary of the English Language* 1059 (2002) (“under this agreement: in accordance with the terms of this document”). Because *Maverick* did not infringe the copyright in “Top Guns,” it follows that Paramount did not use that same copyright, which it received through the agreement, to produce *Maverick*. *Maverick* therefore was not produced under the agreement.

The Yonays argue that a film need not satisfy the “produced . . . hereunder” condition so long as it satisfies the “substantially based upon or adapted from” condition. That is incorrect. Because the two parts of the clause are separated by the word “and,” they both must be satisfied. The Yonays say, however, that the entire clause is a hendiadys—that is, a figure of speech in which a single idea is expressed through two words joined by “and.” For example, if a room is “nice and warm,” that does not mean that it possesses the distinct qualities of niceness and warmth, but rather that it is nicely warm.

We assume that in some contexts, the best reading of a legal phrase might be as a hendiadys. *See* Samuel L. Bray, “Necessary AND Proper” and “Cruel AND Unusual”: *Hendiadys in the Constitution*, 102 Va. L. Rev. 687 (2016). But the Yonays offer no reason to think that this is one of them. A hendiadys typically involves a pair of single words; we are aware of no examples involving phrases as complex as “produced by it hereunder and substantially based upon or adapted from [the article] or any version or adaptation thereof, substantially incorporating the plot, theme, characterizations, motive and treatment of said work or any version or adaptation thereof.” Nor have the Yonays explained what idea they think the clause expresses that could not have been expressed by simply omitting “produced by it hereunder.” “A contract term should not be construed to render some of its provisions meaningless or irrelevant.” *Orr v. Petersen (In re Estate of Petersen)*, 34 Cal. Rptr. 2d 449, 458 n.4 (Ct. App. 1994). And, most importantly, nothing in the context of the agreement suggests any reason to depart from “[t]he ordinary and usual usage of ‘and,’” which “is as a conjunctive.” *People v. C.H. (In re C.H.)*, 264 P.3d 357, 361 (Cal. 2011).

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Both conditions in the agreement must be satisfied to trigger the requirement that Paramount credit Yonay. Because the first was not, Paramount did not breach the agreement.

AFFIRMED.

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APPENDIX B
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CASE No. CV 22-3846 PA (GJSx)

Date: April 5, 2024

TITLE: SHOSH YONAY, ET AL. V. PARAMOUNT PICTURES
CORPORATION, ET AL.

Present: The Honorable PERCY ANDERSON,
United States District Judge

Kamilla Sail-Salesman
Deputy Clerk

Not Reported
Court Reporter / Recorder

Attorneys Present
for Plaintiff:

Attorneys Present
for Defendants:

Proceedings:
IN CHAMBERS — COURT ORDER

Before the Court are the parties' cross-motions for summary judgment (Docket Nos. 58 and 62) and motions to exclude their respective expert witnesses (Docket Nos.

54, 56-57).¹ The motions have been fully briefed. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds these matters appropriate for decision without oral argument. The hearings calendared for January 8, 2024, were vacated and the matters taken off calendar.

I. Background

Plaintiffs Shosh Yonay and Yuval Yonay (collectively “Plaintiffs”) are the widow and son of Ehud Yonay (“Yonay”), the author of a magazine article “Top Guns” (the “Article”) published in California Magazine on April 21, 1983. The Article is an account of the experiences of F-14 pilots and radio intercept officers as they undergo training at the Navy’s Fighter Weapons School (known as “Top Gun”). After the Article’s publication, Defendant Paramount Pictures Corporation (“Defendant”) and Yonay executed an Assignment of Rights, dated May 18, 1983, assigning to Defendant the motion picture rights to the Article. The Assignment of Rights also required Defendant to credit Yonay “on the film of any motion picture photoplay” that is “produced . . . []under” the Assignment of Rights “and substantially based upon or adapted from [the Article] or any version or adaptation thereof . . .” (Docket No. 62-4 at p. 3, section 7(b).) In 1986, Defendant released the motion picture “Top Gun” (the “Original Film”). Yonay received a “suggested by” credit. The story follows fictional characters Pete (“Maverick”) Mitchell and Nick

¹ Plaintiffs also filed a Motion to Strike Evidence Not Produced During Discovery (“Motion to Strike”). (Docket No. 82.) The Court does not rely on the evidence that is the subject of the Motion to Strike in ruling on the parties’ cross-motions for summary judgment or motions to exclude one another’s expert witness reports and testimony. Accordingly, Plaintiffs’ Motion to Strike is moot.

(“Goose”) Bradshaw as they train at the Top Gun Naval Fighter Weapons School.

On January 23, 2018, after Yonay’s death, Plaintiffs sent Defendant a Notice of Termination (“Notice”) terminating Defendant’s rights to the Article pursuant to 17 U.S.C. §203(a), effective January 24, 2020. On May 27, 2022, Defendant released the sequel to the Original Film, “Top Gun: Maverick” (the “Sequel”) without crediting Yonay. In the Sequel, set thirty years after the Original Film, Maverick, now a test pilot, returns to Top Gun to train a new class of graduates for a dangerous mission. Among them is Goose’s son, who holds Maverick responsible for his father’s death.

Plaintiffs commenced this action on June 6, 2022. The First Amended Complaint (“FAC”) alleges three claims: (1) breach of contract, (2) declaratory relief, and (3) copyright infringement. Plaintiffs allege that Defendant breached the Assignment of Rights by not crediting Yonay in the Sequel. (See Docket No. 16 ¶52.) The FAC also alleges that the Sequel infringes Plaintiffs’ copyright because “key elements” in the Sequel are substantially similar to the Article. (Id. ¶35.) Plaintiffs also seek a declaration that the Sequel is a “derivative” of the Article and that Defendant “does not have any rights to make, exploit, or distribute” the Sequel. (Id. ¶¶64-65.)

II. Motions to Exclude Expert Reports and Testimony

At the summary judgment stage of a copyright infringement action courts conduct an objective analysis of the works at issue to assess whether they are “substantially similar.” See Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002). This is known as the “extrinsic test.” Id. When conducting the extrinsic test, courts must filter out the elements of the works that are not protected by copyright law, such as facts, general plot ideas,

and familiar stock scenes. See id. at 823; Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990), overruled on other grounds by Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020). The extrinsic test “is often aided by expert testimony.” Bernal v. Paradigm Talent & Literary Agency, 788 F. Supp. 2d 1043, 1059 (C.D. Cal. 2010).

Plaintiffs rely on the expert testimony of Henry Bean to support their contention that the Article and Sequel are substantially similar. Defendant relies on the expert testimony of Andrew Craig and James McDonald to support its contention that the two works are not substantially similar. The parties move to exclude the testimony of their respective expert witnesses pursuant to Rule 702 of the Federal Rules of Evidence.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., the Supreme Court firmly established the district court’s role as the gatekeeper of expert testimony. 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The Rules of Evidence “assign to the trial judge the task of insuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” Id. at 597, 113 S. Ct. at 2799. Rule 702 codifies this standard:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to

understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Rule 702 embodies “the twin concerns of ‘reliability’ . . . and ‘helpfulness.’” Stilwell v. Smith & Nephew, Inc., 482 F.3d 1187, 1192 (9th Cir. 2007) (quoting United States v. Mitchell, 365 F.3d 215, 234 (3d Cir. 2004)) (internal quotations omitted). “Whether testimony is helpful within the meaning of Rule 702 is in essence a relevancy inquiry.” Hemmings v. Tidyman’s Inc., 285 F.3d 1174, 1184 (9th Cir. 2002). “Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline.” Primiano v. Cook, 598 F.3d 558, 565 (9th Cir. 2010) (internal quotations omitted). The test for reliability “is not the correctness of the expert’s conclusions but the soundness of his methodology.” Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1318 (9th Cir. 1995). The proponent of the expert bears the burden of establishing, by a preponderance of the evidence, that the expert’s testimony is admissible under Rule 702. See Daubert, 509 U.S. at 591 n.10; Lust By & Through Lust v. Merrell Dow Pharm., Inc., 89 F.3d 594, 598 (9th Cir. 1996).

A. Plaintiffs' Expert Henry Bean

Henry Bean (“Bean”) is a writer and former adjunct professor at Columbia University’s graduate film school and New York University’s Tisch School of the Arts. Bean opines that there are numerous similarities between the Article and the Sequel. However, Bean fails to filter out the elements of the Article and Sequel that are not protected by copyright law (i.e., facts), which renders his opinions unhelpful and inadmissible. See Johannsongs-Publ’g Ltd. v. Lovland, No. CV 18-10009-AB (SSX), 2020 WL 2315805, at *4-6 (C.D. Cal. Apr. 3, 2020) (finding expert report that did not filter out unprotected elements to be unhelpful and inadmissible), *aff’d*, No. 20-55552, 2021 WL 5564626 (9th Cir. Nov. 29, 2021).^{2/}

Bean’s opinions are also unhelpful to the extent he provides a subjective, rather than objective, comparison of the Article and Sequel. See Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1442 (9th Cir. 1994) (explaining that the subjective comparison of two works –referred to as the “intrinsic test” – is done with “no expert assistance”); Shaw, 919 F.2d at 1356 (“The intrinsic test . . . should measure substantial similarity in expressions . . . depend-

^{2/} In support of their opposition to Defendant’s motion to exclude Bean’s report and testimony, Plaintiffs filed a Declaration from Bean in which he asserts that he “tried as best as [he] could to compare the elements of the works at issue that are protectable, while disregarding those that are not.” (Docket No. 74-3 ¶9.) However, this contradicts Bean’s prior deposition testimony. Bean testified that he “was not sitting there thinking, well, this goes in the protected bucket and that goes in the unprotected bucket” when analyzing the two works. (Docket No. 54-3 at p. 128:1–4.) See, e.g., Payan v. Los Angeles Cmty. Coll. Dist., No. 2:17-CV-01697-SVW-SK, 2018 WL 6164269, at *8 n.5 (C.D. Cal. Oct. 16, 2018) (finding expert witness declaration inadmissible where the expert’s opinions in her new declaration contradicted her prior deposition testimony).

ing on the response of the ordinary reasonable person In decisions under the intrinsic test, analytic dissection and expert testimony are not appropriate.”) (internal quotations omitted). For example, when comparing the dialogue in the Sequel to that in the Article, Bean cites to excerpts from the Article and writes: “Those exact words may not appear in [the Original Film or the Sequel], yet one feels them informing a lot of the dizzying and dazzling aerial footage of both films, especially in the Sequel” (Docket No. 62-5 at p. 23 (emphasis added).)

Accordingly, Bean’s opinions are unhelpful and do not meet the standards for admissibility set forth in Rule 702. The Court grants Defendant’s Motion to Exclude the Expert Report and Testimony of Henry Bean.

B. Defendant’s Expert Andrew Craig

Andrew Craig (“Craig”) is a Commanding Officer in the Navy Reserve, as well as a former Top Gun instructor. In his affirmative and rebuttal expert reports, Craig opines on the factual accuracy of the Article. For instance, Craig opines that the Article accurately describes the Top Gun program and the experience of flying a jet fighter. Craig also references facts that were confirmed to him by other naval aviators, and facts that he learned from viewing historical photographs and conducting research in the Navy’s Archives. Plaintiffs take issue with these references, arguing that Craig’s reports should be excluded because they contain hearsay. The Court declines to exclude Craig’s reports on that basis. See Hilt v. Foster Wheeler, LLC, 690 F. App’x 482, 483 (9th Cir. 2017) (“[A]n expert may render an opinion based on facts or data . . . that the expert has been made aware of . . . and may render an opinion that is not based on firsthand knowledge or observation.”) (internal quotations and citations omitted); see also EcoServices, LLC v. Certified Aviation Servs., LLC,

312 F. Supp. 3d 830, 839 (C.D. Cal. 2018) (explaining that “experts are entitled to rely on hearsay in forming their opinions”) (internal quotations omitted).

Plaintiffs also contend that Craig’s opinions are unhelpful, and that Craig is not qualified to opine on literary similarities between the Article and Sequel. The Court is unpersuaded by these arguments. As an initial matter, Craig does not opine on literary similarities; rather, he opines on the factual elements of the Article as historical facts. His opinions are helpful because, in ruling on the parties’ cross-motions for summary judgment, the Court must filter out the unprotected, factual elements of the Article and Sequel to assess whether they are substantially similar. See Shaw, 919 F.2d at 1356; Cavalier, 297 F.3d at 826. Accordingly, the Court denies Plaintiffs’ Motion to Exclude the Expert Reports and Testimony of Andrew Craig.

C. Defendant’s Rebuttal Expert James McDonald

The Court does not rely on James McDonald’s rebuttal expert report or testimony in ruling on the parties’ cross-motions for summary judgment below. Accordingly, Plaintiff’s Motion to Exclude the Expert Report and Testimony of James McDonald, and evidentiary objections to McDonald’s report and testimony, are moot.

III. Cross-Motions for Summary Judgment

A. Evidentiary Objections

The parties raise hundreds of evidentiary objections to certain evidence submitted by one another, and to certain statements in each other’s Statements of Uncontroverted Facts. (See Docket Nos. 70-2, 80, 93, 95.) Many of the objections are misguided blanket and boilerplate objections or challenges to the relevance of particular information. The parties’ objections to each other’s Statements of Uncontroverted Facts are largely arguments about the char-

acterization of certain facts and supporting evidence, rather than disputes about the facts themselves. Additionally, many of the parties' objections attack the admissibility of the current form of certain evidence. However, on summary judgment, a court can consider evidence which may be presented in an admissible form at trial, even if not presented in an admissible form at the motion for summary judgment stage. See Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003) ("At the summary judgment stage, we do not focus on the admissibility of the evidence's form."); Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1120 (E.D. Cal. 2006) ("In other words, when evidence is not presented in an admissible form in the context of a motion for summary judgment, but it may be presented in an admissible form at trial, a court may still consider that evidence.") All of the parties' objections to evidence or facts that the Court relies on or cites in this Order are overruled.

B. Legal Standard

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show an absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party does so, the non-moving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. Id. at 324. The court does "not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial." Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir 1999). A "'scintilla of evidence,' or evidence that is 'merely colorable' or 'not significantly probative,'" does not present a genuine issue of material fact. United Steelworkers of Am. v. Phelps

Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989), cert denied, 493 U.S. 809 (1989) (emphasis in original, citations omitted).

The substantive law governing a claim or defense determines whether a fact is material. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809 F.2d 626, 631-32 (9th Cir 1987). The court must view the inferences drawn from the facts “in the light most favorable to the nonmoving party.” Id. at 631 (citation omitted). Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. Id. at 630-31. However, when the non-moving party’s claims are factually “implausible, that party must come forward with more persuasive evidence than would otherwise be [required]” California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir 1987), cert denied, 484 U.S. 1006 (1988) (citation omitted). “No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment.” Id. “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp., 477 U.S. at 322.

C. Analysis

Plaintiffs and Defendant each seek summary judgment on all three of Plaintiffs’ claims: copyright infringement, declaratory relief, and breach of contract.

1. Copyright Infringement

“To establish a successful copyright infringement claim, a plaintiff must show that he or she owns the copyright and that defendant copied protected elements of the work.” Cavalier, 297 F.3d at 822. “Copying may be estab-

lished by showing that the infringer had access to plaintiff's copyrighted work and that the works at issue are substantially similar in their protected elements." Id. Here, the parties do not dispute Defendant's access to the Article, rather, they dispute the issue of substantial similarity.

In determining if two works are substantially similar, the Ninth Circuit's test contains both an extrinsic and an intrinsic component. Id. "At summary judgment, courts apply only the extrinsic test; the intrinsic test, which examines an ordinary person's subjective impressions of the similarities between two works, is exclusively the province of the jury." Funky Films, Inc. v. Time Warner Ent. Co., L.P., 462 F.3d 1072, 1077 (9th Cir. 2006), overruled on other grounds by Skidmore, 952 F.3d 1051. The extrinsic test is an "objective comparison of specific expressive elements," which "focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works." Cavalier, 297 F.3d at 822 (quoting Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994)) (internal quotations and citations omitted); see Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985) (explaining that the extrinsic test "compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters").

"To apply the extrinsic test, courts must first distinguish between protectable and unprotectable elements, and ask only whether the protect[a]ble elements in two works are substantially similar." Hanagami v. Epic Games, Inc., 85 F.4th 931, 942 (9th Cir. 2023) (internal quotations omitted). "This process is referred to as 'filtering.'" Id. "Copyright law only protects expression of

ideas, not the ideas themselves.” Cavalier, 297 F.3d at 823. Facts are also not protected. See Shaw, 919 F.2d at 1356 (“[F]acts and ideas within a work are not protected”). Additionally, “[i]t is well established that, as a matter of law, certain forms of literary expression are not protected against copying.” Berkic, 761 F.2d at 1293. For instance, general plot ideas, familiar stock scenes and themes, and scènes à faire (“situations and incidents that flow naturally from a basic plot premise”) are unprotected. Cavalier, 297 F.3d at 823; see also id. (“In Williams, for example, we found no infringement because the common elements of electrified fences, automated tours, dinosaur nurseries, and uniformed workers were scenes-a-faire that flowed from the concept of a dinosaur zoo.”) (quoting Williams v. Crichton, 84 F.3d 581, 589 (2d Cir. 1996)).

“[N]o bright line rule exists as to what quantum of similarity is permitted before crossing into the realm of substantial similarity.” Baxter v. MCA, Inc., 812 F.2d 421, 425 (9th Cir. 1987); compare Shaw, 919 F.2d at 1357-58 (finding that plaintiff satisfied the extrinsic test by showing that both works involved a common theme, parallel plots and sequences of events, and some characters and dialogue), with Benay v. Warner Bros. Ent., 607 F.3d 620, 629 (9th Cir. 2010) (affirming summary judgment for defendant where “[a] number of similarities between the works arise out of the fact that both works are based on the same historical events, take place at the same time and in the same country, and share similar themes”), overruled on other grounds by Skidmore, 952 F.3d 1051. “Although summary judgment is not highly favored on questions of substantial similarity in copyright cases, summary judgment is appropriate if the court can conclude . . . that no reasonable juror could find substantial similarity of ideas and expression” Cavalier, 297 F.3d at 822 (internal

quotations omitted); see also Shaw, 919 F.2d at 1355 (“We have frequently affirmed summary judgment in favor of copyright defendants on the issue of substantial similarity.”). “A plaintiff avoids summary judgment by satisfying the extrinsic test[,] which makes similarity of the works a triable issue of fact. In contrast, a plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment because a jury may not find substantial similarity without evidence on both the extrinsic and intrinsic tests.” Kouf, 16 F.3d at 1045 (internal citations omitted).

Here, Plaintiffs contend that the Article and Sequel (collectively, “the Works”) are substantially similar because they have similar plots, sequences of events, pacing, themes, moods, dialogue, characters, and settings. Defendant contends that the similarities identified by Plaintiffs are either not similarities at all, or are similarities based on unprotected elements of the Works. The Court concludes that the Article and Sequel are not substantially similar under the extrinsic test.

a. Plot, Sequence of Events, and Pacing

The plots, sequences of events, and pacing of the Works are largely dissimilar. Any similarities are based on unprotected elements, such as general plot ideas, facts, or *scènes à faire*.

The Article is a non-fiction work that describes real-life F-14 fighter pilots, Alex (“Yogi”) Hnarakis, and his radar intercept officer, Dave (“Possum”) Cully, who are shot down easily by their Top Gun instructor in their first aerial combat training exercise. The Article explains how Yogi and Possum’s fighter squadron fits into the overall structure of the Navy’s Pacific Fleet, including Top Gun’s location (Naval Air Station Miramar in San Diego, California), the “officer’s club,” a bar where the Top Gun pilots go for drinks and entertainment. The Article provides descrip-

tions of F-14 flight maneuvers and the intense nature of flight training, including the feeling of G-forces on the body and landing on a naval aircraft carrier. The Article subsequently describes the history and development of the school, its so-called “caste system,” and the “hotshot” pilots that attended and taught there. At the end of the Article, Yogi and Possum graduate from Top Gun and their squadron flies out to a naval aircraft carrier for their next mission.

Top Gun Maverick is a feature film sequel to the 1986 motion picture Top Gun featuring the fictional pilot from the original film, Pete “Maverick” Mitchell, now a test pilot in his mid-fifties. The Sequel begins with Maverick disobeying orders and flying his experimental aircraft at Mach 10. Maverick is then reprimanded and ordered back to the Naval Air Station North Island to train a group of Top Gun graduates for a dangerous mission to destroy a uranium enrichment plant in enemy territory. Maverick quarrels with his superiors about his training methods. When none of the graduates can complete the training course, Maverick takes an unauthorized flight and proves that the mission can be completed successfully. He is then ordered to lead the mission himself with a team of his choosing. Maverick’s team includes Lieutenant Bradley “Rooster” Bradshaw, the son of Maverick’s best friend and former radar intercept officer, who died in the original film. During the movie it is revealed that Maverick promised Rooster’s dying mother that he would not let Rooster become a naval aviator. Rooster, unaware of the promise, resents Maverick for sabotaging his military career and his father’s death. In the Sequel, Maverick is also reunited with a prior love interest, Penny Benjamin (“Penny”), and they re-kindle their relationship.

Maverick and Rooster each lead a pair of F/A-18s fighters on the mission. They launch from an aircraft carrier and destroy the enemy facility, but Maverick is shot down. The pilots are ordered back to the carrier, but Rooster returns to find Maverick being hunted by an attack helicopter. After shooting down the helicopter, Rooster is shot down and ejects. Maverick and Rooster connect on the ground and steal an aging F-14 Tomcat from an enemy base, survive an aerial dogfight, and are saved by one of the other pilots. Maverick and Rooster return safely to the carrier despite having no front landing gear. Later, Rooster and Maverick make-up and Maverick flies off into the sunset with Penny.

Although the plots of both the Article and Sequel feature Top Gun and various graduates and instructors, Top Gun is a real fighter pilot school and the graduates and instructors mentioned in the Article are real people (i.e., Yogi and Possum). Those factual elements are not protected by copyright law. See Shaw, 919 F.2d at 1356. And while both Works involve fighter pilots training and embarking on missions, those general plot ideas are also not protected. See Cavalier, 297 F.3d at 823. To the extent Plaintiffs contend that the Works are similar because they depict or describe fighter pilots landing on an aircraft carrier, being shot down while flying, and carousing at a bar, those are unprotected facts, familiar stock scenes, or scènes à faire. See id. Other than similarities based on unprotected elements, the Works' plots are dissimilar.

The pacing and sequence of events in the Works are also not similar. The Article is structured in a non-linear fashion, shifting back and forth between describing Yogi and Possum's training, their backgrounds, the technical aspects of F-14 fighter jets, etc. The Sequel, on the other

hand, proceeds in a linear fashion and has a consistent pace.

b. Theme and Mood

The themes that Plaintiffs contend are similar between the Works are unprotected stock themes (i.e., “the bonds that form in military service,” “the sheer love of flying,” and “true grit”) and/or themes that are not present in either the Article, Sequel, or both (i.e., “the anachronism of fighter aviation,” “the aviation ‘caste system,’” and “post-war nostalgia that yearns for a simpler 1950s America”). (Docket No. 62 at pp. 7-8.) Additionally, the moods that Plaintiffs identify as similar between the Works are: (1) not moods at all (i.e., the “contrast [between] the ethereal beauty of the ‘vast blue dome of sea and sky’ against jarring, unpredictable competitive action,” and “idyllic flying . . . juxtaposed with gut-wrenching climbs”); (2) not present in the Sequel (i.e., “Post World War II nostalgia”); and/or (3) general, unprotected moods that flow naturally from the basic plot premise of a story about fighter pilots training and embarking on missions (i.e., “the constant threat of death” and “tranquility and violence”). See Shame on You Prods., Inc. v. Elizabeth Banks, 120 F. Supp. 3d 1123, 1158 (C.D. Cal. 2015) (“A general mood that flows naturally from unprotectable basic plot premises is not entitled to protection.”) (internal quotations omitted), *aff’d sub nom. Shame on You Prods., Inc. v. Banks*, 690 F. App’x 519 (9th Cir. 2017).

c. Dialogue and Characters

The dialogue in the Sequel is not similar to that in the Article. As an initial matter, the dialogue in the Article is unprotected because it is presented as real statements made by actual people. See Corbello v. Valli, 974 F.3d 965, 984 (9th Cir. 2020) (“The dialogue is held out by the Work as a historically accurate depiction of a real conversation.

The asserted facts do not become protectable by copyright even if, as Corbello now claims, all or part of the dialogue was made up.”). Additionally, the only phrase Plaintiffs identify as appearing in both Works is the phrase “Fight’s on,” which is not entitled to copyright protection. See Nar-ell v. Freeman, 872 F.2d 907, 911 (9th Cir. 1989) (“Ordinary phrases are not entitled to copyright protection.”); see also Olson v. Nat’l Broad. Co., 855 F.2d 1446, 1450 (9th Cir. 1988) (explaining that “extended similarity of dialogue” is “needed to support a claim of substantial similarity”). To the extent there are similarities between the characters in the Works, the characters in the Article are real people and are therefore not protected by copyright law. See Corbello, 974 F.3d at 976 (“A character based on a historical figure is not protected for copyright purposes.”).

d. Setting

There are notable differences in the Works’ settings. In the Sequel, the Top Gun graduates are preparing for their mission at Naval Air Station North Island, whereas in the Article, Yogi and Possum complete their Top Gun training at Naval Air Station Miramar. The Sequel is set in the 2020s, and the Article is set in the 1980s and earlier. Although Plaintiffs contend that the Works’ settings are similar because both take place at a Naval Air Station along the beach in Southern California, Top Gun was in fact located at Naval Air Station Miramar in the 1980s, so that aspect of the Article’s setting is not protectable. Other similar settings, such as a jet’s cockpit, the sky, a classroom, an aircraft carrier, and a bar or “officer’s club” are unprotectable scènes à faire.

In sum, an objective comparison of Works’ respective plots, sequences of events, pacing, themes, moods, dialogue, characters, and settings demonstrates that they are

not substantially similar. While the Article and Sequel have some similarities, those similarities are based on unprotected elements.

e. Selection and Arrangement

Plaintiffs also contend that the “selection and arrangement” of the unprotected elements in the Article is substantially similar to that of the Sequel.

In addition to filtering out the unprotected elements of the two works and comparing their plots, themes, settings, etc., the Ninth Circuit “also employ[s] a ‘selection and arrangement’ approach to assess substantial similarity” under the extrinsic test. Hanagami, 85 F.4th at 943. This approach protects the “particular way in which the artistic elements form a coherent pattern, synthesis, or design.” Skidmore, 952 F.3d at 1074. Under the selection and arrangement analysis, “[s]ubstantial similarity can be found in a combination of elements, even if those elements are individually unprotected.” Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004); see Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003) (“[A] combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship . . .”). “[A] selection and arrangement copyright is infringed only where the works share, in substantial amounts, the ‘particular,’ i.e., the ‘same,’ combination of unprotectable elements.” Skidmore, 952 F.3d at 1075 (quoting Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991)).

The “selection and arrangement” of the Article and Sequel are not substantially similar. While the works share some unprotected elements, they do not share the same combination of unprotected elements. For example, the

Article includes facts about the technical aspects of F-14 jet aircraft and the history of Top Gun, which do not appear in the Sequel. Plaintiffs merely identify “random similarities scattered throughout” the Works, which is insufficient to establish substantial similarity of “selection and arrangement.” *Id.* (internal quotations omitted).

Overall, the Court concludes that the Article and Sequel are not substantially similar under the extrinsic test. Because “no reasonable juror could find substantial similarity of ideas and expression,” Defendant is entitled to summary judgment on Plaintiffs’ copyright infringement claim. *Cavalier*, 297 F.3d at 822. Defendant is also entitled to summary judgment on Plaintiffs’ declaratory relief claim because it rises and falls with the copyright infringement claim.^{3/}

2. Breach of Contract

In 1983, Defendant and Yonay executed an Assignment of Rights granting Defendant the motion picture rights to the Article. The Assignment of Rights provided as follows:

The Purchaser agrees . . . to announce on the film of any motion picture photoplay that may be produced by it hereunder and substantially based upon or adapted from [the Article] or any version or adaptation thereof, substantially incorporating the plot, theme, characterizations, motive and treatment of [the Article] or any version or adaptation thereof, that said motion picture photoplay is based upon or adapted from or suggested by a work written by the Author

^{3/} Plaintiffs do not dispute that their declaratory relief claim rises and falls with their claim for copyright infringement, or even address their declaratory relief claim in their summary judgment briefing.

(Docket No. 62-4 at p. 3, section 7(b).) Put another way, the Assignment of Rights requires Defendant to credit Yonay on a motion picture if it meets two criteria: (1) it was “produced [] under” the Assignment of Rights; and (2) it is “substantially based upon or adapted from [the Article] or any version or adaptation thereof.” (*Id.*)^{4/} Although Plaintiffs terminated Defendant’s motion picture rights to the Article on January 24, 2020, Plaintiffs now contend that Defendant breached the Assignment of Rights by not crediting Yonay in the Sequel.

The Court concludes that Defendant was not required to credit Yonay because the Sequel was not “produced under” the Assignment of Rights. As an initial matter, the production of the Sequel continued after Plaintiffs terminated Defendant’s rights, and the Sequel was released in 2022. Additionally, the Sequel could not have been produced under the Assignment of Rights because it does not infringe on the Articles’ copyright. That is, the Sequel was produced independently of the rights conveyed to Defendant by the contract.^{5/}

^{4/} Plaintiffs assert that a motion picture does not need to be both “produced [] under” the Assignment of Rights and “substantially based upon [the Article] or any version or adaptation thereof” to require that Defendant credit Yonay. Specifically, Plaintiffs contend that the “and” separating the two phrases is a hendiadys and, therefore, does not have its usual, conjunctive meaning. The Court disagrees. Rather than construing the “and” as a hendiadys, the Court must “give effect to the plain and ordinary meaning of the language used by the parties” to the contract. People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 107 Cal. App. 4th 516, 524 (2003) (internal quotations omitted).

^{5/} The parties’ Motions and briefing do not provide sufficient argument concerning whether the Original Film might qualify as an “adaptation” of the Article. The Court therefore does not assess the second criteria in the Assignment of Rights or determine if the Sequel is based upon an adaptation of the Article. However, because Plaintiffs

Section 8 of the Assignment of Rights further demonstrates that Defendant was not required to credit Yonay. It reads:

Nothing contained in this agreement shall be construed to be or operate in derogation of or prejudicial to any rights, licenses, privileges or property which the Purchaser may enjoy or to which the Purchaser may be entitled as a member of the public even if this agreement were not in existence, and the Purchaser may exercise such rights, licenses, privileges and property which the Purchaser may enjoy or to which the Purchaser may be entitled as a member of the public as though this agreement were not in existence.

(Id. at p. 4, section 8.) Because a member of the public could produce a motion picture like the Sequel – that does not infringe on the Article’s copyright – without crediting Yonay, the Assignment of Rights should not be construed to require Defendant to do so. Accordingly, Defendant did not breach the Assignment of Rights and is entitled to summary judgment on Plaintiffs’ breach of contract claim.

Conclusion

For all of the foregoing reasons, the Court grants Defendant’s Motion for Summary Judgment and denies Plaintiffs’ Motion for Summary Judgment. The Court will issue a Judgment consistent with this Order.

IT IS SO ORDERED.

could only prevail on their breach of contract claim by satisfying both criteria in the clause, the Court’s determination that the Sequel is not produced under the Assignment of Rights is alone sufficient for Defendants to be entitled to summary judgment on the breach of contract claim.

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APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHOSH YONAY, an individual and

YUVAL YONAY, an individual,

Plaintiffs-Appellants,

v.

PARAMOUNT PICTURES CORPORATION,

Defendant-Appellee.

No. 24-2897

D.C. No. 2:22-cv-03846-PA-GJS

CENTRAL DISTRICT OF CALIFORNIA,

LOS ANGELES

Filed: Feb 12, 2026

ORDER

Before: HURWITZ, MILLER, and SUNG, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Dkt. No. 65. Judge Miller and Judge Sung have voted to deny the petition for rehearing en banc, and Judge Hurwitz has so recommended. *Id.*

The full court was advised of the petition for rehearing en banc. No judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

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The petitions for rehearing and rehearing en banc are
DENID.

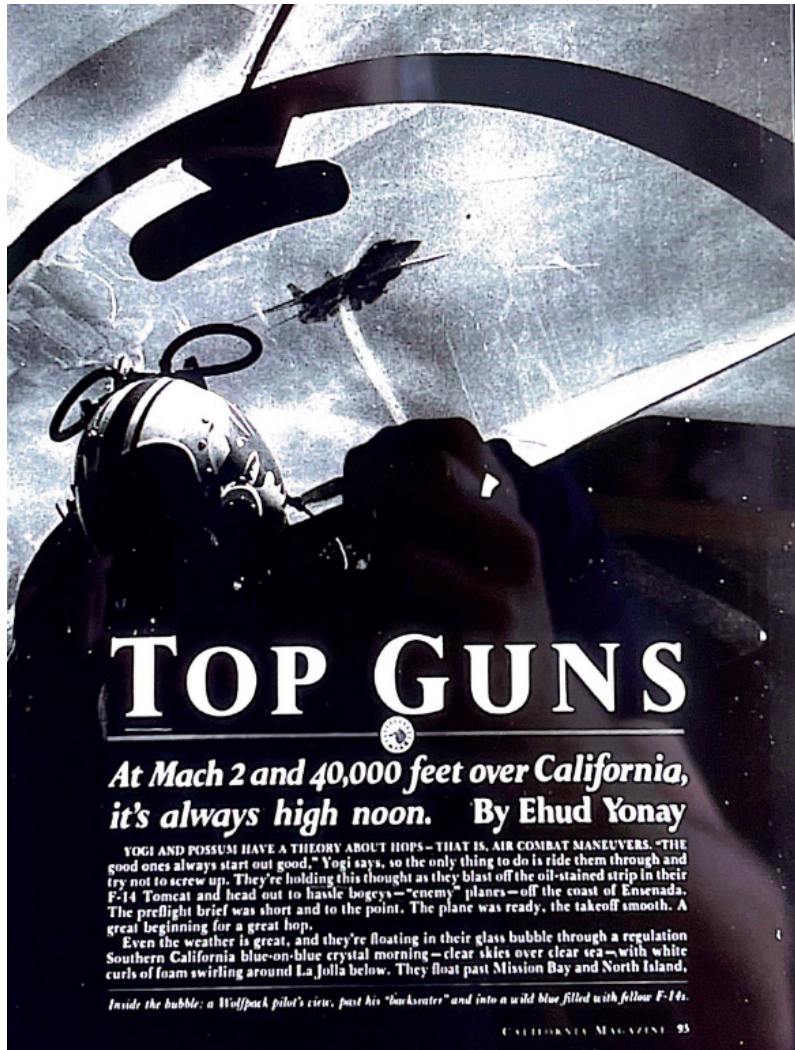
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APPENDIX D

TOP GUNS

At Mach 2 and 40,000 feet over California, it's always high noon.

By Ehud Yonay



Inside the bubble: a Wolfpack pilot's view, past his "backseater" and into a wild blue filled with fellow F-14s.

Yogi and Possum have a theory about hops – that is, air combat maneuvers. “The good ones always start out good,” Yogi says, so the only thing to do is ride them through and try not to screw up. They’re holding this thought as they blast off the oil-strained strip in their F-14 Tomcat and head out to hassle bogeys – “enemy” planes – off the coast of Ensenada. The preflight brief was short and to the point. The plane was ready, the takeoff smooth. A great beginning for a great hop.

Even the weather is great, and they’re floating in their glass bubble through a regulation Southern California blue-on-blue crystal morning – clear skies over clear sea – with white curls of foam swirling around La Jolla below. They float past Mission Bay and North Island, then Possum calls out a new heading and Yogi hangs left, and they’re making straight for today’s action.



Yogi (the pilot, right) and Possum (his radar intercept officer) strap themselves into the cockpit of their F-14 before blasting off into broken San Diego skies.

Once over the Mexican border they pick up speed, and Yogi starts jinking. He whips the stick – the steering mechanism between his legs – from side to side and the plane rolls this way and that, letting him and Possum spot

anybody making for their tail. From where they sit, however, it's not their silver rocket that's rocking but the entire vast blue dome of sea and sky. There are no ups or downs up here, no rights or lefts, just a barely perceptible line separating one blue from another, and that line is spinning and racing like mad in the distance. Yogi was still in junior high school when he realized that flying straight and level might be okay for some people, but if you like yanking and banking – the feeling of riding inside one of those storm-in-a-bottle souvenirs – then there's just one place for you, and that's the cockpit of a fighter plane.

They're at just about the right spot, over international waters some 30 miles off Ensenada, when a voice crackles over the radio to warn of two bogeys 20 miles south.

"Fight's on," says Yogi, who is the pilot, or "stick," and sits up front.

"Roger," says Possum, the radar-intercept officer, or "backseater." He's already bent over his radarscope, punching buttons and looking for the tiny blips of the bogeys – hotshot instructors from Top Gun, the Navy Fighter Weapons School, flying their deadly little F-5s.

With that, Yogi stops jinking, peels off to the right, and pushes the throttle all the way into afterburner. As twin white-hot flames shoot out from the plane's exhaust nozzles, the magnificent silver machine explodes forward, slamming into their backs like a truck-load of bricks and hurling them through the sound barrier. Yogi has rehearsed this kill in his mind a dozen times. He'll cut the first bogey off at the pass with a head-on missile shot, and then, breaking and rolling to avoid getting hit, he'll rein the plane in and pull it around like Ivanhoe at the end of the first joust and come racing back across the skies for the other. Great fighter pilots are always ahead of their planes, and, as his adrenaline surges up, Yogi's eyes bore

into the empty blue space before him, looking for the bo-geys. Nothing can stop him now.

That's when it happens. Suddenly a soft voice is saying "Atoll" in the earphones, and by the Possum spots the little F-5 behind them it's too late. They've been racing fat and dumb and happy like a dodo bird, and the F-5 – painted in desert camouflage, no less, which stands out against the blue like a billboard – just rolled in out of nowhere, got on their tail, and simulated slipping a heat-seeking missile up their exhaust pipe. Atolls are the air-to-air missiles that Russian-built MiG-21s carry, but in this exercise the word means, "Up yours, guys, you're dead and going home with your tail between your after-burners." Their glorious hop is all screwed up.

"I was just starting to transition from my visual scan aft to forward, and Possum's visual scan from inside to outside, and we're dead," says Yogi, who is 26 years old and has the gangly good looks of a John Travolta, in amazed indignation. That's pilot talk for driving without looking. "It started out good, but it sure got bad in a hurry," Possum says, laughing. He is 25 and more the Ryan O'Neal type, with brown hair and mustache. "You wish you could do it over again," he says, "but in the real world you're not going to get a second chance."

It is evening, and the briefing room is quiet. There is a faint aroma of sweat and boot polish and jet fuel in the air. Everybody has left the hangar to bend elbows and play video games and talk great hops at the officers club, but Yogi and Possum stay behind, slouching at their desks in their black flight boots and green flight suits with red turtlenecks showing. They can think of any number of other hops they'd rather talk about. Good hops. "In this business you hate to lose," Yogi says, "and getting shot is synonymous with losing – getting your parachute and dying

and all that sort of thing.” He walks to the blackboard and picks up a couple of fighter plane models. Holding the F-14 straight and level in his left hand, he raises the little F-5 with his right and rolls it down behind the F-14, describing what happened. “You feel just like kicking yourself in the butt,” Possum says.

What makes this particular screw-up even worse is that Yogi and Possum are not with their regular squadron, the VF-1 Wolfpack based at Naval Air Station Miramar in San Diego County. For the last two weeks they’ve been training at Top Gun, Miramar’s internationally known Navy Fighter Weapons School. Just getting here was the ultimate break. Only the best young flyers in a squadron ever make it, and they have already raced past most fighter pilots their age. If they play it right and look sharp, they might even get invited back as Top Gun instructors – which is as high as a fighter pilot can get.

And now they have only three weeks left to make it up. “All you can do at this point is make sure that no wild card ever, *ever* jumps on your tail again,” Possum says.

Yogi shrugs. “It’s Miller time,” he says, hanging up the little model planes, and they head out into the night.

When Yogi and Possum return from a hop and fly into Naval Air Station Miramar, the first thing they see at the end of the runway is a huge red sign stenciled the length of a low, 300-foot-long building: WELCOME TO FIGHTERTOWN, U.S.A. Though the call sign of Miramar is “Home of the Pacific Fleet Fighters,” Fightertown is handier and far more appropriate, since the entire mission of this sprawling 24,000 acre-base – wedged inside a fork formed as I-15 and I-805 cross diagonally some fifteen miles north of San Diego – is to primp and fuss over several hundred fighter jocks so that when the time comes

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and they're staring down the missile racks of a Russian MiG, they are primed and ready.



Top: Possum (left) and Yogi take a break at Miramar's Hangar Number One. On the walls are silhouettes of MiGs shot down in combat by Top Gun graduates. Center: The water survival course prepares young pilots for bail-outs over the ocean. Bottom: Yogi describes a hop in the briefing room.

Lieutenants Alex (“Yogi”) Hnarakis and Dave (“Possum”) Cully are what naval lingo terms a “crew,” or an F-14 team. There are twelve crews in each fighter squadron – in their case, the VF-1 Wolfpack – and there are a dozen such squadrons stationed at Miramar, home base of all the fighter squadrons assigned to the U.S. Pacific Fleet. In “our” half of the world, starting at the California coast and stretching west to the tip of Africa, the Pacific Fleet maintains two battle groups in constant readiness, one in the Indian Ocean and the other in the Pacific. Bigger than many small nations’ entire navies, each battle group – consisting of some half dozen guided missile cruisers, two dozen or so destroyers and frigates, and an aircraft carrier equipped with various early-warning, submarine-patrol, and attack planes – is, in effect, a floating hunk of American territory that can carry a battle to the enemy’s doorstep, thus keeping it from our own. But these armed flotillas are sitting ducks. In the Falkland Islands last summer, all it took was one Exocet missile from a plain-vanilla Super Etendard Argentinian plane to sink the destroyer HMS *Sheffield*, pride of the British Navy. No matter how big the ship or how long its cannons, it is helpless without the assurance of “air superiority” over the battlefield.

That’s where fighter pilots such as Yogi and Possum figure in. Aboard each carrier are two F-14 fighter squadrons whose job is not only to protect the battle group against air attacks but to ride shotgun over the carrier’s three squadrons of attack planes as they go about their bombing and strafing sorties into enemy territory – what the navy calls “power projection.” This is the anachronism of fighter aviation. Even in this age of remote-control, push-button warfare, the survival and effectiveness of the entire U.S. Pacific Fleet rests on a few dozen young men

getting themselves catapulted off a flight deck and hanging it in the skies against numerically superior, land-based enemy planes.

“It’s like in the old days,” says Commander Jack (“Gringo”) Snyder, leader of the Wolfpack, “when one knight from each side would come out and they’d joust, one on a white horse and one on a black horse.” Tall and wiry, which comes from doing 200 push-ups and 100 sit-ups a day in preparation for the joust, Gringo flew an F-4 Phantom in the Vietnam War. He knows that even the greatest air battle is a series of individual duels – that, while a dozen pilots may blast off a carrier at one time, once they get up there they are alone, hurtling through enemy air at 750 miles an hour and tilting against tiny motes of silver that zoom out of the blue to become fire-spitting machines.

Which is where keeping bogeys off your tail and that little hop off the coast of Ensenada come in. “You fight like you train, so you’d better train like you’re going to fight,” fighter pilots like to say. It is also where Top Gun comes in. If Miramar is a fighter pilot’s Camelot, then the Top Gun complex in Miramar’s Hangar Number One is King Arthur’s Round Table, the gathering of the greatest of the greats in fighter aviation. Since its inception in 1968, Top Gun’s hotshot aces have virtually revolutionized the fighter pilot business and, with the possible exception of the Israeli Air Force, established themselves as the international masters of the deadly art of air-to-air combat.

Like the notion of the single-combat warrior, there is something slightly nostalgic about Naval Air Station Miramar. At night the darkened base could be mistaken for an old *From Here to Eternity* set, and even earlier in the day, when the base is bustling, it is enveloped in a time warp of unreality. Not just because it looks like a small desert town out of the 1950s – tract houses, a supermarket,

a Baskin-Robbins ice cream parlor, a golf course, and a bowling alley complete with a Lucky Strike Tavern and Ten Pin Café – but because it has no real reason for being here. The only centers of activity, activity that matters, are the stretches of runway at the south end and the officers club at the north. If an earthquake struck tomorrow and shook everything off the base except the flight line and the O club, few pilots would know the difference.

Among the fighter pilots at Miramar, “officers club” does not refer to the sprawling complex of dining rooms and meeting halls, but rather to the small space at the heart of the building that begins in a vestibule covered from floor to ceiling with heavily carved wooden plaques – more like coats of arms – of the various squadrons. This is the entrance to the WOXOF Room, the inner sanctum of Miramar’s knightly order. (In aviation circles the letters and zeros in WOXOF refer to various unfavorable weather conditions – *X* means “obscured,” for example, and *F* means “fog” – and strung together the letters mean, “You’re grounded, why not make the best of it?”) Inside, the walls are hung with more squadron emblems, and there are glowing Zaxxon and Donkey Kong video games and a small stage lit in reds and greens where, this evening, two young and zesty girls in bikinis are disco dancing.

It is the Wednesday night happy hour, and the small, noisy room is packed with pumped-up fighter jocks. There is a lively trade at the bar, mostly in light beer, but out of this crowd of 50 or so men no more than 3 are looking at the nearly nude dancers. With raw sex waving right in front of their eyes, these supremely healthy young males are standing around in twos and threes and talking about the hop. You don’t even have to listen to catch on – just watch their hands tracing loops and rolls and aerial ambushes with the grace of a ballerina’s.

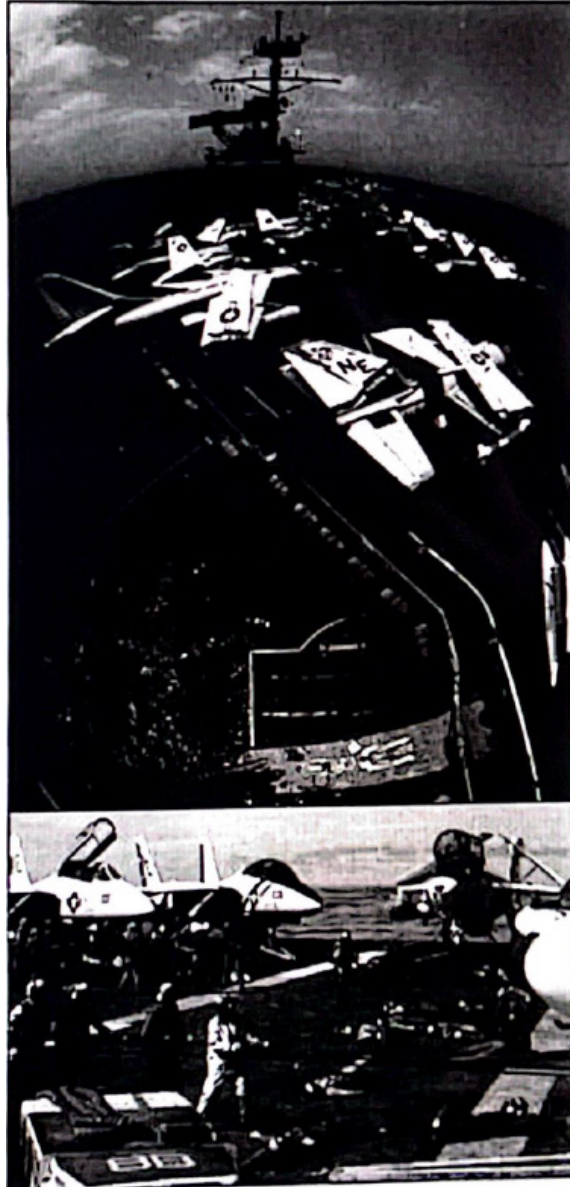
Lieutenant Commander C.J. (“Heater”) Heatley is one of the Wolfpack’s top F-14 drivers. Tall and boyish, with curly brown hair and quiet blue eyes, Heater likes to think things out, such as the reason fighter pilots hang together and “shoot off their watches” in the WOXOF Room. They do it, he says, for the same reason stunt men or Joseph Wambaugh’s cops or anybody else who hangs it out there for a living heads for a bar after a day’s work. “You’re out there supersonic going from deck to 40,000 feet and back down to the deck, simulating killing people and getting yourself killed, handling actual emergencies, and when you finally come in and land you can’t even tell your wife about it,” he says. “How do you explain 6.5 Gs [six and a half times the force of gravity] – that you’re sitting there and you weigh 200 pounds, but when you turn for that bad guy you suddenly weigh more than 1,300? Or how if you pull too many Gs a lot of times you start to black out, and how do you explain that you were in an airplane flying around and you blacked out?”

So that’s the torture. But what about the good things?

Heater throws up his hands. He knew it was pointless even to try to explain. “But those *are* the good things,” he says. “That’s not torture, that’s good. I *like* pulling Gs. I *like* strapping on 25 tons of airplane and hustling around the sky. I like that.”

So that’s where it all starts. With the love of flying.

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Top: With its four acres of flight deck, the USS Ranger can accommodate as many as 85 planes (their wings folded while parked) – and two sunbathers. Bottom: In the mass casualty drill, the entire carrier crew enacts various worst-case scenarios, including nuclear attack.

Alex Hnarakis wanted to fly ever since he was twelve, when in 1968 he sat in front of the TV at his parents' home in the suburbs of Washington, D.C., and watched the Apollo 8 astronauts flying around the moon. So once out of high school he cut off his long hair, shaved his beard, and entered the U.S. Naval Academy in Annapolis, Maryland. There was a small flying school at a nearby civilian airport, and in his senior year he logged a few solo hours – it wasn't military flying, of course, more like putt-putting around inside a lawn mower with wings, but it was better than nothing. He graduated in 1978, six months before his flight training was to start, and was put on temporary duty with VF-111 squadron at Miramar, which was just switching from F-4 Phantoms to awesome F-14 Tomcats. Suddenly he was hanging out with real fighter pilots, sitting in on real briefings, and even hitching rides in the backseat of an A-4 Skyhawk, getting bumped and bounced and breathless pulling Gs. It blew his mind, he remembers, but there was an admission price to this land of the giants. "I had to do well in flight school," Yogi says, "because only by being at the top of the class could I get my choice of flying fighters, and get to fly F-14s." In September 1980 he finished flight school at the top of his class and, with his new gold wings glistening on his tropical khakis, headed for VF-124 squadron at Miramar.

Dave Cully was born in Detroit and grew up in Newport Beach. He wanted to fly, too – just like his older brother, an army helicopter pilot in Vietnam – but his brother told him to be smart, to go to college and take ROTC on the side. He entered UCLA in 1975, played ice hockey and lacrosse, and in June 1979 graduated as an officer with a degree in economics. He already knew he couldn't be a pilot. His eyes weren't good enough. But navy fighter planes have two-man cockpits, and the sight requirements

for backseaters aren't as strict. "It was like, there were the cards, and I could take my hand or walk out," Possum says. "But I wanted to fly." He was "stashed" on temporary duty at the Navy Fighter Weapons School at Miramar. In the summer of 1980 he came out of flight school with his Naval Flight Officer wings, married his high school sweetheart, and was assigned to VF-124. That's where Yogi and Possum met, while learning to fly F-14s.

Yogi had flown jets in flight school – the T-2 Buckeye and A-4 Skyhawk – but moving up to the F-14 Tomcat meant crossing the magic line that separates the men from the boys, like first-time sex, glorious and terrifying. The difference is the afterburner, an engine component that at the pull of a throttle begins to burn huge amounts of fuel at incredible speed, resulting in a burst of power that no ordinary jet engine can duplicate and no plane but a fighter ever needs. "Just getting into an afterburning aircraft is a sensation most attack guys will never know – that feeling of power," says Lieutenant Rick ("Organ") Hammond, a member of the TK Top Gun squadron. "The first time I lit the afterburner in an F-14, the airplane just, you know, just literally *moved*."

The F-14 Tomcat is the U.S. Navy's supreme air war machine, a huge, luxurious monster that could have been designed by the *Star Wars* special effects crew. Its wings can sweep back for fast flying or open to the sides like an eagle's for landing or just for cruising around – "loitering" in navy jargon. It can shoot up to 30,000 feet in one minute, fly at more than twice the speed of sound, and haul seven tons of guns and missiles – including the heat-seeking Sidewinder, the radar-guided, mid-range Sparrow, and as many as six Phoenix missiles, half-ton monsters that can home in on a bomber more than 100 miles away.

In fact, the F-14's radar system can track 24 targets at once and fire six missiles in six different directions in rapid sequence. By comparison, the much smaller Russian MiG carries little more than guns and a few missiles, and must get quite close to a target – directly behind in order to use its heat-seeking Atolls – to hit it.

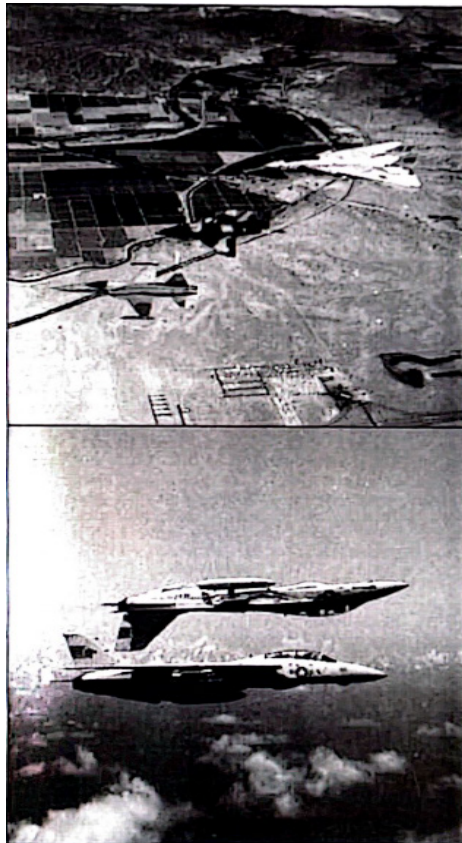
But the F-14 does have its drawbacks. The plane's enormous size is a disadvantage (it can be seen as far away as ten miles), and it is so technically complex that it takes between 20 and 25 hours of work by ground crews to keep it flying for just one hour. The biggest problem, however, is the F-14's price. The next batch of Tomcats to roll off the Grumman Aerospace assembly line on Long Island will cost \$36 million apiece, which doesn't leave much for an adequate stock of spare parts or for new replacements for the plane's troublesome TF-30 engines. The TF-30s "have been, over the years, on a comparative basis, stall-prone," says Rear Admiral George M. ("Tiger One") Furlong Jr., commander of the Pacific Fleet fighter squadrons. At high angles of flight, not enough air flows into the engines, and they die – and in very rare instances the only way to restart an F-14 in the air is to point it nose down and dive until the airflow starts the fans going.

The F-14 has been plagued with other technical troubles since its introduction in 1972, and in 1976 a deadly streak of accidents swept Miramar, killing four men in one 48-hour period alone. That none of these accidents dampened the pilots' enthusiasm for the plane is just another clue to the fighter pilot's code. "They have an incredible denial mechanism," says Captain R.A. Millington, flight surgeon for the Pacific Fleet's aircrews. When an aviator dies, his picture is removed from the squadron roster, his locker emptied of his personal belongings, and all other traces of his presence on the base are obliterated. Even

accident reports that clearly demonstrate technical failures don't erase the lingering doubt. "You think there must have been *something* he could have done and didn't – that if it were you it wouldn't have happened," Heater says. "Such planes take off and land every day without accidents, so obviously it can be done."

It takes nine months to learn how it is done. You start by spending hours and even days in flight simulators that cost as much as real planes but can't crash and don't use gasoline (you can train an hour a day for a whole week in a simulator for what it would cost to fly 60 minutes in an F-14, which burns \$1,500 an hour in gas alone.) Some of the simulators are simple – a cockpit with a small screen in front – but once you master the basics you're ready for the highest high-tech high, the 2F-112, the world's ultimate video game.

You don't just sit and play the 2F-112, you walk into it like an H.G. Wells traveler stepping into the time machine. You and your radar intercept officer climb up and strap into an F-14 cockpit mounted twenty feet high, at the center of a 40-foot-diameter spherical room. The lights go off, and suddenly the entire dome becomes the great outdoors. The illusion of flying is total – move the stick and the scenery moves in response, rolling and soaring and falling. The real action begins as the bogeys start coming at you, and you pull and push and twist the stick, trying to keep them off your tail and get onto theirs instead. Screw up and you go into a spin, and if you don't make the right moves to pull out of it, you crash. The room goes black.



Top (left to right): An F-5E Tiger 11, an A-4 Skyhawk painted in camouflage, and an F-14 Tomcat head home after dogfighting over Yuma, Arizona. Bottom: Two F-14 pilots demonstrate the agility and grace of their 25-ton monsters in a classic Blue Angel “back-to-back” maneuver.

Simulator flights are followed by real flights – low and high, formation flights and air combat maneuvers – and finally, by the last month of training, there’s one thing left to do before you join your permanent operational squadron. It is something so awful, so mortifying, that the dread of it stays with pilots for as long as they remain naval aviators. “There’s some fear every time you’re in the air, mixed with excitement and thrill and tension,” Yogi says,

“but a night carrier landing is the only thing that is sheer, unmitigated terror.” You’ve done day landings on carriers back in flight school, of course, and practiced night landings on the silhouette of a flight deck painted on a regular runway. But nothing, *nothing* prepares you for what’s coming next.

You are flying out of a black sky onto a black sea, and suddenly you see a dot of white light miles away in the void. The voice on the radio tells you that’s the ship down there, but all you see is the little light you must follow down into the controlled crash that is a carrier landing in the best of times. If you are lucky the sea is calm and the air is clear, but if the light bounces in the dark you have no way of knowing which is moving, you or the ship. All you know is that somewhere down there is a 60-foot wall of steel and only 700 feet of deck. If you hit too low you’ll have to be scraped in bits and pieces off the side of the ship, and if you come in too high and fail to snag the restraining cables with your tailhook you’ll have to come around again – and you’ve already screwed up once.

The VF-1 Wolfpack was out on cruise in the Indian Ocean one particularly rough, dark night when a pilot had to come around twelve times. *Twelve times*. The poor guys had nowhere else to go, and he came around and around, burning so much fuel that twice tankers launched off and refueled him in midair and landed on the pitching deck while he was still out there trying to make it down. When he finally did, he hit the deck so hard that he damaged the plane, and when he climbed out of the cockpit he was crying and looked like an old man. “You never get used to it,” says Organ, who sat up half that night watching his buddy trying to come back out of the sky. “If you do, there’s something wrong with you.”

By the fall of 1981 Yogi and Possum had finished their training at VF-124 and were assigned to their permanent squadron, the VF-1 – the squadron they will fly to battle with in the event of war. For as long as they remain with the Wolfpack, it will be their home and family, security blanket and confessional circle. Possum's wife, Lisa, has already joined the Wolfpack's wives group, her family when Possum is out at sea, and in time she will realize that her husband will spend more hours of their married years with Yogi than with her. Indeed, shortly after Yogi and Possum joined the Wolfpack, they began training for a sea tour, and in a few months they were ready. Possum helped Lisa lock up the apartment and store their belongings, then drove her to her parents' home in Newport Beach, where she would stay for as long as he was at sea. And on April 7, 1982, the Wolfpack took off from Miramar and landed aboard the USS *Ranger*, already under way 100 miles south of San Diego. It would be six months before they'd be back.

Spaceship designers could use the aircraft carrier as a model. With 5,000 men aboard, it is a floating steel city, complete with office suites, apartments, parking lots, and machine shops securely hidden under a deck so solid that a 25-ton plane can crash onto it and it won't even be felt below the main level. And as in any city, one can live and work for months and meet only a handful of people and never visit entire neighborhoods.

On Yogi and Possum's first cruise the *Ranger* stopped in Hawaii for a few days, then for four days in the Philippines, where several time-honored naval aviation customs were followed. A team was sent out to look over the wood-carving shops in downtown Manila and place an order for a new Wolfpack plaque to hang at the entrance of Miramar's WOXOF Room. Then the entire squadron was

measured for snazzy new red-on-gray flight suits, which downtown tailors could whip up for only \$27 each. By the time the *Ranger* stopped by again on its way home, everything would be ready. The next port was Singapore. There Gringo located a good-size brass bell that the Wolf-pack would also present to the club when it returned.

But then the *Ranger* reached the Indian Ocean and stayed there for 101 days, and the fun was over. It finally dawned on Yogi that yanking and banking has a deadly intent. Naturally he knew that being a fighter pilot meant that someday he might have to go into real-life battle, but it wasn't something he looked forward to. "I'm no war-monger," Yogi mused one evening. "I don't care if we never go to war. The only thing is, if we do I'd like to be there." One day an order came over the carrier's speakers, and Yogi and Heater blasted off the deck like human cannonballs, their F-14s loaded to the gills with live ammo.

Heading their way was a massive Russian plane that looked like a transport but could have been anything. As they escorted the plane away, Yogi edged up so close that he could look over and see the Russians in their cockpit, staring at him and snapping photographs. He waved the way one does when someone is taking pictures, but the Russians didn't wave back – not even when Yogi's backseater took their picture.

Yogi and Possum flew at least once a day off the *Ranger*, but most flights were ordinary patrols or exercises. There was little air combat, except when a few F-14 drivers would head out to a randomly selected "MiG alley" over the ocean and practice dogfighting. Years ago, legend has it, some of the men on a cruise would play other games, games they would have been drummed out of the navy for if they were ever caught playing. In the game of "thumping," a guy might be flying straight and level with-

out a care in the world when another would come slinking behind and below, then shoot under him and go into a sharp climb right in front of his nose – not only scaring the living daylights out of him but interrupting the air currents around his wings.

Though Yogi would dogfight with the best of them, he was almost too serious for the Wolfpack crowd, and he tried to use those long ocean flights to improve his flying skills. “He was like a sponge, soaking it all in,” says Heater, once an instructor at Top Gun and Yogi’s instructor on the cruise. They spent hours talking tactics in the briefing room before and after missions and in the dining room during meals, and then Heater began teaching Yogi classic air maneuvers such as the “vertical egg,” in which two planes chase each other in ever-widening vertical loops. And while Yogi was learning from Heater, Possum was doing the same sitting behind Gringo.

Finally, after more than three months in the steaming Indian Ocean, the *Ranger* started to head home. The first stop would be Perth, Australia, and the Wolfpack was determined to do it in style. Few of the men knew how or when Gringo had planned it, but no sooner had the *Ranger* dropped anchor than a glorious sailing yacht materialized alongside with a huge sign on its mast: WELCOME WOLFPACK. When the VF-1 gang got on board there were bottles of chilled champagne waiting, which they hoisted in full sight of the poor suckers still waiting to hitch a ride to shore.

The first thing Yogi did when he got in was pull out a phone book, call up a couple of skydiving clubs, then head out with them to do some free-falling. Possum and a few of the others rented a car and went sight-seeing. Before blowing town, however, the Wolfpack organized a bash. The invitations – engraved – went out to every city official

in Perth they could think of, as well as to the other fighter squadrons. That, everybody had to admit, was class.

But nobody expected class at Subic Bay near Manila, where the *Ranger* then stopped for five days. Sometimes it seems that the only reason the Cubie Point naval base was built there, with its officers club high on a hill overlooking the bay, was to give naval aviators back from a cruise a place to let off steam. Anything goes, including, after enough beer went down one evening, pushing all the tables together in the shape of a carrier deck, stretching a few towels across, and doing belly landings. Somehow somebody remembered to pick up the new Wolfpack plaque and the custom-made red-on-gray flight suits, and even to have Gringo's big brass bell mounted on a specially engraved base.

Delivering the bell to the WOXOF Room was a great event. It was no ordinary bell. The Wolfpack had brought it for a purpose, to help uphold the club's bylaws, which state that a bell should be rung on two occasions – when someone walks into the club with his hat on, or when a customer finds himself behind the bar. On either occasion, the transgressor picks up the tab for everybody's drinks. Of course, to hang the bell the Wolfpack had to get behind the bar, but what the hell – the going was still first class.

Shortly after they returned to Miramar, Yogi and Possum were assigned to fly together. They had done well separately on the cruise, and even better once they became a team. In fact, they did so well together that last January they were told to report to Top Gun for air combat training. Now they would learn what being a fighter pilot is really all about.

If war broke out and this country's aviators were ready for it, it would be a first, and the credit would belong entirely to Top Gun, located in a second-floor cubby of offices

at the east end of Hangar One at Miramar. There is history on the high walls that flank the pipe-railed stairway – they are covered with red stenciled silhouettes of MiGs shot down in combat by Top Gun graduates. For a young fighter jock swaggering up the stairs in a brand-new flight jacket, the effect is awesome. At the top of the staircase are two large silhouettes stenciled in black. They are two Libyan SU-22 jets bagged in 1981 over the Gulf of Sidra by two F-14 crews from the USS *Nimitz*, and the only air kills since the Vietnam War.

In 1964, just as Yogi and Possum were entering the third grade, North Vietnamese gunboats fired on the U.S. destroyer *Maddox* in the Gulf of Tonkin (or so President Lyndon Johnson insisted), a war flared up, and suddenly hotshot naval aviators were getting creamed by Charlie pilots who were just learning how to drive their early-model MiG-15s and -17s. The navy was losing one Phantom for every two MiGs it bagged. A 1968 study commissioned by the navy concluded that the problem was missiles that didn't work and aircrews who didn't know how to dogfight, and it recommended the establishment of a fighter-pilot school. In reality, the whole thing was a monumental Pentagon screw-up. The navy's brand-new, high-tech F-4 Phantoms were designed, and their pilots trained, to intercept high-flying Soviet bombers – to scramble up, locate the target on the radar, nail it from behind with a missile, and come home. Easy. But confronting those fast little MiGs was something else.

In the spring of 1969 a few crack flight instructors with VF-121, the F-4 Phantom training group at Miramar, got together in a small trailer outside their hangar to establish the U.S. Navy Postgraduate Course in Fighter Weapons Tactics and Doctrine. In time it would be renamed the Navy Fighter Weapons School, but it was Top Gun – name

of an annual air-to-air gun competition held by the various armed services in the 1940s and '50s – that stuck. Inside the trailer were two tiny offices, a narrow hallway, and a room into which the first class of eight could barely fit, but it was the birthplace of a revolution in fighter aviation. For the first time fighter jocks – not Pentagon experts or plane manufacturers – were setting performance standards for their flying machines. There were long debates into the night. New air maneuvers were invented, first with hands tracing loops in the air, then on the blackboard, and finally, the following morning, in the skies.

They started by flying F-4 Phantoms against F-8 Crusaders, the navy's last classic single-seater fighter, and then against Mongooses, stripped-down A-4 Skyhawks that made great MiG imitators. By the time the air war over Vietnam was resumed in early 1972 after two years of inaction, scores of Top Gun graduates were out on their carriers off the coast and MiGs were being shot down all over the place. The navy's kill ratio zoomed to twelve to one. But the final seal of approval on the Top Gun concept came on May 10, 1972, when two recent graduates, lieutenants Randall ("Randy") Cunningham and William P. ("Willy") Driscoll, blasted off the USS *Constellation* and headed toward Hanoi to escort an attack force over the Hai Dong railroad yards. It would turn out to be the hop to end all hops. Not just because they downed three MiGs in one day, but because those three took them over the magic five-kill line to make them the first official aces of the Vietnam War. As the navy flew Randy and Willy home to parade them across the country, the story of that little hangar at Miramar finally started getting out, and when the war drew to a close combat-seasoned jocks scrambled to get there as instructors.

To truly appreciate what was happening at Top Gun in those heady years of the early 1970s, one must first understand that there are few caste systems as elaborate and demanding as the one military pilots live under. Its dividing lines are drawn like the circles around the bull's-eye of a gunnery target. On the outside is the mass of humanity that doesn't count at all – nonflying nonentities. In the outer ring, only slightly more significant, are the aviator's families, groupies, and hangers-on. Then come helicopter pilots, transport pilots, bomber pilots, and assorted prop-driven plane pilots, and next the attack pilots, whose planes have no afterburners and who charge at ground targets only. In the inner rings, where fighter pilots belong, there are finer distinctions that only the pilots themselves can discern, until one tiny circle is left at the center, the bull's-eye, where the elite of the fighter elite stand in glorious isolation. The greatest of the greats, the makers of legends – the “shit-hots.”

At Top Gun, back in those postwar days, *everybody* was hot. So hot that the place sizzled even when nothing was happening. So hot that a lot of people suggested that even Randy Cunningham didn't truly belong there. Not that he wasn't a great fighter pilot. His three-MiG day was awesome, and in 1976 he and Willy Driscoll would actually be inducted into the base's Aviation Hall of Fame. But, though the young aviators at Miramar might be content to gape at Cunningham's two silver stars and Navy Cross, to the Top Gun hotshots his new MIG ACE license plate was, well, unprofessional. “Really great fighter pilots are like the great gunfighters in the Old West,” says Jim (“Hawkeye”) Laing, one of the original Top Gun hotshots. “They didn't have to tell anybody how great they were – all they had to do was just stand there, and the aura was such that everybody knew. It's the same here. *Everybody knows.*”

Not that anybody was just standing around at Top Gun. There were the drinking sessions at Bully's, a steak house in San Diego, and the late-night car races in Imperial Valley, running through sleepy little towns at 100 miles an hour with no headlights. "It's all right, officer, we're from California," a tanked-up marine hotshot once told a cop who had stopped him. "This *is* California," the cop answered, and wrote him up. But most of all there was flying. Glorious flying. The greatest fighter flying in the world was taking place every day over Yuma, Arizona, or the Chocolate Mountains or the Pacific Ocean as Top Gun's Vietnam vets set out to rewrite every single fighter aviation text ever written.

Yet this fighter pilot's Valhalla almost came to an end in late 1977, when Rear Admiral Frederick ("Field Day Fred") Fellows assumed command of Naval Air Station Miramar and set out to restore discipline and naval decorum to the fighter community. Suddenly the old peacetime regulations were being enforced, and before long the hotshots began to leave. Top Gun's dark ages lasted until the spring of 1979, when Fellows was replaced by Rear Admiral Paul ("Gator") Gillcrist. Unlike his predecessor, Gillcrist was a fighter pilot's pilot – he had flown the F-8 Crusader in the early years of the Vietnam War. A sigh of relief swept the fighter jock community, but by then so many of the original hotshots had left that hardly anybody with any war experience was available for a Top Gun instruction post.

By the time Yogi and Possum walked over from the south end of Hangar One, home of the VF-1 Wolfpack, to the north end to begin their Top Gun training last January, only the course chief, Commander Ernie ("Ratchet") Christensen, and one or two instructors could speak with the authority of actual combat experience. But it was still

shaping fighter aviation doctrines and tactics, and it was still the greatest fighter-pilot school in the world.

It started slowly. Gently. There were lectures and briefings, but soon Yogi and Possum were up in the air, and there was more flying than they had ever had. There were one-versus-one hops (one student crew against one instructor), then two-versus-two hops, and then came the tough two-versus-unknown hop, in which two student crews take off not knowing how many bogeys are waiting out there or where they'll come from or in what order. That's how Yogi and Possum happened to be flying off the coast of Ensenada on that bright January morning, just floating through the blue looking for game, when that F-5 rolled in and sent them home with a simulated Atoll shot. Before long the hops were running into each other, and Yogi and Possum noticed that something was happening to them. They were flying twice a day – not cross-country cruising but edge-of-the-seat, hard flying, intense, mind-bending flying – and they didn't even have to speak except to draw attention to a bogey. They were being hammered into a team.

And so it was that on a sunny day last February Yogi and Possum strolled out of Hangar One in their flight suits, with their helmets and oxygen masks dangling from their arms and their chutes slung macho-casual over their shoulders. Their plane was ready and waiting, and as they climbed into the cockpit nobody came running up to say that the hop would be delayed. That was a good sign right there. And then the little huffer cart blew air into the engines to get them going, and in seconds their machine was humming like a rocket. They taxied out to the runway, lined up, and blasted off, and still everything was okay. They banked right and leveled off at 2,000 feet, then climbed higher and headed for the rugged Mojave Desert

country around China Lake for the most important Top Gun hop, the culmination of their training. It was a great beginning for a great hop.

Once over China Lake they teamed up with a few A-7 attack planes, which they escorted over “enemy” land on a bombing mission. The A-7s did the bombing, and Yogi and Possum and the rest of the F-14s went along on a MiG sweep, looking for bogeys and fighting their way to and from the target area, taking care not only of their own tails but of those nose-down A-7s below. Since this was “enemy” territory, and the Russians were big on radar control, they flew in low, hugging the terrain at 500 feet.

Yogi and Possum were zipping along, shooting up mountains and down canyons and flying so low that it was hard to keep from staring at the ground, but they had to keep looking for bogeys. Only a few days earlier they had been out there over China Lake, just coming out of a mission, when they turned back and saw two bogeys riding their tail. Yogi watched the one on the left and Possum tried to keep the one on the right in sight, but then Yogi found out that his bogey had just fired a missile. There are a couple of things a pilot can do with a heat-seeking missile heading his way, and one of those is to break hard – pull away fast – to foul up the missile’s tracking system. Possum was losing his bogey and was just turning his head to look over his right shoulder when suddenly Yogi pulled the stick and headed up in a 7.5-G climb. As Possum fought to keep his face from smashing into the radarscope he heard his neck begin to pop, the vertebrae cracking the way knuckles do when pulled – “puk, puk, puk.” That’s when Yogi said real cool into the mike, “Hey, you still got those guys back there?” Possum couldn’t even look up to ask him if he was kidding or what.

So now they were shooting up and down those brown and yellow desert hills, and they still had to keep an eye peeled on that huge blue dome above them. But nothing happened. They saw a few bogeys in the distance, but nothing to worry about and they came over the target area and turned around and headed back, and still nothing. They would have preferred a little more action, when you came right down to it, but what really mattered was that they had been ready for it all along – they could have fought their way out of anything. They had made it into bogey country and hadn't screwed up once.

Yogi and Possum finished the Top Gun course at the end of February. As their class picture went up in the briefing room and they received their new Top Gun flight jacket patches (a MiG caught in a fighter's cross hairs), the news came that the Wolfpack was named top fighter squadron on the West Coast – one of only two contenders for the Admiral Clifton Award, the navy's greatest tribute to a fighter squadron. Two weeks later the men of the Wolfpack began flying out to land on the pitching and rolling flight deck of the USS *Kitty Hawk*, some 100 miles out to sea off San Diego, in preparation for their next cruise. This time Yogi and Possum would lead those long fighter patrols over the Indian Ocean, and out there over their wing would be a young pilot just out of training, eager to learn how to be a real fighter pilot.

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FIGHTERTOWN, U.S.A.

Old pilots never die—they move to San Diego.



(Left to right) World War I pilot Robert Todd, Zeke Cormier and Tom Lanphier, who flew in World War II, and Willy Driscoll, a Vietnam ace.

Naval air station Miramar may be the “official” Fightertown U.S.A., but if you were to paint the name on the side of a blimp and send it soaring over all of San Diego County you would still be on the mark. Ever since the dawn of the dogfight age, ex-fighter pilots have drifted to this balmy land of azaleas and great blue yonders.

At Palomar Airport Dick Martin lovingly restores old World War II Spitfires and Corsairs and P-51 Mustangs for use in films or TV series such as *Baa Baa Black Sheep*, based on the daredevil exploits of Gregory “Pappy” Boyington and his unruly VMF-214 squadron. Just a few miles away in Escondido, Richard Rossi, a Flying Tigers ace who actually flew with Boyington, raises avocados. Thomas Lanphier – who on April 18, 1943, shot down a

Japanese bomber carrying Admiral Isoroku Yamamoto, architect of the raid on Pearl Harbor – lives in San Diego, and so do Zeke Cormier, who shot down eight Japanese planes in World War II, and Charlie Stimpson, who has twice as many notches on his World War II record.

The North San Diego branch of the Fighter Aces Association alone has twelve members, each of whom shot down at least five enemy planes, and some go back to World War I. Robert M. Todd shot down five German planes in the summer of 1918, then told all about it in his book, *Sopwith Camel Fighter Ace* (Ajay Enterprises, 1978). The Fighter Aces Association meets every three months at the Rancho Santa Fe Inn “to tell war stories and lie to one another a lot,” says Cormier, and other fighter pilots congregate at the San Diego Aerospace Museum in Balboa Park. Many, however, make their yearly pilgrimage to Miramar.

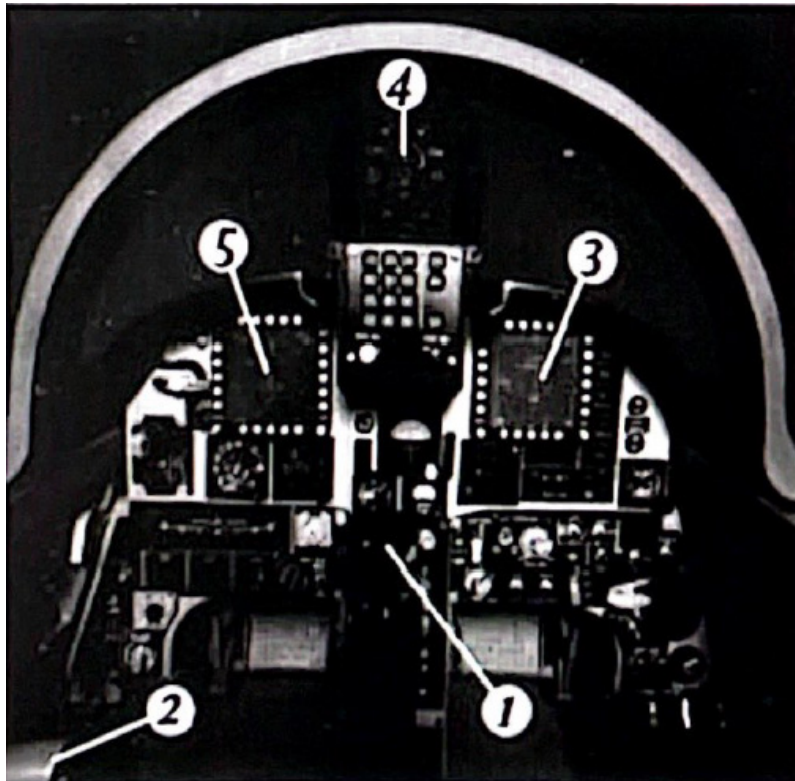
There, just outside the WOXOF Room of the officer’s club, where today’s young fighter jocks trade tales of great hops, is the base’s Aviation Hall of Fame, a 30-foot hallway covered with portraits of aviation legends from Charles Lindbergh to Chuck Yeager. In a large room at the end of the hall, members of the 50-year-old Daedalian club gather on the second Thursday of each month to hoist a toast to comrades who have flown their last flights and to wish happy landings to those who still show up. They span the history of fighter aviation, these men who flew Jennys and Mustangs and F-8 Crusaders. Some go clear back to the beginning. Navy Commander Carlton D. Palmer, 93, made the first flight off a battleship back in 1922, launching his Sopwith Camel off a makeshift ramp atop the gun turrets of the USS *Texas*, and a year later he made the first carrier landing in a military plane. Somehow, to hear him tell it, it doesn’t seem so long ago. – E.Y.

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DREAM MACHINE

Step into the Tigershark—the ultimate video game.



Super ace Chuck Yeager, the first pilot to break the sounder barrier, once said that “of all the airplanes in the world that I’ve flown, the F-5 is the most fun to fly.” The F-5 is actually a family of planes, starting with the F-5A back in 1964 and culminating last year with the F-5G Tigershark (now called F-20). All are elegant, zippy beauties with body lines so trim they look like canoes with wings.

The only fighter plane made in California, the F-5 is an anomaly in the high-budget defense business. It is not only small, effective, and easy to repair, but it is also very

cheap. The F-5E Tiger IIs used by Top Gun instructors to simulate Russian MiGs cost around \$5 million each, and even the top-of-the-line Tigershark lists at only \$9 million – one quarter the price of a single F-14 Tomcat.

The navy could court-martial anyone it caught showing off the classified cockpit of the F-14, but here's how to make a hop in an F-20:

1. **The stick.** Say you're entering bogey country. To find out what's ahead, push the air-to-air weapon select button with your right thumb. (This is basically an "on" switch – your head-up display and digital display indicators are now operating.)

2. **The throttle.** With your left index finger, select "range while search." A plot (which looks like a radar scope) of the range in question will appear on your right-hand digital display indicator.

3. **The right-hand digital display indicator.** If there's a bogey out there, it will appear on this screen as a small black square. To lock your radar onto its tail, press the throttle's acquisition button until the screen acquisition symbol (two parallel vertical lines) brackets the target. Suddenly the acquisition symbol disappears, and a numbered aiming circle appears around the black square – this tells you at a glance how fast, how high, and in what direction the bogey is going.

4. **The head-up display.** From this point on, you can look straight through your head-up display and see both the real target and the head-up steering circle (which looks like a bull's-eye) simultaneously.

5. **The left-hand digital display indicator.** On this screen is a list of your available missiles and gun ammunition. Once you have picked your weapon, maneuver the plane until the head-up display's steering circle is directly

over your target. When you reach the proper range the word SHOOT will flash onto your head-up display. Pull the stick's missile release or gun trigger with your right index finger. *Bingo*. – E.Y.

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THE AGONY AND THE AGONY

The truth behind yanking and banking.

If you sit in the cockpit of an F-5 and drop your hands to your sides, your fingers reach two metal bars lying flat along the base of the seat. The bars are painted in black and yellow stripes – a warning sign. Pull up and squeeze them and an explosive charge will blast you out of the cockpit and into the air, your seat will drop away, your parachute will open above, and you will float safely down to earth. That's how the ejection seat is supposed to work if anything goes wrong with the plane, but the trouble is you can't practice with it, only memorize a series of steps. "How many times have you punched out [ejected]?" asked Lieutenant Al ("Shoes") Mullen when I told him I wanted to run through it all again before our flight.

"Not once," I said.

"That's as many times as I've done it," he said, "and I don't plan to start now."

In a crazy sense, there was more reassurance in that fighter jock's swagger than in all the hours of safety training I had completed before going up in an F-5 (F-14s are classified – no civilians allowed) with Shoes as my pilot.

It was raining on the morning of our flight, but then the gray cloud cover broke, and taking off and flying through those fluffy white clumps was a near-sexual delight. It didn't last. As we flew over an Imperial Valley date farm and began dogfighting with Yogi and Possum in their F-

14, my dispassionate observer mode was brutally shattered. It began as Yogi and Possum drifted away, vanished, then turned and headed back in our direction. Suddenly Shoes whipped the stick hard, first to the left and then to the right, and before I could catch my breath or brace myself he must have seen something, because he pushed the throttle and sent us into a sharp climb. It was my first introduction to the G forces.

When you are pulling Gs – withstanding several times the force of the earth’s gravitational pull – the pressure comes from everywhere. Even your eyelids weigh several times what they normally do, and the pressure on your chest is so intense that you can hardly breath. For the next half hour or so, I learned later, we went through several classic air moves, but all I remember is a series of flash impressions and a general feeling of physical torture. The things I thought would be the hardest to take, such as flying upside down, were anticlimactic. Indeed, at one point I remember seeing green fields where the sky ought to be, and it was sheer nirvana – after several minutes of pulling Gs and feeling the air pockets in my G-suit inflate against my legs to force the blood back to the heart, it was a relief to rest head down and let the blood return to my brain. And then, in an instant, we were climbing at 6.5 Gs, and I realized I was sitting slumped in my seat like a shriveled old man, a 1,100-pound old man, unable to straighten my back.

There were a lot of things I was unable to do. I couldn’t pick up my camera from a nearby shelf – on earth it weights about one and a half pounds. I couldn’t slow the plane by pressing my feet forward as Shoes suddenly pointed the plane nose down and went into a dive. I couldn’t keep track of Yogi and Possum’s plane, streaking by like flashes of metallic light and nothing more. I had

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never felt so useless in all my life. I had lost control of everything that was happening from one second to the next, exactly the opposite of what fighter pilots feel – and must feel – all of the time.

And when I climbed out of the cockpit at the end of our hourlong flight, I couldn't even swagger. Every muscle in my body ached, I was exhausted and slightly nauseated, and all I wanted to do was go to sleep. But they tell me the first time is the worst, and I can't wait to get up there again.

– **E.Y.**

APPENDIX E**RELEVANT CONSTITUTIONAL, STATUTORY,
AND REGULATORY PROVISIONS**

1. The United States Constitution, Article I, Section 8, clause 8 provides in relevant part as follows:

The Congress shall have Power * * *

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; * * *.

2. Sections 102, 106, 203, and 501 of 17 U.S.C. provide in relevant part as follows:

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

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§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

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§ 203. Termination of transfers and licenses granted by the author

(a) **CONDITIONS FOR TERMINATION.**—In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination inter-

est unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

(4) The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or the grantee's successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not

less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) EFFECT OF TERMINATION.—Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in

the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this clause.

(4) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).

(5) Termination of a grant under this section affects only those rights covered by the grants that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(6) Unless and until termination is effected under this section, the grant, if it does not provide other-

wise, continues in effect for the term of copyright provided by this title.

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§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the interven-

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tion, of any person having or claiming an interest in the
copyright.

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