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10 BARBARA CHASE-RIBOUD

11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA  
13 WESTERN DIVISION

14 BARBARA CHASE-RIBOUD, an Individual, )  
15 Plaintiff, )

16 v. )

17 DREAMWORKS, Inc. (dba DREAMWORKS )  
18 SKG) a Delaware Corporation; )  
19 DREAMWORKS FILMS LLC, a California )  
20 limited liability company; DREAMWORKS )  
21 DISTRIBUTION LLC, a California limited )  
22 liability company; DREAMWORKS LLC, a )  
23 California limited liability company; PUNCH )  
24 PRODUCTIONS, INC., a Connecticut )  
25 Corporation; PENGUIN PUTNAM, INC., a )  
26 Delaware Corporation; PENGUIN BOOKS, )  
27 USA, INC., a New York Corporation; and )  
28 DOES 4 through 50, inclusive, )

Defendants. )

CASE NO. CV-97-7619 ABC (JGx)

**PLAINTIFF'S REPLY IN SUPPORT OF  
HER MOTION FOR A PRELIMINARY  
INJUNCTION**

Date: December 8, 1997  
Time: 10:00 a.m.  
Courtroom: 690

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I.

**INTRODUCTION**

Why does Plaintiff Barbara Chase-Riboud ask this Court to enjoin the motion picture Amistad which is sure to be both a critical and box office success? She wants an acknowledgement – credit – for her artistic contributions to this compelling adaptation of the Amistad affair.

If Chase-Riboud is denied her requested relief, she will be irreparably harmed. Although she can proceed with her claim for money damages, Amistad will open and run through theaters across the country and abroad without affording her due recognition. Recognizing this uncompensable harm, governing copyright laws expressly provide that the requested injunction should issue upon Chase-Riboud’s showing of a reasonable probability that she will succeed on the merits of her claim. Indeed such relief is “common” in copyright cases.

Chase-Riboud agrees that the Amistad story is an important piece of our country’s history and as such deserves public attention. Both Chase-Riboud and the law part company with DreamWorks, however, in concluding that the social significance of this story means that Chase-Riboud’s rights in Echo of Lions are somehow lessened. Rather, as the United States Supreme Court stated in Harper & Row Publishers, Inc. v. Nation Enterprises:

[i]t is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike. “[T]o propose that fair use be imposed whenever the ‘social value [of dissemination] . . . outweighs any detriment to the artist,’ would be to propose depriving copyright owners of their rights in the property precisely when they encounter those users who could afford to pay for it. “[Citation] And as one commentator has noted: “If every volume that was in the public interest could be pirated away by a competing publisher . . . the public [soon] would have nothing worth reading.”

1 471 U.S. 471, 559 (1985). While DreamWorks is correct that this Court must take account of public  
2 interest when it evaluates whether a preliminary injunction is appropriate, courts have uniformly held  
3 that the public interest favors the author whose rights have been infringed.

4 DreamWorks' Opposition is curious in many respects. First, DreamWorks must be  
5 commended for both unearthing and creatively describing its case law. For example, DreamWorks  
6 boldly cites the Supreme Court's opinion in Harper & Row, Inc. v. Nation Enterprises as standing  
7 for the proposition that "[m]aterial dealing with historical events or characters" is "not protectable  
8 under the copyright laws." (Opp'n at 8.) The Nation Court, however, expressly found that the rights  
9 afforded by a copyright in a non-fiction work extended to "subjective descriptions and portraits of  
10 public figures whose power lies in the author's individualized expression." 471 U.S. at 563. This  
11 misrepresentation to the Court is not isolated. Rather DreamWorks' Opposition is replete with  
12 explications of "authorities" that are simply inconsistent with the law governing this case.

13 Second and more importantly, DreamWorks' attack rests upon a basic misunderstanding of  
14 both Chase-Riboud's claim and rudimentary copyright law. Obviously, there are an outstanding  
15 number of factual similarities between Echo of Lions and Amistad as well as between Echo of Lions  
16 and Black Mutiny,<sup>1</sup> the book to which DreamWorks addresses much of its papers. A copyright,  
17 however, does not protect historical facts, and for this reason Chase-Riboud makes no claim to any  
18 protectable interests in such facts. Rather, Chase-Riboud's claim rests wholly on her unique,  
19 creative expression of the historical record, which is mirrored in Amistad and goes unaddressed in  
20 DreamWorks' Opposition.

21 DreamWorks' confusion is best illustrated by accepting DreamWorks' challenge – read and  
22 compare Black Mutiny with Echo of Lions and Amistad. (Opp'n at 21-21.) Looking simply at the  
23 differing portrayals of Cinque, the leader of the African mutiny, the contrast in expression could not  
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<sup>1</sup> For the convenience of the Court, a copy of the recently republished Black Mutiny is attached to the  
accompanying Supplemental Declaration of John Shaeffer ("Shaeffer Supp. Decl.") as Exhibit  
**[make last Exhibit]\_\_**.

1 be more striking. The Cinque of Black Mutiny is an ignorant savage,<sup>2</sup> who does tricks for coins so  
2 he can get drunk,<sup>3</sup> throws himself at the feet of Tappan and refers to him as “white man massa,<sup>4</sup>  
3 professes his Christianity,<sup>5</sup> and returned to his savage ways in Africa.<sup>6</sup> Black Mutiny’s unsavory  
4 expression of Cinque is hardly Chase-Riboud’s expression of the same historical figure as found in  
5 Echo of Lions and Amistad.

6 This fundamental misunderstanding in the distinction between facts and protectable  
7 expression infects the declarations of both Clifton Johnson and Howard Subur, DreamWorks’  
8 purported experts. These experts’ opinions rest on the assumption that historical facts dispense with  
9 Chase-Riboud’s claim of right to her expression of such facts. Dr. Johnson claims, without citing  
10 any historical record, that “[t]he Cinque depicted in the film corresponds quite faithfully to the  
11 actual, historical character.” (Johnson Decl. at ¶ 13.) Looking solely at the disparate treatment of  
12 Cinque in Echo of Lions and Amistad on the one hand and Black Mutiny on the other completely  
13 undermines the relevance of Dr. Johnson’s opinion on the issue of whether DreamWorks has copied  
14 Chase-Riboud’s protectable expression of the historical Cinque.

15 DreamWorks’ creative view of the facts and law carries over to many of the identities noted  
16 by Chase-Riboud. For example, DreamWorks’ claim that its Joadson character is both scene a faire  
17 – an indispensable element to the telling of the Amistad affair — and historically based is an  
18 oxymoron. While admitting that no character in history participated in the Amistad story in a  
19 manner similar to Joadson, DreamWorks contends that this piece of history cannot be told without  
20 such a character. In making this circular argument, DreamWorks ignores the numerous  
21 contemporary tellings of the Amistad story that do not incorporate such a character. More  
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23 <sup>2</sup> Black Mutiny at 192, 253 (“These men, Adams thought, accused of piracy and murder were like  
24 children”) and at 281, 306 (in referring to Cinque — “how could one expect more from a child of the  
25 jungle”).

26 <sup>3</sup> Black Mutiny at 191.

27 <sup>4</sup> Black Mutiny at 239.

28 <sup>5</sup> Black Mutiny at 292.

<sup>6</sup> Black Mutiny at 307 (“On his way back to Sherbro, Cinque got drunk on palm wine, blasphemed  
the missionaries and the white man’s God.”)

1 importantly, DreamWorks’ post-hoc speculative attempts to explain the similarities between Joadson  
2 and Echo of Lions’ Braithwaite, are mooted by the sworn statement of Amistad’s writer, David  
3 Franzoni. David Franzoni’s declaration is utterly silent on his motivation for creating Joadson,  
4 leaving only one possible conclusion — that his Joadson is the Braithwaite of Echo of Lions.

5 DreamWorks’ collective silence should also be noted. Other than the perfunctory statement  
6 that neither David Franzoni nor Stephen Spielberg ever read Echo of Lions – taken from their  
7 carefully crafted declarations — DreamWorks has no evidentiary response to Chase-Riboud’s  
8 evidence of access and actual copying. The law is clear, once “copying of constituent elements of  
9 the work that are original” is shown, the injunction should issue.

10 Finally, DreamWorks’ Opposition is notable for its unabashed effort at proving the adage  
11 that the best defense is a good offense. Even the most cursory reading of Black Mutiny belies the  
12 claim that Chase-Riboud is similarly guilty of copyright infringement. With the exception of a few  
13 similarities that cannot legitimately be called such, each of the 88 similarities DreamWorks notes  
14 between Echo of Lions and Black Mutiny are simply facts of history and do not even approach the  
15 realm of expression.<sup>7</sup> (Attached as Exhibit A to Shaeffer Supp. Decl. is a chart indicating the factual  
16 basis for DreamWork’s noted “similarities”).

17 Most troubling and telling is DreamWorks’ reckless charge that Chase-Riboud is a plagiarist  
18 for usage of the phrase “abominable conspiracy.” (Opp’n at 2.) The sentence DreamWorks quotes  
19 from Black Mutiny and alleges was lifted by Chase-Riboud is part of history. In the same Memoirs  
20 of John Quincy Adams cited by DreamWorks’ expert as support for a meeting between Adams and  
21 Cinque, the following sentence appears:

22 I read, especially, the article in the American and Foreign Anti-Slavery  
23 Reporter of 1st October 1840, entitled “the Amistad Case,” p. 48-51, with  
24 deep anguish of heart, and a painful search of means to defeat and expose  
25

26 \_\_\_\_\_  
27 <sup>7</sup> Applying the standard used by DreamWorks, Chase-Riboud could outline hundreds of similar  
28 “identities” between her book and Amistad, but such identities have nothing to do with copyright  
law. Moreover, the strained non-historical similarities cited do not stand up under even the simplest  
of scrutiny.

1                   the abominable conspiracy, Executive and Judicial, of this Government  
2                   against the lives of those wretched men.

3 Adams, Memoirs of John Quincy Adams, Vol. X, 373 (1976) (emphasis added) (copies of relevant  
4 pages from these memoirs are attached as Exhibit B to Shaeffer Supp. Decl.). One would have  
5 assumed that with the numerous experts consulted by DreamWorks for its Amistad project and the  
6 fact that DreamWorks' own historical expert references these same memoirs in his declaration, the  
7 company would have checked the veracity of its charge before defaming Chase-Riboud.<sup>8</sup>

8                   DreamWorks' laches claim is also fanciful. DreamWorks not only proceeded with its  
9 production knowing full well that Chase-Riboud would make a claim, DreamWorks invited her  
10 delay by continually promising to provide her with information and stating that it would respond to  
11 her demand. As DreamWorks notes, Chase-Riboud's claim is based on the motion picture and not  
12 the shooting script. As late as November 11, 1997, however, DreamWorks' counsel declared that  
13 there was not yet a final version of the movie and that changes were still being made. (11/11/97  
14 Declaration of Robert S. Chapman, Shaeffer Supp. Decl. Ex. C.)

15                   Shortly after Chase-Riboud contacted DreamWorks, Jeffrey Katzenberg contacted Chase-  
16 Riboud's counsel "holding out an olive branch" and asking that the parties work together towards a  
17 resolution. When DreamWorks' current counsel took over, they requested that they be given time to  
18 review the file and respond to the listing of similarities Chase-Riboud had provided to the company.  
19 Chase-Riboud continued to correspond with DreamWorks' counsel up to the time she moved for a  
20 preliminary injunction. DreamWorks repeatedly promised that changes were being made to the film  
21 that would address Chase-Riboud's concerns, that an explication of these changes would be provided  
22 to her, and that she would be given the opportunity to view the film once it was completed. While  
23 Chase-Riboud can be faulted for relying on DreamWorks' good faith, DreamWorks cannot now be  
24 permitted to claim prejudice for its own bad faith.

25                   When all of the parties' rhetoric is stripped away, the only issue before this Court is whether  
26 Chase-Riboud's expression of the facts surrounding the Amistad affair deserve copyright protection.  
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28 \_\_\_\_\_  
<sup>8</sup> See Johnson Decl. at ¶ 8.

1 The identity between Echo of Lions and Amistad is too stunning for there to be any dispute as to  
2 constituent copying. While DreamWorks may now advocate that all tellings of the Amistad story  
3 effectively be held in the public domain, it undoubtedly will switch sides and demand the broadest  
4 copyright protection for Spielberg’s creative genius, which is his telling of Amistad. As the holder  
5 of the copyright in Echo of Lions, Chase-Riboud has not only the right to profit from her labors  
6 financially, she has the right to public acknowledgment for her own creative contribution to  
7 Amistad. It is only in granting her request for a preliminary injunction that she can receive such  
8 rightfully earned acknowledgment.

## 9 II.

### 10 BACKGROUND

#### 11 A. UNTIL RECENTLY THE AMISTAD AFFAIR HAS NOT BEEN PART OF 12 OUR POPULAR HISTORY.

13 With the possible exception of DreamWorks’ film expert Howard Subur, it is agreed that the  
14 story of the Amistad affair has not been part of our contemporary history. (See Subur Decl. at ¶ 151  
15 (“The movie Amistad is . . . one of the most famous – and written about – cases in American  
16 jurisprudence.”)) Although the case represents the first and last victory by a person of African  
17 descent before the United States Supreme Court until Brown v. Board of Education over 100 years  
18 later, the case: (1) has never been cited by the United States Supreme Court for any proposition; (2)  
19 has only been cited in a few contemporary federal opinions; (3) and is not part is not part of our  
20 Constitutional Law or our Civil Rights Jurisprudence. (See Shaeffer Supp. Decl. [attaching  
21 Shepard’s citations for United States v. Amistad Schooner, 40 U.S. 518].) Its absence is best  
22 described by the last Federal Court to reference the case in its opinion. United States v. Buck, 690 F.  
23 Supp. 1291 (S.D.N.Y. 1988). Dispensing with the defendants’ analogy to the Amistad case, the  
24 Buck court stated that, in declaring the Africans free, “[t]he Court did not look beyond the domestic  
25 laws of Spain, which it considered dispositive.” Id. at 1302.

26 Similarly, despite the claims of both of DreamWorks’ experts there has, until recently, been  
27 little scholarly or dramatic interest in the story. Accepting the bibliography attached to Dr.  
28 Johnson’s declaration, in the 150 years since the Supreme Court’s opinion, less than a dozen books  
(excluding children’s books and recently published works) have been published on the Amistad

1 affair. Moreover, at least one scholar, after reviewing both the primary and secondary sources  
2 available concluded that there was insufficient information about this incident to write a dissertation.  
3 (Declaration of Nell Painter (“Painter Decl.”) at ¶ \_\_\_\_.)

4 The Amistad story can be briefly summarized as follows. In 1839, the captive Africans  
5 mutinied aboard the Spanish slave ship L’Amistad. When the ship was intercepted off the coast of  
6 Connecticut following the mutiny, litigation arose as to whether anyone held a property interest in  
7 the Africans. Pursuant to the laws of Spain, the Africans were slaves and therefore Spanish property,  
8 only if they were proven born into slavery. The lower court found that the Africans were born in  
9 Africa and ordered them free. Representing the Spanish Government, the United States took the  
10 case to the United States Supreme Court, where then former president John Quincy Adams  
11 represented the Africans. The Supreme Court ultimately affirmed the lower court’s decision. The  
12 Africans ultimately returned to Africa after enough money was raised on their behalf to pay for their  
13 transport.

14 While there exists scattered primary sources concerning the Amistad affair, these references  
15 focus primarily on the overriding legal and political issues of the time. (Painter Decl. at ¶ \_\_\_\_.) In  
16 particular, these sources focus on, from a nineteenth century perspective: (1) the status of the  
17 schooner; (2) reparations owed the schooner’s owners; (3) the legal status of the Africans; (4) the  
18 U.S. Constitution recognition of human slavery; and (5) the future of the institution of slavery in the  
19 United States. (Painter Decl. at ¶ \_\_\_\_.) These sources are virtually silent on the human relations that  
20 are now in the forefront in our post civil rights world. (Painter Decl. at ¶ \_\_\_\_.)

21 **B. ECHO OF LIONS AND DREAMWORKS’ ACCESS**

22 In about 1985, Chase-Riboud began her research into the Amistad affair for her third  
23 historical novel. (Declaration of Chase-Riboud filed with her Motion for Preliminary Injunction  
24 (“Chase-Riboud Decl.”) at ¶ 7.) Chase-Riboud chose this story because of its absence from our  
25 contemporary history. (*Id.* at ¶ 6.) She also wanted to tell the story from a contemporary  
26 perspective, with the African’s participating in their fate. (*Id.*) By telling the story with this point of  
27 view, she translated it from one about Spanish property law to America’s first civil rights trial. (*Id.*)  
28



1 Chase-Riboud read all of the primary and secondary sources available at that time about the  
2 incident. Her research uncovered the raw facts of the incident, but she discovered that these sources  
3 contained little if any explication of its participants, their motives and relationships. (Chase-Riboud  
4 Decl. at ¶¶ 17-22.)

5 In addition to taking these raw historical facts and sculpting a dramatic story with three  
6 dimensional rendering of the historical characters of the Amistad affair, Chase Riboud created  
7 fictional characters, including Braithwaite, an affluent, erudite African-American who works in the  
8 anti-slavery movement and is involved in the fate of the imprisoned Africans. (Chase-Riboud Decl.  
9 at ¶ 17.) Chase-Riboud created this character as a link to between the Africans and America as well  
10 as to link White and Black America.

11 Chase-Riboud's Amistad novel, Echo of Lions was published to critical acclaim in 1989, and  
12 has now sold in excess of 500,000 copies.

13 In February 1993, Chase-Riboud granted Punch Production, Inc. an option to, among other  
14 things the motion picture rights to Echo of Lions. (Chase-Riboud Decl. at ¶ 30, Exhibit L.) In the  
15 course of its development of its "Echo of Lions Project," Punch involved David Franzoni as its  
16 "writer" for the project. (Declaration of Benjamin Pettis accompanying Chase-Riboud's Motion for  
17 Preliminary Injunction ("Pettis Decl.") at Exhibit B; Declaration of David Franzoni accompanying  
18 DreamWorks Opposition ("Franzoni Decl.") at ¶ 4.) Punch provided Franzoni with a copy of Echo  
19 of Lions.

20 In March 1995, Punch elected to abandon its option to Echo of Lions. By no later than June  
21 of the same year, Franzoni was with DreamWorks working on its Amistad project. (Chase-Riboud  
22 Decl. at Exhibit V.) Franzoni was hired by DreamWorks due to his "knowledge" of the Amistad.  
23 **New Yorker Article** Shaeffer Supp. Decl. at Ex. D.)

24 **C. DREAMWORKS PROCEEDED WITH AMISTAD KNOWING OF CHASE-**  
25 **RIBOUD'S CLAIMS AND INVITED HER DELAY IN FILING SUIT.**

26 On or about November 22, 1996, Chase-Riboud learned of DreamWorks' intent to produce a  
27 motion picture based on the Amistad affair. (Chase-Riboud Decl. at ¶ 31.) Due to her prior contacts  
28 with Spielberg's company concerning her novel Echo of Lions, she immediately contacted

1 DreamWorks to inquire about whether her book had inadvertently been used as a source for its  
2 movie.

3 Ultimately, Chase-Riboud retained counsel to represent her in negotiations with  
4 DreamWorks. On February \_\_, 1996, Chase-Riboud’s counsel received a telephone call from  
5 Jeffrey Katzenburg concerning the Amistad matter. (Declaration of Pierce O’Donnell (“O’Donnell  
6 Decl.”) at ¶ \_\_.) Katzenburg stated that he was “holding out an olive branch” and wanted to work  
7 informally to resolve this matter. Thereafter, DreamWorks provided Chase-Riboud with a shooting  
8 script for Amistad.

9 A review of shooting script indicated a number of striking identities between Echo of Lions  
10 and Amistad that were not part of history. Chase-Riboud met with DreamWorks to review these  
11 similarities and ultimately she provided the company with a written explication of these similarities.  
12 (CITE)

### 13 III.

#### 14 DISCUSSION

##### 15 A. A PRELIMINARY INJUNCTION IS NOT AN EXTRAORDINARY REMEDY 16 IN A COPYRIGHT CASE, AND IS AN APPROPRIATE REMEDY IN THIS 17 CASE.

18 DreamWorks is simply wrong in claiming that a preliminary injunction would be an  
19 extraordinary remedy in a copyright case like this one. 4 Nimmer, Nimmer on Copyright, §  
20 14.06[A] at 14-112 (1997) (in copyright cases preliminary injunctions are “actually quite ordinary,  
21 even commonplace”); Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d  
22 1184, 1187 (5th Cir. 1979) (“Preliminary injunctions are a common judicial response to the  
23 imminent infringement of an apparently valid copyright.”).

24 The parties agree on the standard to be applied in this case. The preliminary injunction shall  
25 issue if Chase-Riboud demonstrates “either a reasonable likelihood of success on the merits and  
26 irreparable injury[] or that serious questions going to the merits were raised and the balance of  
27 hardships tips in plaintiff’s favor.” Cadence Design Systems, Inc. v. Avant! Corp., 125 F.3d 824,  
28 1997 WL 583702 \*2 (9th Cir. 1997).

1 A “reasonable probability of success” is not coextensive with proof as a matter of law, as  
2 would be required for a finding of summary judgment. Rather, “[t]he standard for deciding a motion  
3 for a preliminary injunction is patently different . . . from the standard applied in deciding a motion  
4 for summary judgment. . . . Preliminary injunction decisions rule on only the probability of success  
5 of the merits rather than the merits themselves.” Brokers’ Assistant, Inc. v. Williams Real Estate  
6 Co., Inc., 646 F. Supp. 1110 (S.D.N.Y. 1986) (citation omitted). Even if it is uncertain whether a  
7 plaintiff will prevail at the trial on the merits, the plaintiff need not prove her case with absolute  
8 certainty prior to the trial in order to succeed on her motion for a preliminary injunction. “[I]t will  
9 ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial,  
10 difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate  
11 investigation.” Id. at 1197 (citations omitted).

12 Upon a mere showing of a reasonable probability of success on the merits, Chase-Riboud is  
13 entitled to a presumption of irreparable harm.” Cadence, 125 F.3d 824, 1997 WL 583702 at \*3.  
14 “Irreparable harm is presumed because the copyright owner’s right to exploit [her] work is unique.”  
15 Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., Inc., 900 F. Supp. 1287, 1301 (C.D.Cal.  
16 1995).

17 Despite DreamWorks’ claim to the contrary, in this Circuit, the availability of money  
18 damages does not rebut this presumption.<sup>9</sup> Cadence, 125 F.3d 824, 1997 WL 583702 at \*3 (“the  
19 alleged availability of money damages is not a reason to deny injunctive relief”). Moreover,  
20 DreamWorks’ recitation of its investment in Amistad or the harm that would befall it if the  
21 injunction would enter is irrelevant to rebutting this presumption. Id. at \*5; Practice Management

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23 <sup>9</sup> A copyright holder

24 owns the exclusive rights (1) to reproduce the copyrighted work; (2) to  
25 prepare derivative works based on the copyrighted work; (3) to distribute  
26 copies . . . of the copyrighted work to the public; (4) to perform the  
27 copyrighted work publicly; and (5) to display the copyrighted work  
publicly.

28 Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1397 (9th Cir. 1997)  
(affirming preliminary injunction of book). Many of these accepted rights are not easily  
compensable and would be vitiated if an artist could not preliminarily enjoin an infringing work.

1 Information Corp. v. American Medical Ass’n, 877 F. Supp. 1394, 1396 (C.D.Cal. 1994)  
2 (preliminary injunction granted despite defendant’s plea that it would suffer extreme and irreparable  
3 harm and plaintiff has suffered none). As the Ninth Circuit recently held in Cadence, “[i]n this  
4 circuit, as well as in other circuits, a defendant who knowingly infringes another copyright ‘cannot  
5 complain of the harm that will befall it when properly forced to desist from its infringement.’” Id.  
6 (quoting Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1338 (9th Cir. 1995)).<sup>10</sup>

7 While DreamWorks correctly argues that this Court must “give[] substantial weight” to the  
8 public interest in deciding whether or not to grant an injunction, its conclusion that the public  
9 interest would be served by not enjoining Amistad is simply wrong.<sup>11</sup> “It is virtually axiomatic that  
10 the public interest can only be served by upholding copyright protections and, correspondingly,  
11 preventing misappropriation of the skills, creative energies, and resources which are invested in the  
12 protected work.” 4 Nimmer, Nimmer on Copyright, § 14.06 at 14-112 (citing Apple Computer, Inc.  
13 v. Franklin Computer Corp., 714 F.2d 1240, 1255 (3rd Cir. 1983); see also, Atari, Inc. v. North  
14 American etc. Corp., 672 F.2d 607, 620 (“a preliminary injunction is necessary to preserve the  
15 integrity of copyright laws” [cited by plaintiffs]).

16 Finally, DreamWorks contends that the preliminary injunction should not be granted because  
17 such a ruling would effectively end the case. (Opp’n at 6.) The Ninth Circuit, however, expressly  
18 rejects such an argument. Cadence, 125 F. 3d 824, 1997 WL 583702 at \*5 (overruling lower court  
19 denial of preliminary injunction due to potential that such relief would “seriously jeopardize”  
20 defendant’s “ability to survive as a relatively new company”).

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23 <sup>10</sup> At best, the issue of the potential harm to DreamWorks is relevant to the size of the bond ordered  
24 in granting the injunction. American Honda Motor Co., 900 F. Supp. at 1301 (“[T]he amount of  
25 Defendants’ alleged loss, while relevant to determining the size of the bond Plaintiffs must post,  
26 does not change the Court’s conclusion that the injunction should issue based on its finding that  
Plaintiffs are likely to prevail on their copyright claim.”).

27 <sup>11</sup> DreamWorks also claims that this Court must also give substantial interest to the interest of third  
28 parties. DreamWorks, however, cites no copyright authority supporting this proposition, nor does it  
demonstrate that any third parties would be irreparably injured – presumably any theater would have  
a claim against DreamWorks who already admits its ability to pay money damages.

1 In sum, the Court must only consider whether Chase-Riboud has demonstrated a reasonable  
2 likelihood of success on the merits. Once shown, the injunction should issue. American Honda  
3 Motor Co., Inc., 990 F. Supp. at 1301 (“It is well settled in this circuit that once a copyright holder  
4 has shown a likelihood of success on the merits based on access and substantial similarity,  
5 irreparable injury is presumed, warranting a preliminary injunction.”); Practice Management  
6 Information Corp. v. American Medical Ass’n, 877 F. Supp. 1394, 1396 (C.D.Cal. 1994) (same).

7 **B. THE INJUNCTION SHOULD ISSUE BECAUSE CHASE-RIBOUD HAS**  
8 **SHOWN A REASONABLE PROBABILITY THAT SHE HAS**  
9 **PROTECTABLE INTERESTS IN ECHO OF LIONS AND DREAMWORKS**  
10 **HAS COPIED PROTECTED ELEMENTS OF HER WORK.**

11 Intentionally or otherwise, DreamWorks fundamentally misrepresents the controlling  
12 standard governing claims for copyright infringement in this Circuit. According to DreamWorks’  
13 view of the world, Chase-Riboud has no protectable right in Echo of Lions, because “[m]aterial  
14 dealing with historical events or characters . . . is simply not protectable under the copyright law.”  
15 (Opp’n at 8.) DreamWorks further contends that even if Chase-Riboud has a protectable right in  
16 Echo of Lions, “[l]iability for plagiarism requires both copying and ‘substantial similarity.’” While  
17 DreamWorks does not challenge Chase-Riboud’s evidence and proof of access and actual copying  
18 (other than with the conclusory declarations of Spielberg and Franzoni) DreamWorks argues that  
19 Chase-Riboud’s claim must fail because she has failed to demonstrate that DreamWorks has copied  
20 “a substantial portion of the copyrighted work.” (Opp’n at 11.)

21 As articulated by the United States Supreme Court and expressly adopted by this Circuit, “to  
22 establish infringement, only two elements must be proven (1) “ownership of a valid copyright, and  
23 (2) copying of constituent elements of the work that are original.” Feist Publications, Inc. v. Rural  
24 Tel. Serv. Co., 499 U.S. 340, 362 (1991); Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.,  
25 924 F. Supp. 1559, 1562 (S.D.Cal. 1996), aff’d 109 F.3d 1394 (1997) (quoting same

26 **1. Not Only Does DreamWorks Fail to Respond to Chase-Riboud’s Proof of**  
27 **Actual Copying, Its Papers Actually Further Such Proof.**

28 “Copying is a question of fact that calls for any evidence that would [enable] the trier of fact  
to conclude that discovered similarities in protected expression arose not from independent creation  
but from copying.” Dr. Seuss, 924 F. Supp. at 1564. Where proof of actual copying of protected

1 elements of a plaintiff’s work is demonstrated, “that is the end of the case.” M. Kramer Mfg. Co.,  
2 Inc. v. Andrews, 783 F.2d 421, 445 (4th Cir. 1986). DreamWorks offers no substantive response to  
3 Chase-Riboud’s proof of actual copying (Memo. at 21-26), other than to deny such action and to  
4 claim that the issue “need not be decided here.” (Opp’n at 7.)

5 In fact, the evidence of actual copying is now actually stronger. In his telling declaration,  
6 Amistad’s writer, David Franzoni admits receiving from Dustin Hoffman’s production company,  
7 defendant Punch Productions, Inc., a copy of Echo of Lions. (Franzoni Decl. at ¶ 4.) Franzoni  
8 claims, however, not to have read the book because of his “practice” “not to read works of fiction  
9 [when working on a historical project] but instead to go to history books and prime source  
10 materials.” (Id. at ¶ 3.) Courts facing similar facts have freely rejected such self-serving statements  
11 in the face of strong proof of copying. Bradbury v. Columbia Broadcasting Systems, Inc., 287 F.2d  
12 478, 481-482 (9th Cir. 1961) (rejecting as incredible self serving statement that received but never  
13 read book).

14 What is significant about Franzoni’s testimony, however, is that he never read Black Mutiny.  
15 While DreamWorks admits substantial similarities between Echo of Lions, Amistad and Black  
16 Mutiny,<sup>12</sup> relying on its license to Black Mutiny as its defense, the author of its picture never read the  
17 book. Because Black Mutiny was not relied upon by Amistad’s author, it cannot be the source for  
18 such similarities. Accordingly, there are serious questions as to the credibility of Franzoni’s claim  
19 that he never read Echo of Lions and the Court could reasonably conclude that the similarities  
20 between the movie and Chase-Riboud’s novel are the result of copying. Moreover, this conclusion is  
21 furthered by the admission of Franzoni’s counsel to the New Yorker magazine that “her client –  
22 whose only other major credit is the HBO movie “Citizen Cohn” was hired precisely because of his  
23 Amistad experience.” (**New Yorker Article** Shaeffer Supp. Decl. Ex. .)

24 Franzoni fails to offer a single comment about any of the similarities noted by Chase-Riboud  
25 between Echo of Lions and his screenplay. While DreamWorks’ experts have concocted a slew of  
26 rationalizations for the similarities noted by Chase-Riboud, Franzoni fails to adopt even one of them.

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28 <sup>12</sup> Opp’n at 15 (similarities between the book and the film “also grow out of both parties having used material from ‘Black Mutiny’”) [**cites to brief and Subur**]

1 For example, despite Johnson’s claim that Joadson is a composite of historical figures and Subur’s  
2 suggestion that Joadson is scene a faire, Franzoni fails to provide a single insight as to why this  
3 Court should not find that Joadson was copied from Echo of Lions. Additionally, while Johnson  
4 claims that Amistad “faithfully presents [Cinque] as he existed in history,” Franzoni fails to even  
5 agree with Johnson’s unsupported supposition. Moreover, while both Johnson and Subur justify the  
6 meeting between Cinque and Adams by citing Black Mutiny and numerous unreferenced historical  
7 sources, in light of Franzoni’s admission that he never read this book, this Court is left with nothing  
8 to rebut Chase-Riboud’s evidence that Franzoni simply copied this scene from Echo of Lions.

9 With the additional proof of actual copying unwittingly proffered by DreamWorks, Chase-  
10 Riboud’s proof of actual copying is now even stronger. If, as will be again demonstrated below, this  
11 Court finds that Chase-Riboud has protectable interests in Echo of Lions, then a preliminary  
12 injunction should issue because Chase-Riboud has demonstrated a reasonable probability that  
13 DreamWorks actually copied Echo of Lions. See Bradbury v. Columbia Broadcasting Systems, Inc.,  
14 287 F.2d at 481-482 (where strong evidence of copying is shown defendant must counter with  
15 similarly strong evidence, and mere denials of copying are insufficient).

16 **2. Abundant Circumstantial Evidence Demonstrates Amistad Copied From**  
17 **Echo of Lions.**

18 Because proof of actual copying, like that found here, is rare, courts generally look to  
19 circumstantial evidence. Data East USA, Inc. v. Epyx, Inc., 862 F.2d 204, 206 (9th Cir. 1988)  
20 (“there is seldom any direct evidence of copying in these matters”). In such cases, courts typically  
21 look to evidence of access and substantial similarity to distinguish between copying and independent  
22 creation. Dr. Seuss, 924 F. Supp. at 1564. “[T]elling dissimilarities that betray the plagiarist’s  
23 attempt to hide his tracts” are also relevant. Id.; Concord Fabrics, Inc. v. Marcus Bros. Textile  
24 Corp., 409 F.2d 1315, 1316 (2d Cir. 1969) (“We feel that the very nature of these differences only  
25 tends to emphasize the extent to which the defendant had deliberately copied the plaintiff.”)

26 Before continuing to explain this Circuit’s standards for evaluating evidence of access and  
27 substantial similarity, one “dissimilarity” bears note. Early in her discussions with DreamWorks,  
28 Chase-Riboud reported the similarities between her character Braithwaite and DreamWorks’  
Joadson. Both characters are erudite Blacks printers who were active in the fate of the Africans.

1 (Chase-Riboud Decl. at Exhibit B to Declaration of Cinque Henderson at 98 (continuity script reads  
2 “note Adams means major, respectable newspapers, as opposed to the type of abolitionist newspaper  
3 Joadson publishes”). While DreamWorks’ initial response was to claim that Joadson was simply  
4 scene a faire and later based on Fredrick Douglas, DreamWorks now claims that its character is both  
5 an amalgamation of a number of abolitionists as well as scene a faire. (Shaeffer Supp. Decl. at ¶ 2;  
6 declaration of Debbie Allen filed in support of DreamWorks Opposition (“Allen Decl.” at ¶ 7.) To  
7 support this new rationalization, DreamWorks has made a telling change to Amistad from its  
8 shooting script. DreamWorks has added an off-screen voice which introduces Joadson as “Theodore  
9 Joadson of the Antislavery Society . . . . and owner of the Forten Shipping Service.”<sup>13</sup> This late  
10 addition to Amistad is an unabashed and ultimately failing effort to link Joadson to “James Fortsen  
11 [sic], a famous black abolitionist at the time, who was a source of funding for . . . the white  
12 abolitionist paper, the “Liberator,” a historical figure not mentioned by Johnson, DreamWorks expert  
13 on the Amistad affair. (Allen Decl. at ¶ 7; see Declaration of Gary Nash, Ph.D. at \_\_\_\_.) This change  
14 is analogous to flight from the scene of a crime, and is a fingerprint of DreamWorks’ illicit copying  
15 of Echo of Lions.

16 In the face of overwhelming evidence of access, DreamWorks concedes the point, but tells  
17 the Court that such dramatic access is irrelevant to the proof substantial similarity. (Opp’n at 36-37.)  
18 Again DreamWorks misrepresents the law. In Smith v. Jackson, the Ninth Circuit reaffirmed that in  
19 this Circuit “we require a lower standard of proof on substantial similarity when a high degree of  
20 access is shown.” 84 F.3d 1213, 1218 (9th Cir. 1996); see Shaw v. Lindheim, 919 F.2d 1353, 1361  
21 (9th Cir. 1990). The reason for this rule is obvious. Since the trier of fact is being called upon to  
22 determine whether the identity in protectable elements found in two works is the product of  
23 independent creation or copying, the greater the evidence of access the lower the threshold must be  
24 on the issue of substantial similarity.

25  
26  
27 <sup>13</sup> Compare Exhibit 107 p. 192 to the declaration of John Shaeffer (“Shaeffer Decl.”) filed in support  
28 of Chase-Riboud’s with Exhibit B p. 98 to the declaration of Cinque Henderson filed in support of  
DreamWorks’ Opposition (“Henderson Decl.”) (emphasis added).



1 DreamWorks spends the bulk of its brief arguing that Chase-Riboud has failed to show a  
2 sufficient degree of substantial similarity with protectable elements of Echo of Lions to justify a  
3 finding that she has a reasonable probability of success on the merits. DreamWorks' arguments are  
4 founded not only on a fundamental misunderstanding of copyright law, but on a misunderstanding of  
5 Chase-Riboud's claim. According to DreamWorks, "in order to prove infringement there must have  
6 been copying of a substantial portion of the copyrighted work." (Opp'n at 11, quoting Kustoff v.  
7 Chaplin, 120 F.2d 551, 560 (9th Cir. 1941).) While this may have been the law in this Circuit in  
8 1941, it currently is not applicable.

9 Twenty years after deciding Kustoff, the Ninth Circuit clarified that "substantial" refers to the  
10 degree of identity between the noted similarities and not the amount of similarities between the two  
11 works. Bradbury v. Columbia Broadcasting System, Inc., 287 F.2d at 485.

12 To constitute an invasion of copyright it is not necessary that the whole of  
13 a work be copied nor even a large portion of it in form or substance, but  
14 that, if so much is taken that the value of the original is sensibly  
15 diminished or the labors of the original author are substantially, to an  
16 injurious extent, appropriated by another, that is sufficient to constitute an  
17 infringement.

18 Id. Similarly, the United State Supreme Court in Harper & Row Publishers, Inc., noted that  
19 a taking many not be excused merely because it is insubstantial with  
20 respect to the infringing work. As Judge Learned Hand cogently  
21 remarked, "no plagiarist can excuse the wrong by showing how much of  
22 the work he did not pirate."

23 471 U.S. at 565 (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 19\_\_)  
24 cert. denied, 298 U.S. 669 (1936). The Ninth Circuit recently reaffirmed that substantiality does not  
25 equate to the amount of infringement. Shaw v. Lindheim, 919 F.2d 1353, 1363 (9th Cir. 1990)  
26 ("Even if a copied portion be relatively small in proportion to the entire work, if qualitatively  
27 important, the finder of fact may properly find substantial similarity." (quoting Baxter, 812 F.2d at  
28 425 [get full cite])

1 Applying the appropriate standard of “substantial” to DreamWorks’ arguments immediately renders  
2 specious its repeated focus on elements of Echo of Lions not adopted by Amistad as a defense to this  
3 claim – e.g., the love story between Covey and Braithwaite’s daughter, and the development of  
4 Braithwaite profession and family in Echo of Lions. (Opp’n at 21; Subur Decl. ¶¶ 49, 125.) [**cite**  
5 **case that infringer cannot point to what he did not take as a defense**] Likewise, the fact that  
6 there are elements to DreamWorks telling of the Amistad story that are not part of Echo of Lions –  
7 e.g., Joadson’s meetings with Adams – is irrelevant to absolve DreamWorks for those elements of  
8 the book it in fact copied. See v. Durango, 711 F.2d 141, 143 (9th Cir. 1983) (“where substantial  
9 similarity in protected expression does exist, it is not excused by the presence of additional,  
10 dissimilar”).

11 While DreamWorks’ Opposition correctly notes that this Court’s analysis of substantial  
12 similarity applies only to the “protectable elements” of Echo of Lions, the company again confuses  
13 the applicable rule. In Apple Computer v. Microsoft Corporation, 35 F.3d 1435, the Ninth Circuit  
14 explained in detail the modern application of what has traditionally been referred to as the intrinsic-  
15 extrinsic test for substantial similarity. Id. at 1442. “As it has evolved . . . the extrinsic test now  
16 objectively considers whether there are substantial similarities in both ideas and expressions,  
17 whereas the intrinsic test continues to measure expression subjectively.” Id.

18 The Ninth Circuit further articulated a three-part process for determining actionable  
19 substantial similarity. First, the plaintiff must identify “the alleged similarity between [her] work and  
20 the defendant[s]’ work. Id. at 1443. Second the “court must determine whether any of the alleged  
21 similar features are protected by copyright.” Id. In this regard, the court must separate “unprotected  
22 ideas” from “potentially protectable expression; to that expression, the court must then apply the  
23 relevant limiting doctrines – e.g., scene a fair and originality – through the eyes of the ordinary  
24 consumer.” Finally,

25 [h]aving dissected the alleged similarities and considered the range of  
26 possible expression, the court must define the scope of the plaintiff’s  
27 copyright – that is, decide whether the work is entitled to “broad” or “thin”  
28 protection. Depending on the degree of protection, the court must set the

1 appropriate standard for a subjective comparison of the works to determine  
2 whether, as a whole, they are sufficiently similar to support a finding of  
3 illicit copying.

4 Id.

5 a. **Chase-Riboud’s Expressions of Amistad Affair that Appear in Amistad  
6 are Entitled to Broad Protections Under Governing Copyright Law.**

7 In the present case, the alleged similarities are well defined, the parties, however, strongly  
8 disagree as to whether “the alleged [similar] features are protected by copyright.” [Cite to  
9 **Opposition Brief**] In particular, on the issue of the protection afforded novelizations of historical  
10 events there is absolutely no meeting of the minds between DreamWorks on the one hand and  
11 Chase-Riboud and the law on the other.

12 DreamWorks in no uncertain terms contends that “[m]aterial dealing with historical events or  
13 characters . . . is simply not protectable under the copyright laws. (Opp’n at 8.) DreamWorks is  
14 simply wrong. In Dr. Seuss, the Ninth Circuit reaffirmed that similarity in the expression of a  
15 character can form the basis for an infringement suit. Dr. Seuss, 109 F.3d at 1399 (infringement  
16 found on similarities in representation of cat). Similarly, courts within this Circuit have recognized  
17 protections for characters standing alone. See American Honda, 900 F. Supp. at 1297 (recognizing  
18 protection for the character James Bond outside a James Bond Movie); Anderson v. Stallone, 11  
19 U.S.P.Q.2d 1161 (recognizing copyright protection for the Rocky character). The cases cited by  
20 DreamWorks to distinguish this point only stand for the proposition that no protection is afforded to  
21 “stock” characters. See Franklin v. Cirolì, 865 F. Supp. 947, 949 (D.Mass. 1994). Since  
22 DreamWorks does not contend that Joadson or Cinque are stock characters (and they are not), the  
23 cases DreamWorks cites are irrelevant.

24 Moreover, the United States Supreme Court case to which DreamWorks cites to support the  
25 erroneous assertion that neither character nor history is protected under copyright law expressly  
26 stands for the opposite proposition. In Harper & Row Publishers, Inc., the Court expressly  
27 recognized that copyright protection extends to “subjective descriptions and portraits of public  
28 figures whose power lies in the author’s original expression.” 471 U.S. at 564 (while President Ford  
could not prevent others from copying bare historical facts of his biography he could prevent the

1 copying of his “subjective descriptions”). The cases DreamWorks cites concerning the protections  
2 afforded works of history predate Harper & Row.<sup>14</sup>

3 Similarly, while DreamWorks is correct that historical fact, like any other facts, are entitled  
4 to no copyright protection, the Supreme Court, in no uncertain terms, has held that the expression of  
5 facts, including historical facts are entitled to copyright protection. Feist, 499 U.S. at 348 (“even a  
6 directory that contains absolutely no protectable written expression, only facts, meets the  
7 constitutional minimum for copyright protection if it features an original selection in arrangement.”).  
8 One need look no further than DreamWorks’ absurd comparison chart between Black Mutiny and  
9 Echo of Lions to see that DreamWorks simply does not understand the difference between facts and  
10 the expression of facts. (See Shaeffer Supp. Decl. at ¶ \_\_.) Despite claiming to have consulted with  
11 some of the most noted scholars on the Amistad affair, DreamWorks brazenly proffers that Chase-  
12 Riboud is the plagiarist in this case due to the following types of similarities between Echo of Lions  
13 and Black Mutiny:

- 14 • The *Tecora* (the slave ship which brought Cinque from Africa) lands in Cuba;
- 15 • Captives taken to the Misericordia corral in Havana;
- 16 • The Spaniard Ruiz buys 49 Africans to be slaves;
- 17 • Ruiz, Montez (another Spaniard) and Antonio (to Cuban slave) survive the mutiny
- 18 • John Quincy Adams decides to take the Africans’ case;
- 19 • Chief Judge Story finds in favor of the Africans; they are released; and
- 20 • Cinque and others sail home on the *Gentleman*.

21 Each of the above, as with each of the other “similarities” noted by DreamWorks, are simply  
22 similarities of fact rather than similarities of the expression of facts. (Shaeffer Supp. Decl. ¶ \_\_.)

23 DreamWorks’ misunderstanding of this critical distinction carries throughout its response to  
24 the similarities noted by Chase-Riboud, including the following:

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26 <sup>14</sup> DreamWorks does cite Narell v. Freeman, 872 F.2d 907 (9th Cir. 1989) as endorsing the reasoning  
27 of the holding of Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980). While  
28 Narell, did involve a factual work, the Ninth Circuit, affirming the lower court’s grant of summary  
judgment for the defendant, found that the defendant’s copying largely amounted to nothing more  
than common phrases not deserving of copyright protection. Narell, 872 F.2d at 911.

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- DreamWorks responds to the similarity in the expression of the meeting between Cinque and John Quincy Adams, by citing to both the meeting described in Black Mutiny as well as to the alleged reference to a meeting found somewhere in John Quincy Adams’ Memoirs’ (Johnson Decl. at ¶ 8) or in his autobiography (Subur Decl. at ¶ 79) or in “other authoritative [unnamed] works;”
  - While acknowledging that neither Joadson nor Braithwaite exist in history, DreamWorks claims this similarity is excused because “there were literally hundreds of black abolitionists in New England at the time.” (Johnson Decl. at ¶ 11.)
  - DreamWorks dismisses Chase-Riboud’s claim of similarity with respect to expression of Cinque, citing that “Cinque was an actual historical character, described in a number of historical works.” (Opp’n at 23.)
  - DreamWorks similarly responds to Chase-Riboud’s claim concerning her expression of Covey by simply citing that because “Covey is another actual historical figure” and he is “depicted in ‘Black Mutiny’ it is obvious plaintiff did not invent” him. (Opp’n at 27.)

15 Chase-Riboud agrees with DreamWorks that certain types of factual recitations are entitled to  
16 only the most minimal of protections and that infringement can be found only if the works are  
17 virtually identical. (Opp’n at 12.) DreamWorks, however, errs in its attempt to attribute this “thin”  
18 protection to all expressions founded in fact. Rather, the governing principle focuses on the range of  
19 possible expressions of particular facts. The broader the range of expression, the broader the  
20 protection to be afforded the expression. Harper & Row, 471 U.S. at 562; Apple Computers, Inc., 35  
21 F.3d at 1443-1444 (the breadth of copyright protection is dependent on the range of possible  
22 expression); Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 489 (9th Cir. 1984)  
23 (limited number of ways to express strategies for playing scrabble limited the breadth of copyright  
24 protection). This variability in the ability to express historical facts, and thus, the scope of protection  
25 to be afforded the protectable expression, was discussed by the Harper & Row Court:

26 “[E]ven within the field of fact works, there are gradation as to the relative  
27 proportion of fact and fancy. One may move from sparsely embellished  
28 maps and dictionaries to elegantly written biography. The extent to which

1 one must permit expressive language to be copied in order to assure  
2 dissemination of the underlying facts, will thus vary from case to case.”  
3 471 U.S. at 562 (quoting Gorman, Fact or Fancy? The Implications for Copyright, 29 J. Copyright  
4 Soc. 560, 563 (1982)).

5 As the court in Burgess v. Chase-Riboud noted with respect to the novel Sally Hemings, the  
6 expression found in Chase-Riboud’s historical fiction is entitled to broad copyright protection, on par  
7 with that of works of fiction. 765 F. Supp. 233, 243 (E.D.Pa. 1991). The same breadth of protection  
8 is due Echo of Lions.<sup>15</sup> A number of fictional works now have been written about the Amistad  
9 affair, and each portrays the story significantly differently, conclusively demonstrating the range of  
10 expression the sparse historical record will permit.<sup>16</sup> Black Mutiny portrays the Africans as  
11 primitives who convert to Christianity but ultimately return to their primitive ways up on their return  
12 to Africa. The Opera, Amistad, emphasizes the media circus created by the Amistad Africans and,  
13 includes an African Trickster God who helps the captives regain their freedom. (Declaration of  
14 Thulani Davis (“Davis Decl.”) ¶ \_\_\_\_.) Pesci’s novel Amistad tells the story of the Amistad without a  
15 Black abolitionist or a meeting between Cinque and John Quincy Adams. The screenplay Great  
16 Heart tells the Amistad story from John Quincy Adams’ perspective and emphasizes his choice  
17 between what he believes to be morally correct and the well-being of his family. This breadth of  
18 potential expression of the Amistad affair, means that Chase-Riboud is entitled to the broadest  
19 protections for her expression of this story.<sup>17</sup>

20  
21 <sup>15</sup> Chase-Riboud does not dispute that the fact of the Amistad and its participants are described in the  
22 available historical record. However, despite DreamWorks’ conclusory claims to the contrary, even  
23 the most exacting review of the available facts in history fails to humanize any of the historical  
24 participants in the Amistad affair or to dramatize the event itself. (Painter Decl. ¶ \_\_\_\_.)

24 <sup>16</sup> DreamWorks and its experts claim that the similarity in plot, character, theme dialogue, mood,  
25 setting and pace is due solely to the fact that both Amistad and Echo of Lions are historically based.  
26 (Opp’n at 17-20; Subur at ¶ 29.) Looking at the range of very different expression of the same  
27 history, however, directly undermines this point. DreamWorks has not and cannot point to a single  
28 published or unpublished work that bears anything close an identity found in “total look and feel”  
between Amistad and Echo of Lions.

<sup>17</sup> A court within this Circuit recently discussed the relationship between the range of possible  
expression and the breadth of copyright protection in the context of protection to be afforded a  
prejudice reduction seminar. Cano v. Difference Institute, 1996 WL 371064 (N.D.Cal. 1996)

1                   **b. Braithwaite is not Scene a Faire and this Doctrine Does Not Limit Chase-**  
2                   **Riboud’s Noted Protectable Expressions in this Case.**

3                   In virtually the same breath, DreamWorks claims that its character Joadson is both scene a  
4                   faire and historically based. While DreamWorks cannot be faulted for its creativity and  
5                   resourcefulness, the same cannot be said for its logic and reasoning.

6                   Scene a faire is a limiting doctrine that excludes from copyright protection those expressions  
7                   that are “as a practical matter indispensable, or at least standard, in the treatment of a given [idea].”  
8                   Frybarger v. International Business Machines Corp., 812 F.2d 525, 530 (9th Cir. 1987) (quoting  
9                   Atari, Inc. v. North American Philips Consumer Elecs., Corp., 672 F.2d 607, 616 (7th Cir. 1982)  
10                  (further citations omitted); Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985) (“incidents  
11                  which flow naturally from a basic plot premise” are not protectable). The best way to understand  
12                  this doctrine is by example. Scene a faire was found by courts in the following situations:

- 13                  • Indispensable to a movie about a boxer is a boxing scene. Anderson v. Stallone, 11  
14                  U.S.P.Q.2d 1161 (C.D.Cal. 1989).
- 15                  • Indispensable to a karate video game are the characters engaging in basic karate moves.  
16                  Data East USA v. Epyx, Inc., 862 F.2d 204, 208 (9th Cir. 1988).
- 17                  • Indispensable to a movie about the Hindenberg are scenes of the crew celebrating before  
18                  leaving and the German national anthem. Hoehling v. Universal City Studios, 618 F.2d  
19                  972, 979 (2d Cir. 1980)
- 20                  • Indispensable to a movie about slavery are scenes of attempted escape, pursuit by dogs,  
21                  and the atrocity of the buying and selling of human beings. Alexander v. Haley, 460 F.  
22                  Supp. 40, 45 (S.D.N.Y. 1978).

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24                                   [A] key element in any copyright analysis is a determination of the  
25                                   possible range of expression available to express a particular idea in a  
26                                   particular type of work involved. It is a logical consequence of the policy  
27                                   against granting a monopoly in ideas and facts that the scope of protection  
28                                   provided varies according to the type of work and the nature of the ideas  
                                 expressed in it. “Some ideas can be expressed in a myriad of ways, while  
                                 others allow only a narrow range of expression.”

Id. at \*8 (quoting Landsberg v. Scrabble Crossword Game Players, 736 F.2d 485, 488 (9th Cir. 1984))

1 While DreamWorks claims that Joadson, Black abolitionist, is an indispensable element to  
2 the telling of the Amistad story, DreamWorks cannot cite to, and Chase Riboud has not found, a  
3 single telling of the Amistad story, other than Echo of Lions, that makes reference to such an  
4 “indispensable” character. (Shaeffer Supp. Decl. at ¶ \_\_\_\_.) In fact, Thulani Davis, the librettist for  
5 the recent produced Amistad opera, testifies that not only is such a character not part of her opera it  
6 is not necessary to the telling of the story. (Davis Decl. at \_\_\_\_.) Similarly, one must question the  
7 “necessity” of such a character, when, among the “hundreds of Black abolitionists in New England at  
8 that time” (Johnson Decl. at ¶ 11), DreamWorks cannot cite to one who had any direct involvement  
9 whatsoever with the Amistad affair. (Nash Decl. at \_\_\_\_.)

10 **c. DreamWorks Diversion into an Attack on the Originality of Echo of**  
11 **Lions lacks both Merit and Credibility.**

12 A final limiting factor this Court should consider in evaluating Chase-Riboud’s protectable  
13 interests in Echo of Lions is their originality. Apple Computer, Inc., 35 F.3d at 1445 (“protection  
14 extends only to those components that are original to the author.”) In a dramatic fashion,  
15 DreamWorks takes the offensive by claiming that Chase-Riboud is the plagiarist, and cites to 88  
16 purported similarities between Echo of Lions and Black Mutiny. As mentioned above, all of the  
17 “similarities” that reasonably can be considered similarities refer to historical facts. (Shaeffer Supp.  
18 Decl. ¶ \_\_\_\_.) One would think that before making such a defamatory charge against a writer,  
19 DreamWorks would have consulted with its “distinguished historians and educators with expertise in  
20 the field” (Henderson Decl. at ¶ 3) about whether any charged identities were, in fact, simply part of  
21 history.

22 Moreover, a careful reading of DreamWorks’ charged similarities reveals that, at best, the  
23 company is accusing Chase-Riboud of misappropriating ideas from Black Mutiny rather than any  
24 protectable expressions. Even the quickest read of Black Mutiny reveals not only that DreamWorks  
25 could not sustain a charge to the theft of any expression by Chase-Riboud, but underscores the  
26 similarities between Amistad and Echo of Lions. (Shaeffer Supp. Decl. at Ex. \_\_\_\_.)

27 For example, DreamWorks cites Cinque’s meeting with Adams as a similarity. (Lynn Decl.  
28 at p. 17, #75.) As noted in Chase-Riboud’s opening papers, the meeting in Black Mutiny consists of  
Adams viewing Cinque behind bars. After asking the guard whether the “two that are almost



1 mulatto bright” learn better than the others, Adams takes Cinque’s hand and states “God willing, we  
2 will make you free.” To which, Cinque replies “God is good.” Black Mutiny at 254. DreamWorks  
3 does not even contend that this telling of a meeting between Adams and Cinque bears any  
4 relationship to the expression of the meeting in Echo of Lions, and yet DreamWorks cites this  
5 example as a basis for its acquisition that Chase-Riboud is a plagiarist.

6 Independent of DreamWorks’ fundamental misunderstanding of copyright law, and far more  
7 troubling, is the charge that Chase-Riboud “lifted” “almost verbatim” the concept of an “abominable  
8 conspiracy” from Black Mutiny. (Opp’n at 2.) While Chase-Riboud may be faulted in this one  
9 instance for forgetting a historical source of a phrase, DreamWorks, which consulted with “some of  
10 the world’s leading experts on history and slavery,” should have investigated that history before  
11 placing this spurious claim before this Court. In simple fact, this concept is part of history. John  
12 Quincy Adams, in his memoirs, writes:

13 I read, especially, the article in the American and Foreign Anti-Slavery  
14 Reporter of 1st October 1840, entitled “the Amistad Case,” p. 48-51, with  
15 deep anguish of heart, and a painful search of means to defeat and expose  
16 the abominable conspiracy, Executive and Judicial, of this Government  
17 against the lives of those wretched men.

18 Adams, Memoirs of John Quincy Adams, Vol. X, 373 (1976) (emphasis added). Even more  
19 astounding and telling is the fact that the declaration filed by one of DreamWorks experts makes  
20 explicit reference to these same memoirs. (Johnson Decl. at ¶ 8.)

21 **d. There Exists a Substantial Similarity Between Amistad and Protectable**  
22 **Elements of Echo of Lions**

23 Having demonstrated that it is reasonably probable that Chase-Riboud had protectable  
24 interests in Echo of Lions and that such interests, due to their range of expression, are entitled to  
25 broad copyright protection, the Court must look at each of the similarities in protectable interests and  
26 objectively determine whether it is reasonably probable that Chase-Riboud can ultimately prove that  
27 one or all of these identities are substantially similar. Apple Computer, Inc., 35 F.3d at 1442. Next  
28 the Court must determine whether it is reasonably probable that Chase-Riboud can ultimately prove

1 that “an ‘ordinary, reasonable observer’ would find substantial similarity of expression of the shared  
2 idea.” Smith v. Jackson, 84 F.3d at 1218.

3 As mentioned above, substantiality does not equate with the amount of protected identity but  
4 rather to the substantiality in identity of the unique similarity. 919 F.2d at \_\_\_\_ (“Even if a copied  
5 portion be relatively small in proportion to the entire work, if qualitatively important, the finder of  
6 fact may properly find substantial similarity.”) (quoting Baxter, 812 F.2d at 425 [get full cite]); see  
7 Woods v. Universal City Studios, Inc., 920 F. Supp.62, 65 (S.D.N.Y. 1996) (in preliminarily  
8 enjoining film after its release, court rejected argument that infringement was de minimus).  
9 Moreover, “where substantial similarity in a protected expression exists, it is not excused by the  
10 presence of additional, dissimilar material.” See, 711 F.2d at 143; Rogers v. Koons, 960 F.2d 301,  
11 308 (2d Cir. 1992) (“where substantial similarity is found, small changes here and there made by the  
12 copier are unavailing”). Elaborating on this standard, the Second Circuit in Koons, recognized that  
13 “[i]t is only where the points of dissimilarity exceed those that are similar and are – when compared  
14 to the original work – of small import quantitatively or qualitatively that a finding of no infringement  
15 is appropriate.” 960 F.2d at 308 (citing 3 Nimmer § 13.03[B][1][a]).

16 Before addressing the particulars about the protectable similarities, Chase-Riboud is  
17 compelled to respond to DreamWorks’ vicious attack on Stanford Whitmore, her expert. Whitmore  
18 is uniquely qualified to offer expert opinion to this Court. For the past 35 years he has served as an  
19 arbiter to the Writers Guild of America West (the “Guild”). Obviously troubled by Whitmore’s  
20 unique qualifications, DreamWorks attempts to dismiss his experience by couching it as a  
21 perfunctory predetermined labor process to define credit between two writers, (Suber Decl. at \_\_\_\_.)  
22 The labor process does not simply determine who wrote a movie and is not unfairly biased in favor  
23 of the first writer. Instead, the process looks at a myriad of elements to determine who is deserving  
24 of credit for the expression that is the motion picture. This credit can be given to a writer, group of  
25 writers or a secondary source like a book. (Declaration of Stanford Whitmore (“Whitmore Decl.”),  
26 dated November 16, 1997, at ¶ 11.) Indeed, Whitmore has presided over arbitrations where a novel  
27 was the source material for the screenplay. (Id. at ¶ 5.)  
28

1           Although Whitmore does not profess to be an expert in the laws of copyright, the analytical  
2 tools he employs in determining writing credit are nearly identical to those used to analyze copyright  
3 infringement cases – plot/narrative, structure, theme, characters, and dialogue. (Whitmore Decl. at ¶  
4 13.) DreamWorks’ assault on Whitmore in his deposition again simply demonstrates its fundamental  
5 misunderstanding of the difference between facts, which are not protected, and the expression of  
6 facts, which is protected.

7           In sharp contrast with Whitmore’s years of experience evaluating who or what source should  
8 be credited for a film, DreamWorks’ expert, Subur, claims qualification to offer relevant testimony  
9 to this Court simply because he teaches at UCLA’s film school and has offered similar testimony in a  
10 number of other cases.<sup>18</sup> **[Pierce to Add]**

11                           **1.       DreamWorks’ Efforts To Divert the Substantial Similarity of the**  
12                           **Joadson/Braithwaite Identity are Unavailing and The Preliminary**  
13                           **Injunction Should Issue on This Substantial Similarity Alone.**

14           All of DreamWorks’ wild, after-the-fact speculation about possible non-infringing  
15 justification for its Joadson character simply dissolve before the sphinx-like silence of Amistad  
16 writer, David Franzoni. While DreamWorks stumbles over itself claiming that Joadson is both or  
17 either scene a faire or based on one or more historical figures, Franzoni is utterly silent on the  
18 “inspiration” for his expression of Joadson. One would assume that if Franzoni had relied on a  
19 historical figure, he would have said as much in his sworn statement to the Court. Similarly if, as  
20 contended by both Allen and Subur, Joadson was an “indispensable” character to the telling of the  
21 Amistad story, DreamWorks counsel would have insisted that such a statement be added to  
22 Franzoni’s declaration. Obviously, what DreamWorks asserts it could have relied upon for Joadson  
23 is irrelevant, especially in light of the admission of Franzoni’s counsel that DreamWorks hired  
24 Franzoni precisely because of his Amistad knowledge.<sup>19</sup> (Shaeffer Supp. Decl. ¶ \_\_\_\_.) The Court

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25  
26 <sup>18</sup> Unfortunately, DreamWorks did not make Subur available for deposition prior to the filing of this Reply.

27 <sup>19</sup> Cf. Pret-A-Printee, Ltd., v. Allton Knitting Mills, Inc., No. Civ. 3770 (WCC), 1982 WL 1788, at  
28 \*3, \*9 (S.D.N.Y. Sept. 16, 1982) (rejecting defendants’ claims of independent creation and noting that certain exhibits “are so conveniently conclusory and lacking in any indication of contemporaneous preparation that the inference is inescapable that they were prepared well after the

1 need not look beyond Franzoni’s declaration to conclude that it is reasonably probable that Chase-  
2 Riboud will prove Joadson is simply a copy of protectable expression from Echo of Lions, her  
3 Braithwaite.

4 Even ignoring Franzoni’s telling silence, DreamWorks cannot concoct a post-hoc  
5 rationalization for why Joadson is not copied from Chase-Riboud’s Braithwaite. While admitting  
6 that there is no historical figure directly identifiable in name and conduct as Joadson/ Braithwaite,  
7 DreamWorks is forced to contend that Joadson is an “historical composite.” Ignoring for a moment  
8 that no court has ever endorsed anything close to what DreamWorks is suggesting, it is curious that  
9 DreamWorks’ own experts cannot agree on which historical characters Joadson is based upon. Allen  
10 claims that Joadson is a composite of James Pennington, James Fortsen, and Henry Highland Garnet.  
11 (Allen Decl. at ¶ 7.) Subur contends that Braithwaite is a composite of James Pennington, David  
12 Walker and William Wells Brown. (Subur Decl. at ¶ 43.) Johnson, DreamWorks’ only declarant  
13 with any historical background, points only to James Pennington as a source. (Johnson Decl. at ¶  
14 11.) Indeed, Johnson goes so far as to state that Pennington was “a participant in aiding the defense  
15 of the Amistad mutineers.” Id. In point of fact, Pennington’s involvement consisted of writing a  
16 single letter and later claiming that the Amistad incident represented a message from God that white  
17 missionaries should go to Africa. (Nash Decl. at ¶ \_\_.) Ignoring for a moment that, despite Chase-  
18 Riboud repeated requests, DreamWorks never cited a single one of these persons as a source for  
19 Joadson,<sup>20</sup> not one of these historical figures bears any resemblance to the Joadson\Braithwaite  
20 character of Amistad and Echo of Lions.

21 Although DreamWorks attempts to confuse the analysis of its infringement through post hoc  
22 and self-contradictory explanations of what might have been the basis for various elements of the  
23 film and what might have been the basis for Chase-Riboud's novel, its arguments are irrelevant to  
24 copyright law. The issue is not whether DreamWorks might have produced the film without copying  
25

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26 fact by a man well-versed in defending copyright infringement proceedings.”); John Charles Design  
27 v. Queen Int’l Design, Inc., 940 F. Supp. 1516, 1520 (C.D. Cal. 1996) (“hindsight may not be used to  
28 determine that the challenged design was obvious”).

<sup>20</sup> Shaeffer Supp. Decl. at

1 Chase-Riboud's book; the issue is whether DreamWorks in fact copied protected elements of Echo  
2 of Lions when it produced Amistad (which is why the newly discovered evidence about Franzoni is  
3 so important to the case). DreamWorks' approach – which would permit infringers after the fact to  
4 mount a defense by scouring all prior works of authorship and the entirety of history for similarities  
5 to the plaintiff's work -would, in effect, impose a "novelty" requirement on works of authorship, a  
6 requirement that has been repeatedly rejected by the courts as inconsistent with basic principles of  
7 copyright protection. See Nimmer on Copyright § 2.01 [A], p. 2-7 ("it is now clearly established ...  
8 that the originality necessary to support a copyright merely calls for independent creation, not  
9 novelty.") & p. 2-10 ("Originality in the copyright sense means only that the work owes its origin to  
10 the author, i.e., is independently created, and not copied from other works. Therefore, a work is  
11 original and may command copyright protection, even if it is completely identical with a prior work,  
12 provided it was not copied from such prior work but is rather a product of the independent efforts of  
13 its author.") (citing cases). In short, the issue in this case is not whether DreamWorks might have  
14 produced a work of original authorship under some hypothetical state of facts, the issue is whether it  
15 actually has copied Chase-Riboud's protected expression.

16 Obviously, without understanding that its contention that Joadson is both a historical  
17 composite and a scene a faire is essentially an oxymoron, DreamWorks, and particularly its expert  
18 Subur insisted that Joadson is indispensable to the telling of the Amistad story. (Opp'n at \_\_\_\_.) It is  
19 difficult to fathom how Joadson can be indispensable to the telling of the Amistad story in light of  
20 Johnson's admission that "there were literally hundreds of black abolitionists in New England at that  
21 time" yet not one took on a role anything close to that portrayed by Joadson/Braithwaite. (Johnson  
22 Decl. at ¶ 11; Nash Decl. at ¶ \_\_\_\_.) Moreover, DreamWorks simply chooses not to confront the fact  
23 that not one of the modern successful retellings of the Amistad story, with the exception of Echo of  
24 Lions, includes any character even resembling Joadson/Braithwaite. (Shaeffer Supp. Decl. at ¶ \_\_\_\_.)  
25 Joadson is not scene a faire.

26 DreamWorks' final desperate plea to distinguish Joadson from Braithwaite is to focus on the  
27 differences between the two characters. First, DreamWorks cites to the fact that Braithwaite has a  
28 family and that a significant element of Echo of Lions is the love story between Braithwaite's

1 daughter and Covey. While it is not surprising that Chase-Riboud’s 374-page book contains a  
2 further explication of Braithwaite than can be found in DreamWorks’ two hour movie, the fact that  
3 DreamWorks did not misappropriate all of Braithwaite is utterly irrelevant to this case. Harper &  
4 Row, 471 U.S. at 565 (1985).

5 While DreamWorks cites to a number of differences between Braithwaite and Joadson –  
6 including that (1) Joadson was a freed slave; (2) Joadson meets with Adams; and (3) Joadson  
7 directly participates in the African’s defense – these dissimilarities are not sufficient to so  
8 overwhelm the identities that the remaining similarity between Joadson and Braithwaite when  
9 compared with Echo of Lions is qualitatively or quantitatively unimportant. Rogers, 960 F.2d at  
10 308. Moreover, at least one of the discrepancies – DreamWorks’ late off-camera tagging of Joadson  
11 as the owner of the Forten Shipping Service – can only be seen as a “telling dissimilarit[y] that  
12 betray[s] the plagiarist’s attempt to hide his tracks.” Dr. Seuss, 924 F. Supp. at 1564; compare  
13 Shaeffer Decl. at Exhibit 107 p. 192 with Henderson Decl. at Exhibit B p. 98.

14 Despite DreamWorks’ best efforts, the identity in the expression of Braithwaite/ Joadson  
15 remains astounding. While DreamWorks correctly notes that Chase-Riboud cannot own the idea of  
16 including a Black abolitionist in the telling of the Amistad story, the identity of Braithwaite/Joadson  
17 goes far beyond that simple idea directly to protected expression.

- 18 • Both Joadson and Braithwaite serve the dramatic function of linking White and Black  
19 America. (Chase-Riboud Decl. at ¶¶ 17-18.)
- 20 • Both Joadson and Braithwaite serve to provide a contemporary Black voice to the  
21 Amistad story. (Id.)
- 22 • Despite DreamWorks’ claim to the contrary, both Joadson and Braithwaite were active  
23 members of the abolitionist cause. (Shaeffer Decl. at ¶ \_\_\_\_; Echo of Lions at 148  
24 (“Braithwaite’s house was a stopover on the underground railroad”) and 150 (“She  
25 thought of the danger Henry [Braithwaite] ran, printing anti-slavery pamphlets”);
- 26 • Despite DreamWorks’ claim to the contrary, both Joadson and Braithwaite were active in  
27 supporting the Africans’ cause. Echo of Lions at 197 (“The rule was that one took care of  
28 one's own, and for Braithwaite and his friends that included Joseph Cinque and his men”)

1 and 212 (“In the harbor, aboard Townsend’s yacht, the plans to kidnap the Africans if  
2 Judson bowed to the pressures symbolized by the schooner Grampus, laying at anchor  
3 and icebound nearby, were rehearsed. Henry Braithwaite had alerted the underground rail-  
4 way all the way to Montreal”)

- 5 • Both Joadson and Braithwaite move freely in the White world. [cites]
- 6 • Both Joadson and Braithwaite express the problems and ambiguities faced by free Black  
7 Americans in the nineteenth century. (Chase-Riboud Decl. at ¶¶ 17-18.)
- 8 • Despite DreamWorks’ claim to the contrary, both Joadson and Braithwaite do not shy  
9 away from confrontation with White America. (Shaeffer Decl. 254 (“I’ve lost many a  
10 client looking a [White] man in the eye”);
- 11 • Both Braithwaite and Joadson printed abolitionist pamphlets. See Henderson Decl. at  
12 Exhibit B p. 98 (“Adams means major, respectable newspapers, as opposed to the type  
13 of abolitionist newspaper that Joadson publishes”); Echo of Lions at 150 (“She thought of  
14 the danger Henry [Braithwaite] ran, printing anti-slavery pamphlets”);
- 15 • Both Braithwaite and Joadson attended court proceeding including the argument before  
16 the United States Supreme Court. (Shaeffer Supp. Decl. at ¶ \_\_\_\_; Echo of Lions at 174,  
17 329.)

18 The similarities in expressing the Joadson/Braithwaite characters is overwhelming, and the  
19 differences cited by DreamWorks do more to further the evidence of actual copying than to trump  
20 the similarities. If this Court finds that Chase-Riboud has a reasonable probability of proving a  
21 substantial similarity with respect to the Joadson/Braithwaite identity, the preliminary injunction  
22 should issue.

## 23 2. The Limited History of Cinque Bears No Identity to the Cinque 24 Expressed in Both Echo of Lions and Amistad.

25 Obvious cognizant that the Cinque expressed in Black Mutiny bears no relation to the Cinque  
26 expressed in Amistad and Echo of Lions, DreamWorks proffers its only remaining defense – the  
27 Cinque expressed in both works is the Cinque of history. (Opp’n at 23.) Despite the supposed  
28 wealth of primary source materials describing Cinque and DreamWorks’ legion of “the worlds  
leading experts on history and slavery,” the only support DreamWorks can draw for this speculation

1 is the naked conclusion of Johnson – [t]he Cinque in the film corresponds quite faithfully to the  
2 actual, historical Cinque. (Johnson Decl. at ¶ 13.) As with the silence of Franzoni’s declaration, the  
3 absence of a single cite to any source material is astounding.

4 The historical record offers only the sparsest of portrayals of Cinque, which is not surprising.  
5 (Chase-Riboud Decl. ¶¶ 19-21; Painter Decl. ¶ \_\_.) Unlike the press of today, the nineteenth century  
6 press was not interested in the human aspect of the Africans’ struggle. (Painter Decl. ¶ \_\_.)  
7 Moreover, the abolitionist themselves who championed the Africans’ cause historically had little  
8 interest in the actual personage. Id. Rather, the abolitionists were more concerned about their cause  
9 – the abolition of slavery, and not the rights of individual persons. Id.

10 Although the historical record demonstrates that Cinque was the leader of the Africans, his  
11 description beyond that is sketchy at best. (Shaeffer Decl. at 3 [**more cites**].) In fact, the most  
12 detailed description of Cinque is not based on his conduct whatsoever, rather it stems simply from  
13 the speculation of a Phrenologist based on an evaluation of the contours of Cinque’s head. (See  
14 Shaeffer Decl. at Ex. 57.)

15 Moreover, the available history emphasizes Cinque’s early conversion to Christianity and his  
16 love of God, a expression of Cinque not found in either Echo of Lions or Amistad. [**cites**] Rather,  
17 both Echo of Lions and Amistad express Cinque as a man who remains true to his African roots.  
18 Chase-Riboud Decl. at ¶¶ 19-21 [**add cites**] Moreover, like Braithwaite/Joadson, the Cinque of  
19 Amistad and Echo of Lions is active in his fate and perceives himself as equal with White America.  
20 (Chase-Riboud Decl. at ¶¶ 19-21. [**add cites**].)

21 DreamWorks’ attempts to divert the obvious identity between the expression of the two  
22 Cinque’s in only two other respects. First, DreamWorks claims that the invocation of ancestors in  
23 times of trouble is part of Mende culture. Even assuming that DreamWorks is correct, the  
24 elimination of this one identity does little to diminish the remaining substantial similarity. Secondly,  
25 DreamWorks attempts to argue that the Amistad Cinque participates to a greater extent in his legal  
26 defense than the Cinque of Echo of Lions. Again, as referenced above, such a minor discrepancy in  
27 the characters is insufficient to override the similarities. Rogers, 960 F.2d at 308. [**Dennis add**  
28 **reference to Cinque’s participation in the defense**]



1 Absent telepathy, it is impossible to state whether the identity of the Cinque expressed in  
2 both Echo of Lions and Amistad is actually the historical Cinque. The existing written remnants of  
3 his personality are simply insufficient to develop the three dimensional character first conjured up by  
4 Chase-Riboud and later manifested in DreamWorks' Amistad. Without evidence to explain away  
5 the substantial similarity in the expression of Cinque through history or to provide overriding  
6 differences between the expression of the two characters, the Court should find that it is reasonably  
7 probable that Chase-Riboud will prove substantial similarity between the expression of Cinque in  
8 Echo of Lions and Amistad.

9 **3. Rather than Absolving DreamWorks of Culpability, the Historical**  
10 **Reference Found By DreamWorks of a Meeting Between Adams**  
11 **and Cinque Actually Furthers Chase-Riboud's Claim of an**  
12 **Identity in This Meeting.**

13 Without providing any citation, DreamWorks' expert dismisses Chase-Riboud's claim of  
14 identity with respect to the meeting between Cinque and John Quincy Adams as an historical fact  
15 referenced in Adams' own memoirs. (Johnson Decl. at ¶ 8.) After diligently searching and  
16 ultimately uncovering the reference to such a meeting, Chase-Riboud understands why DreamWorks  
17 was not more forthcoming to the Court. As in Black Mutiny the meeting between Cinque and  
18 Adams occurs when Adams views the Africans in jail. The sum total of Adams' description of this  
19 meeting is as follows:

20 They are all but one, young men, under thirty, and of small stature – none  
21 over five feet six; Negro face, fleece, and form, but varying in shades of  
22 color from ebony black to dingy brown. One or two of them are almost  
23 mulatto bright. Cinque and Grabow, the two chief conspirators, have  
24 remarkable countenances. Three of them read to us part of a chapter in the  
25 English New Testament very indifferently. One boy writes a tolerable  
26 hand. Mr. Ludlow teaches them; but, huddled together as they are, and  
27 having no other person to talk with but themselves, their learning must be  
28 very slow.

1 (Shaeffer Supp. Decl. at Ex. \_\_; Memoirs at 360.) While this meeting tracks quite closely the  
2 meeting described in Black Mutiny, it bears no relationship whatsoever to the meeting expressed in  
3 Amistad and Echo of Lions.

4 Obviously, recognizing the speciousness of its claim of identity in the expression in history of  
5 the meeting between Cinque and Adams with the expression in Echo of Lions and Amistad,  
6 DreamWorks counters with a number of equally specious challenges. First, while the experts may be  
7 unable to agree that both Amistad and Echo of Lions “tell[] an intimate story between two  
8 extraordinary men” – Cinque and Adams – both Chase-Riboud and Spielberg cite that as a theme for  
9 their interpretation of this story. (Chase-Riboud Decl. at ¶¶ 21-22, Ex. R (“Steven was taken . . .  
10 with the possibilities of telling an intimate story between two extraordinary men”).

11  
12 Second, and more importantly, DreamWorks and its expert Subur are simply wrong that the  
13 Cinque of Echo of Lions is fluent in English during this meeting. (Opp’n at 25; Subur Decl. at ¶ 83.)  
14 While Covey is not referenced throughout the discussion in Echo of Lions it is clear that he is acting  
15 as Cinque interpreter virtually throughout the conversation. On page 289 of Echo of Lions, at the  
16 outset of the conversation between Adams and Cinque, Chase-Riboud writes: “[t]hen he says  
17 something almost inaudibly, so that Covey has to strain to hear the words.” (Shaeffer Decl. at Ex.  
18 108 p. \_\_.) On the very next page of the book, Chase-Riboud has Cinque say to himself internally:  
19 “[a]ll these things I do – the explaining, the listening, through Covey. (Id.) Cinque does speak four  
20 lines of English to Adams later in the conversation (pp. 299-300), but this exchange is immediately  
21 followed by “Adams looked up in irritation at Covey, who has allowed Cinque to speak for himself  
22 during this exchange.” (Id. at \_\_.) DreamWorks contends that the meeting between Cinque and  
23 Adams “could not be more different.” (Opp’n at 25.) To support this claim, however, DreamWorks  
24 cites to paragraph 83 of Subur’s declaration that simply notes that the Cinque of Echo of Lions spoke  
25 English. Obviously, since Subur was mistaken, DreamWorks’ claim of difference must vanish.

26 Thirdly, DreamWorks asserts that the meeting between Cinque and Adams in the Amistad is  
27 much briefer than the meeting in Echo of Lions. The length of the meeting is not what matters.  
28 Rather it is the drama that the meeting expresses. In both Amistad and Echo of Lions the meeting is  
significant for the development of the character of Cinque. In both, Cinque approaches Adams as an

1 equal, something that could not have happened in history.<sup>21</sup> Chase-Riboud Decl. at ¶ 21, Painter  
2 Decl. at . Like other elements of its copying, DreamWorks has altered elements of the meeting.  
3 Where, as here, “substantial similarity is found, small changes here and there made by the copier are  
4 unavailing”. Rogers, 960 F.2d at 308.

5 DreamWorks’ response to the identity in the meeting expressed in both Echo of Lions and  
6 Amistad is unavailing, and the Court should find that there exists a reasonable probability that  
7 Chase-Riboud will prove a substantial similarity in this respect. Finding such a reasonable  
8 probability with respect to this identity alone entitles Chase-Riboud to the requested preliminary  
9 injunction.

10 **4. There Is Substantial Identity Between Who Amistad and Echo of**  
11 **Lions Express a Link Between the Amistad Affair and the**  
12 **American Civil War.**

13 There can be no dispute about the dramatic identity between the ending of Echo of Lions and  
14 Amistad. (Compare Shaeffer Decl. at Ex. 107 p. 288, Exhibit 108 p. ?) In the finished motion  
15 picture DreamWorks did make changes to the ending, however, the underlying expression remains –  
16 a voice traveling back from Africa and a shot of a civil war battle. (Opp’n at 29.)

17 Again DreamWorks, intentionally or otherwise, misrepresents the record, contending that in  
18 Echo of Lions, Cinque’s voice does not travel back from Africa to a Civil War scene. (Opp’n at 29.)  
19 The relevant passage from Echo of Lions reads as follows:

20 I lift my arms outwards for enough breath to carry an otherworldly shout,  
21 terrible and maledictory, undulating back over the ocean I have just  
22 crossed.

23 For thirty-one years I forgot the Amistad, and now that I am dying at the  
24 mission at Komende in Sherbo, Black Snake, who has been Sarah Kinson

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25 <sup>21</sup> As it does repeatedly throughout its Opposition, DreamWorks again confuses notions of ideas and  
26 expression. Chase-Riboud agrees that it has no claim to the idea of a meeting between Adams and  
27 Cinque. However, as quick reference to Black Mutiny demonstrates, there is a myriad of ways of  
28 expressing such a meeting. See Chase-Riboud Decl. at Exhibit D p. 81-82. Echo of Lions and  
Amistad have expressed this meeting identically – as a meeting among equals, a meeting between  
America and Africa – it is this identity of expression that is actionable.

1 all these seasons, tells me that on the day I speak of, the twenty-eighth of  
2 January, 1842, three thousand miles away, thunder, impossible in that  
3 month in New England, was heard over the New Haven jailhouse and  
4 across Montauk Bay. Like the echo of lions, it rumbled southwards along  
5 the Atlantic coast and the marshes of Delaware, across the Schuylkill River  
6 Valley to a place they call Gettysburg.

7 (Shaeffer Decl. at Exhibit 108 p. )

8 DreamWorks expert contends that “it was the trial that rumble(s) southward” in January  
9 1842. (Subur at ¶¶ 117-118.) DreamWorks expert again makes the most rudimentary error of  
10 history. The United States Supreme Court’s opinion in the Amistad case dates from its January term  
11 1841. United States v. Libellants and Claimants of the Schooner Amistd, 40 U.S. 518 (January Term  
12 1841). January 1942 refers to the date Cinque returned to Africa – the day the voice carries “back  
13 over the ocean -- which corresponds to portrayal of the scene in Amistad and Echo of Lions. (Black  
14 Mutiny at 302, Shaeffer Supp. Decl. Ex. (“On January 1842, the Gentleman anchored at Freetown”).  
15 The closing sequence in both Echo of Lions and Amistad is a dramatic device to link the entire  
16 Amistad affair, not simply the trial, to America’s civil war

17 Finally, DreamWorks attempts to distance itself from this similarity by citing to an isolated  
18 reference in Black Mutiny were the analogy rolling thunder. (Opp’n at 29.) This reference,  
19 however, bears little resemblance to the dramatic expression found in both the ending of Echo of  
20 Lions and Amistad, which expresses the link between the entire Amistad affair -- not simple Adam’s  
21 contribution -- to the American Civil War.

22 This similarity dramatically demonstrates the idea expression dichotomy and how  
23 DreamWorks has stolen Chase-Riboud protectable expression. Simply put, Chase-Riboud has no  
24 claim to the idea of linking the civil war to the entire Amistad affair. However, the identity of  
25 expression, linking Cinque’s return to Africa with a voice traveling back across the Atlantic to a  
26 symbol of the Civil War is a unique and protectable expression, one stolen by DreamWorks.

27 **5. Other Substantial Identities Warranting a Preliminary Injunction**  
28 **From this Court.**



1 Libellants and Claimants of the Schooner Amistad, 40 U.S. 518 (1941) with Subur Decl. at ¶ 129.  
2 As mentioned, there have been a myriad of different stories about the Amistad affair, but none with  
3 the identity of Echo of Lions and Amistad.

4 **c. The Destruction of the Slave Colony**

5 While DreamWorks' response emphasizes the differences in the execution of the attack on  
6 the African slave colony. Chase-Riboud simply point is the telling fact that, like Echo of Lions,  
7 Amistad portrays this attack as a contemporaneous event with the decision by the United States  
8 Supreme Court.

9 **d. Cinque had one Child**

10 DreamWorks emphasizes that Cinque had two unborn children when he was captured. What  
11 is relevant, however, is that in Echo of Lions there is mention of the return of Cinque's wife and his  
12 two year old son and in Amistad we see Cinque's wife with a young boy.

13 **e. The Drowning of the Slaves**

14 While DreamWorks defends its showing of the drowning of the slave in the middle passage  
15 as an event that happened in history, DreamWorks concedes that such an event is described in  
16 similar vivid detail in Echo of Lions. While DreamWorks cursorily dismisses this similarity as  
17 history, Franzoni, Amistad's author, fails to testify to the source of his expression.

18 **6. The Similarities excised by DreamWorks Bolster the Probability that the**  
19 **Remaining Similarities are the Product of Actionable Copying Rather Than**  
20 **Independent Creation.**

21 As DreamWorks correctly notes, identities in drafts that fail to appear in the final product  
22 cannot be considered as element for substantial similarity. See, 711 F.2d at 142. However, certain  
23 errors, even if excised from the final product are relevant evidence for evaluating whether the  
24 remaining similarities are the product of independent creation or illicit copying. See M. Kramer  
25 Mfg. Co., Inc. v. Andrews, 783 F.2d 421, 445 (4th Cir. 1986) ("courts have consistently viewed  
26 evidence of 'common errors' as the strongest evidence of copying").  
27  
28

1           The “common error” at issue here is the translating of the letter between a British Minister  
2 and the United States Secretary into a letter between Queen Victoria and President Van Buren.<sup>23</sup>  
3 (See Chase-Riboud Decl. at ¶ 42.) This same type of error was noted by the Court in Burgess v.  
4 Chase-Riboud, in finding that a playwright had infringe Chase-Riboud earlier novel Sally Hemings.  
5 765 F. Supp. 233 (E.D.Pa. 1991). The fact that this letter now has been excised from Amistad means  
6 that the Court cannot consider it an actionable identity, but it does not prevent this Court from taking  
7 this fact into consideration in evaluating whether there has been actionable copying in this Case.

8           Moreover, the Court should take note of DreamWorks’ astounding claim that this letter is in  
9 fact part of history. One must question to what history DreamWorks refers. First, DreamWorks’  
10 experts claim that this letter was written by the British Prime Minister with the consultation of Queen  
11 Victoria. Subur and Johnson. In fact, William Lamb Melbourne with the British Prime Minister at  
12 the time. Henry Fox, who wrote the letter, was the British Minister residing in Washington, D.C.  
13 (Shaeffer Supp. Decl. at \_\_ Adams Memoirs.) Furthermore, DreamWorks’ experts assert that Queen  
14 Victoria directed Fox to write the letter. Subur and Johnson. Fox, however, had no consultation  
15 with Queen Victoria about this letter. (Shaeffer Supp. Decl. Memoirs at 400.)

16           **C.     DREAMWORKS “EQUITABLE DEFENSE” ARE SIMPLY A MALICIOUS**  
17           **DIVERSION AIMED NOT ONLY TO UNDERMINE CHASE-RIBOUD’S**  
18           **CREDIBILITY WITH THIS COURT BUT ALSO TO DESTROY HER**  
19           **REPUTATION IN THE COMMUNITY.**

20           **1.     DreamWorks’ Wholly Unfounded Charge of Plagiarism Should be**  
21           **Considered as Further Evidence of the Company’s Actionable Copying of**  
22           **Echo of Lions**

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23  
24  
25           <sup>23</sup> Another telling error is the reference to Cinque with his brother-in-law in the rice fields prior to his  
26 kidnapping. DreamWorks points to the references in Black Mutiny to both Cinque’s work in rice  
27 fields, and, at the end of Black Mutiny, there is a reference to Cinque meeting “his sister’s husband.”  
28 DreamWorks simply misunderstands Chase-Riboud point. There is no reference in either history or  
in Black Mutiny that Cinque was with his “brother-in-law” in his rice fields on the day of his  
kidnapping. Moreover, the term “brother-in-law” is a Western European concept, and would not  
have been a term used in Africa.

1                   **2. DreamWorks has No Claim of Laches, for DreamWorks Long Knew of**  
2                   **Chase-Riboud’s Meritorious Claims and Any Delay on the Part of Chase-**  
3                   **Riboud is Solely Attributable to DreamWorks Bad Faith.**

4                   DreamWorks laches argument demands that the Court considers only the fact that Chase-Riboud  
5                   first learned of her “potential” claim more approximately 10 months prior to seeking this injunction.

6                   To accept DreamWorks claim requires the Court to ignore that:

- 7                   • DreamWorks expressly asked Chase-Riboud to pursue this matter on an informal basis with  
8                   the company and represented that it was “holding out an olive branch”;
- 9                   • DreamWorks intentionally lulled Chase-Riboud into believing that it was investigating her  
10                  claim in good faith and would get back to her as soon as practicable;
- 11                  • DreamWorks never rejected Chase-Riboud settlement demand but repeatedly represented that  
12                  it would respond upon completion of its investigation;
- 13                  • Chase-Riboud’s claim is against the completed movie and not the shooting script and as  
14                  recently as November 11, DreamWorks represented to this Court that the movie was not done  
15                  and that editing was continuing;<sup>24</sup>
- 16                  • DreamWorks told Chase-Riboud that many of her cited similarities were being removed from  
17                  the movie during the editing process and that DreamWorks would provide her with a  
18                  continuity script and a video of the movie upon completion so that she could evaluate the  
19                  status of her claim; and
- 20                  • DreamWorks proceeded with principal photography and editing of its movie despite knowing  
21                  of Chase-Riboud’s outstanding claim and its representations that the company intended to  
22                  address her claims.

23                  As DreamWorks admits, the mere passage alone is not sufficient to establish the equitable  
24                  defense of laches. Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 737 (9th Cir. 1947)  
25                  (“mere delay will not ordinarily bar a suit for an injunction against a naked infringer” [citation  
26                  omitted]). Rather laches requires a finding of unreasonable delay and that that the defendant has

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27                  <sup>24</sup> DreamWorks’ laches argument is difficult to fathom when taking into consideration its vigorous  
28                  argument that the claim before the Court is the similarities only between the completed film and  
                    Echo of Lions and its acknowledgement that the film has only recently been completed.



1 been unfairly prejudice by the delay. See King v. Innovation Books, 976 F.2d 824, 832 (2d Cir.  
2 1992) (“A party asserting the equitable defense of laches must establish both plaintiff’s unreasonable  
3 lack or diligence under the circumstances in initiating an action, as well as prejudice from such  
4 delay.”)

5 The King case is directly relevant to the case at bar. In King, the plaintiff, upon discovery of  
6 a potential infringement, promptly notified the alleged infringing defendant. 976 F.2d at 927. In  
7 October 1991, plaintiff received a copy of defendant’s script and continued to voice his objections to  
8 the defendant. Id. at 831. On March 3, 1992, four days before the release of the movie, plaintiff was  
9 granted a screening, but did not move for a preliminary injunction until May 28, 1992. Id. at 827-  
10 828. The trial court granted plaintiff an injunction and the defendants appealed. In affirming the  
11 grant of the injunction the Second Circuit held that the correct time to commence the running of the  
12 laches period was when the plaintiff first saw the infringing movie and not at the time he received  
13 the script. Id. at 832-833. The King Court reasoned that “King could not be certain about what the  
14 film would contain until he actually viewed the film.” Id. The Court went on to find that even if the  
15 time began to run at plaintiff received the script

16 we would not be willing to say that King unreasonably delayed in  
17 initiating this suit, in light of his conduct and the history of the parties  
18 prior to the commencement of the suit. As mentioned previously,  
19 King objected to the possessory credit to Allied as soon as he learned  
20 of the film in October 1991. He attempted to obtain, the screenplay,  
21 tentative credits and a copy of the movie. He continued to voice his  
22 objections to what seemed planned by appellants and attempted to  
23 become fully informed and resolve the matter.

24 Id. at 833; cf Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d at 372 (15 month delay not  
25 unreasonable because defendants knew plaintiff would make claim); compare New Era Publications  
26 International v. Henry Holt and Co., 863 F.2d 576, 584 (2d Cir. 1989) (two year delay and plaintiffs  
27 inaction supported laches finding [cited by DreamWorks]); Century Time Ltd. V. Interchron Ltd.,

1 729 F. Supp. 366, 368 (found “tactical maneuvering” in plaintiff waiting two months despite  
2 knowing that defendant would not change mark [cited by DreamWorks]).

3 Chase-Riboud has diligently pursued her claim. A suit filed six months ago based solely on  
4 the screenplay would have been premature and undoubtedly would have entitled the Court to screen  
5 credit for the film as “Neutral Film Editor.” That is not an appropriate role for a court of equity.  
6 Chase-Riboud moved for preliminary injunctive relief as quickly as possible given her inability to  
7 view the film at any earlier date.

8  
9 **D. DUE TO THE OVERWHELMING EVIDENCE OF DREAMWORKS’ THEFT  
10 AND CHASE-RIBOUD’S LIMITED MEANS THE COURT SHOULD ORDER  
11 A NOMINAL BOND.**

12  
13  
14 DATED: November 28, 1997

O’DONNELL & SHAEFFER, LLP

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17 By: \_\_\_\_\_  
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20 BARBARA CHASE-RIBOUD  
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