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Filmmakers' Copyright Claim Against Warner Bros. Tossed

By Noah Barron
Daily Journal Staff Writer

LOS ANGELES — A federal judge has ruled that the Warner Bros. film "We Are Marshall" did not infringe on any copyrights held by filmmakers who made a documentary about a 1970 plane crash that killed most of the Marshall University football squad.

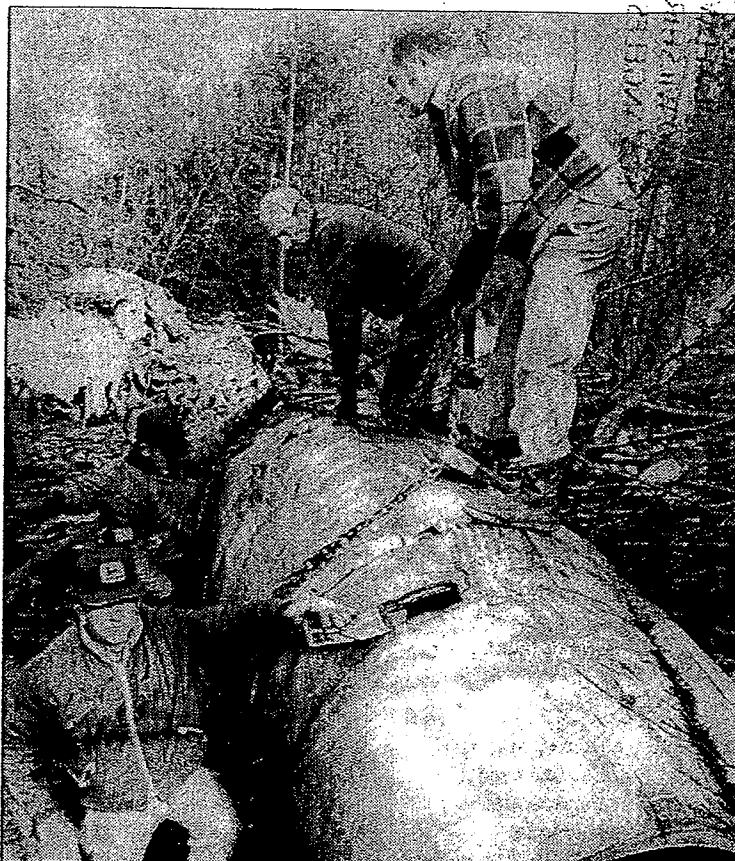
U.S. District Judge Gary A. Feess in Los Angeles on Monday issued a summary judgment that threw out Deborah Novak and John Witek's claims that they were owed \$20 million for ideas taken from their 2000 documentary, "Ashes to Glory," and used by the studio in the 2006 Matthew McConaughey movie, which grossed \$43 million.

"If the unproctable elements of the two works — the historical facts, scenes à faire, the biographical data — are removed from the analysis, the two works are not substantially similar," Feess wrote. *Deborah Novak, et. al. v. Warner Bros. Pictures*, CV07-4000GAF (C.D. Cal., filed 2007).

Feess, quoting *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. filed 2002), wrote in his 39-page order that copyright protects the original expression of ideas but does not protect "the facts and ideas themselves because facts, whether alone or as part of a compilation, are not original."

Litigation of this type is a constant headache for Warner Bros., assistant general counsel Zazi Pope said. Pope said Warner Bros. spends hundreds of thousands each year fighting copyright suits from writers who believe they can copyright factual events.

"By reaffirming the fundamental principle that historical facts cannot be owned and are not protected by copyright, the decision is a victory not only for the creative team behind 'We Are Marshall,'" she wrote in an e-mail, "but also for all writers and filmmakers who derive their inspiration from real-life events."



Associated Press

Emergency personnel in Kenova, W. Va., retrieve the charred engine from the wreckage of the plane that crashed carrying members of the Marshall University football team in 1970.

The outside lawyer who took the case for Warner Bros., Andrew Esbenschade of Caldwell, Leslie & Proctor in Los Angeles, said that his primary strategy was to demonstrate the differences in style between the documentary and the fictionalized movie.

"The pace, dialogue and style were all different," Esbenschade said. "The judge said he watched each more than once."

Of the plaintiffs' request for \$20 million in damages, Esbenschade said, "We found the amount of money... to be completely meritless."

The documentary filmmakers had attempted to sell rights to their work to Warner Bros., Esbenschade said, but negotiations broke down when they couldn't agree on a fee. The studio and the filmmakers

Their lawyer, John A. Marder of Manning, Marder, Kass, Elrod & Ramirez, disagreed. He plans to appeal to the 9th Circuit Court of Appeals.

"We have been here before and won in the 9th Circuit," Marder said. "I am certain we will again. The evidence in this case is just too strong."

Marder's earlier case was *Grosso v. Miramax*, 383 F.3d 965 (9th Cir. 2004), a similar copyright appeal relating to a screenplay entitled "The Shell Game" whose author, Jeff Grosso, alleged was copied by Miramax to create the 1998 movie "Rounders."

Marder won a reversal on appeal. The 9th Circuit sent the case back to the trial court, where Marder lost.

He said in the "We Are Marshall" matter, Feess erred by deciding the works were dissimilar enough to throw out the case. He said the judge should only have ruled as to whether the similarity was significant enough to merit jury trial.

"It's not the judge's job to be the jury," Marder said. "It's the judge's job to be a gatekeeper."

Marder said he believes the similarity of the pieces, as well as the rights negotiations between Warner and the documentarians, will convince the appellate court to remand the case to a jury trial.

Marder said that the screenwriter who created "We Are Marshall," Jamie Linden, freely acknowledged in a Warner Bros. memo that he had solely used "Ashes to Glory" as his source material, the necessary requirement to show copying took place.

Pope said Marder had taken up prior unsuccessful copyright litigation against Warner Bros. — *Aaron Benay v. Warner Bros.*, CV05-8508 (L.A. Super. Ct., filed Dec. 5, 2005) — a suit that also resulted in summary judgment in favor of Warner. That case was a similar dispute concerning the rights to the story behind 2003's Tom Cruise film "The Last Samurai."

Both "We Are Marshall" and "Ashes to Glory" focus on the 1970 crash of a Southern Airways flight carrying most of the Marshall football team. The plane plunged into a hillside in Huntington, W.Va., near the Tri-State Airport, killing all aboard.

The fictional film and factual documentary use different techniques to tell the story of the university's rebuilding of its football program, Feess wrote.

noah_barron@dailyjournal.com