

18th Annual Entertainment and Media Law Conference

Session Two: How Close is Too Close?

The Fight Over Substantial Similarity in Entertainment Works

March 3, 2021 @ 1 p.m. Pacific

Hypothetical, Story Treatments, Bench Brief, and Case Summaries

The following hypothetical will be used as the premise for this conference session. It is followed by story treatments for the two works in question, a discussion of the legal issues raised by the hypothetical, and summaries of recent cases involving motions to dismiss infringement claims on the basis of a lack of substantial similarity.

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Hypothetical

Abby Andrews is a Hollywood screenwriter with numerous credits to her name. In 2010, she wrote and shopped around a screenplay entitled *Tortuga Tides*, a swashbuckling romantic adventure set in the buccaneer era. The story follows the adventures of pirate queen Jane Sterling as she seeks the last resting place of a legendary Spanish treasure galleon and, along the way, negotiates her way through a Bermuda Love Triangle involving her first mate and the dashing agent of the British crown sworn to bring her to justice. Landing as it did at a time when pirates were not in vogue (heist movies were then ascendant), the film was never made.

One company that read but passed on the screenplay was major studio Zinger Zoetrope. However, in the summer of 2019, Zinger dominated the summer box office with *Corsairs of the Cosmos*, a swashbuckling romantic adventure which follows the adventures of space pirate queen Jayne Starling as she scours the galaxy to find the crash site of a legendary spaceship of

the Old Federation. Along the way, she negotiates her way through a love triangle involving her new ship's doctor and the dashing Imperial agent sworn to bring her to justice.

Tortuga and *Corsairs* share certain elements in common, beyond the main character's name (referred to collectively hereafter as "St*rling") and the overall tone of the stories, such as:

- In both stories, St*rling has similar personality traits: She is obsessed with finding the wreck, she is notable for her efforts to avoid taking life, and she is a skilled combatant.
- Both begin with a vignette from the main character's childhood, in which she first learns about the legendary wreck and is given a necklace that connects her to the lost ship.
- Both stories involve a chase between different locations (islands in one case, planets in the other).
- Both feature a scene critical to both works in which the hero and her pursuer meet in a seedy port, leading to the agent infiltrating St*rling's ship after they cooperate to escape an unexpected threat.
- Both feature a battle between ships, in which St*rling pulls off a surprise victory by stealing onto the other ship with one other crew member in the middle of the battle.
- Both feature a near miss with a giant monster – a sea serpent in one, a space dragon in another – and both have encounters with ghost ships.
- Both the first mate in *Tortuga* and the doctor in *Corsairs* have longed for St*rling's affections in secret, as to which St*rling is blind for the first half of the film.
- In both works, St*rling finds the ship in a remote location protected by green storms.
- Both St*rlings make the decision to abandon the ship rather than reap the full rewards of finding it.
- Both St*rlings are driven by a legacy left behind by their parents.

There are also many differences in dialogue and other elements; notable differences include:

- One is set in space and the other is not (obviously).
- While St*rling's family and parentage are motivating factors for her character in both stories, in *Tortuga* it is the haunting nature of her father's death that shapes her desire to complete her quest, while in *Corsairs* it is the mystery of her parentage that drives her.
- In *Tortuga*, Sterling has no particular grudge against authority, while in *Corsairs* Starling hates the Imperium.
- The dashing officer in *Corsairs* is female.
- Apart from St*rling, all of the other names differ significantly – as do the species.
- Starling's crew in *Corsairs* is a smaller group with more fully developed backgrounds.
- The ship battle in *Tortuga* is with the agent's ship, while the battle in *Corsairs* is with a rival pirate spaceship; the concept of the rival pirate crew is absent in *Tortuga*.
- The space dragon and ghost ship scenes in *Corsairs* are presented quickly as part of a montage of intervening adventures during the search, but are major scenes in *Tortuga*.

- The denouement and nature of Starling’s hidden connection to the legendary lost ship differs:
 - In *Tortuga*, Sterling discovers that her father did not drown seeking the wreck, but in fact found it; his last message gives her the strength to turn her back on her obsession. She leaves the treasure behind, including the necklace.
 - In *Corsairs*, a data chip hidden in the necklace, when used in the ship’s computer, discloses proof that Starling is the descendant of the ship’s captain and that her arrival was expected. Starling destroys the ship to prevent it being found by others, but salvages key information and technology against the needs of the future.

Zinger also owns three theme parks in the United States. One classic ride at the parks that originally opened in 1986 was “Space Scoundrels,” whose storyline had as its main character a roguish female freighter pilot. Following the success of *Corsairs*, the ride was modified during the pandemic-related closure of Zinger’s parks so that the main character was now Starling (incorporating the voice of the actor playing Starling and her pirate lingo) and the costumes of the animatronic characters took on piratical aspects. However, the basic story and flow of the ride, which conveys a different story from the film, did not change.

Andrews sued Zinger for copyright infringement in the U.S. District Court for the Central District of Fredonia, alleging that both *Corsairs* and the revamped “Space Scoundrels” infringe her copyright in *Tortuga*. Zinger moved to dismiss on the basis of a lack of substantial similarity between copyrightable elements of Andrews’ work and Zinger’s film and ride. Zinger did not, however, raise in its motion the question of whether it had access to Andrews’ work. Andrews in part argued that the relevance of the various elements of her work and their originality (or lack thereof) would not be obvious without expert testimony, and represented that she had retained an expert who would be prepared to testify on those issues.

The Twelfth Circuit, in which Fredonia is located, does not have well-developed law on substantial similarity. While it tends to follow Ninth Circuit precedent on copyright issues, it has occasionally found other circuits’ reasoning to be more persuasive. The district court granted Zinger’s motion to dismiss, finding that many of the common elements of the works were (1) ideas rather than expression and/or (2) long-existing tropes or scènes à faire, and that on the face of the works at issue no reasonable juror could find that they were substantially similar based on either the copyrightable elements or the arrangement of the uncopyrightable elements. The district court judge rejected the idea that expert testimony would help the analysis and rather nastily noted that the fact that the defendant’s “Starling” character could be easily slotted into a pre-existing theme park ride demonstrated that she belonged to a world of tired old tropes.

Andrews has now appealed.

Story Treatments

Tortuga Tides

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1675, Saint-Domingue. Jane Delahaye, eleven-year-old daughter of a deceased French father and a Haitian mother, listens to her mother tell her the tale of the strange silver necklace she wears. It was found, so the story goes, by her father – a crewman on the ship of infamous pirate Simon LeRouge – in his voyages around the Caribbean. After passing through a strange storm of green clouds and drifting way off course, the battered ship wound up off the coast of a desert island where the crew found the wreck of the *Desiderata*, a Spanish treasure galleon long thought lost. The crew explored the ship and took a fraction of the treasure, with the intent to return for the rest later – her father pocketed the necklace. But the strange storm returned, sinking Simon's ship, and only her father was left alive adrift on a fragment of the ship's hull. Jane's father spent the rest of his life searching for the wreck, and died in the attempt. Jane's mother gives her the necklace.

June 1692, at sea aboard the *Firedrake*. Jane – now called Captain Jane Sterling after the silver necklace she always wears – commands a crew of cast-offs and adventurers, plucked from a dozen ports. Obsessed with finding the *Desiderata*, she faces a near-mutiny from the crew when she announces yet another break from their usual and profitable freebooting to seek the lost ship. The unrest is settled by her first mate, the charming and roguish Philip Desmond, who reminds them of how good they have it on the *Firedrake* and the survival rate of the crew on this ship versus that under other captains, and that they owe Sterling their lives a dozen times over.

In her cabin afterwards, Sterling acknowledges Desmond's support, but does not thank him and tells him she could have handled it. She tells him of her intent to sail for Port Royal, where she has heard there is a sailor spreading rumors about the *Desiderata*. Desmond flirts with her outrageously, but Sterling does not take him seriously; this is just how he is. In fact, Desmond is passionately in love with his captain and his rakish reputation is just a story told in the crew cabins; he hides his true feelings behind the banter because he thinks Sterling's obsession is all she cares about. But he hopes that if somehow she does find the *Desiderata*, things could change.

Elsewhere, the *H.M.S. Relentless* rendezvous at sea with another ship of the line, and a special passenger is shuttled across to the *Relentless* by lifeboat. Captain Arthur Bellington stiffly welcomes aboard Crown agent Bernard Walsingham and demands to know what is so important that his current mission has been interrupted at sea. Walsingham tells the captain that his new mission is to track down and bring Sterling to justice, dead or alive, for her attacks on English traders and military vessels. They discuss Sterling's unusual penchant for sparing her victims – not one sailor on any ship she has attacked has drowned, a fact Walsingham attributes to her horror of her father's death at sea. But when Bellington suggests that she might just be a

weak-hearted woman, Walsingham points out that someone terrified of drowning needs courage to live her life at sea. Walsingham suggests beginning the search at Port Royal, where Sterling is known to appear from time to time, and where he has already seeded rumors about the *Desiderata* to attract her attention. That, he tells Bellington, is Sterling's weakness if it can be called that.

The *Relentless* reaches Port Royal first, and is spotted by the *Firedrake* as it approaches. While Sterling does not know that she specifically is being hunted, she will not make port while a Navy ship is docked. But she also refuses to change her plans, and opts to moor the *Firedrake* in a nearby cove and then make her way into the port alone by foot and in disguise.

In a seedy tavern in Port Royal, Sterling is startled to overhear another person asking about rumors of the *Desiderata*, and whether Sterling herself has been seen in the city. She approaches the stranger – Walsingham – and without disclosing who she is tells him she might be able to put him in touch with Sterling. They leave the tavern together.

Then, disaster. This is June 7, 1692, the date on which Port Royal was destroyed by an earthquake and a subsequent tsunami. The ground shakes, and panic and looting break out as the city begins sliding into the sea. Only through Sterling's quick sword and Walsingham's quick thinking do the pair escape Port Royal on horseback as a titanic tsunami looms behind them. The *Relentless* survives, carried by the enormous wave up and over the submerged town, with dramatic shots of the crew staring dumbfounded at the buildings below them. The *Firedrake* is safe in its secluded cove and Desmond nearly drops his façade of indifference when Sterling returns unharmed with their new companion.

The quest for the *Desiderata* seems to be at a dead end, until Walsingham mentions in passing that disasters seem to be plaguing the Caribbean lately, what with the earthquake, the sighting of giant serpents in the sea between Cuba and Hispaniola, pestilence on Barbados, and a deadly storm of green clouds reported off the coast of Tortuga. Sterling immediately orders the crew to set course for Tortuga.

The *Firedrake* speeds across the Caribbean, hopping between islands in pursuit of more news of the green storm. Walsingham continues in the pose of a mere fortune-hunter, to learn more about Sterling. He finds himself increasingly impressed with Sterling's poise and clear-headedness, her concern for her crew, and her sorrow for those who died in the tragedy at Port Royal. Sterling, thinking she has found someone who understands her need to find the *Desiderata* and from whom she does not need to maintain a distance as captain, starts to open up to the well-spoken and witty man, and sparks begin to fly. Desmond watches all of this with increasing anxiety, of course, and tries to plant doubts in Sterling's mind about this stranger she has just met.

Off of Port-au-Prince, they are intercepted by the *Relentless*, and Walsingham announces with unfeigned sorrow that he must return to his ship. He advises Sterling to surrender, knowing

that it will never happen. Sterling's ship is outmatched, but she nevertheless prepares to fight. Things look bleak for the *Firedrake* as the *Relentless* prepares to fire its cannons, but a sea serpent attacks and gives them an opening to escape.

The *Firedrake* follows in the wake of the storm past Tortuga and beyond. It seems to be leading them on a chase across the water, as if trying to escape them. Her hold over the crew begins to fragment as they chase the killer storm, finally catching up with it near the Bermudas just as the faster *Relentless* catches up with them. The crew mutinies when Sterling orders them to sail into the heart of the storm to escape. They lock Sterling and Desmond in the captain's cabin, and try to surrender to the *Relentless*.

But Captain Bellington refuses Walsingham's demand that he take prisoners, and fires on the other ship. The *Firedrake* begins to sink. Desmond, thinking that this is the end, confesses his love for Sterling; Sterling tells him that they'll talk later because right now they're getting off the ship. She shows him the secret door that she had built into her cabin, and they escape overboard in the chaos. They swim to the far side of the *Relentless* unnoticed and make their way up the side to the bridge.

Sterling surrenders to Bellington, to Desmond's shock, and tells Bellington that despite their mutiny there's no reason to let her crew drown. Bellington tells her there's no point to letting them live, either, since they'd all hang anyway – at which point Walsingham levels a pistol at Bellington and orders the crew to stand down, telling them that Bellington has defied his orders on behalf of the crown; Bellington tells the crew to shoot everyone on the bridge. A fight breaks out on the deck of the *Relentless* with the conflicting orders. At that point the escaping sailors from the *Firedrake* climb over the side and the battle turns to Sterling's side; Sterling winds up crossing swords with Bellington, and defeats him.

Sterling takes control of the ship and her now chastened crew, and they rescue the stragglers. She then orders the crew to sail the *Relentless* into the storm.

As the storm rages around them, flashes of lightning illuminate another ship racing alongside driven by the howling winds – the spectral form of Simon LaRouge's ship, trapped forever in the storm, the skeletal figure of LaRouge himself still at the helm. He laughs maniacally as the rain drives so hard that vision is obscured and the *Relentless* is thrown – not tossed – through a wall of water into bright daylight. The ship is off the coast of a small island; on its shore is the vast hulk of a wrecked ship and a smaller boat close by. The storm rings the entire island as if the isle is in the eye of a hurricane.

Sterling, Desmond, and Walsingham head to the shore in a rowboat. There they find a skeleton resting against the side of the rowboat, and scratched into a plank of driftwood is the last message of Jane's father to his daughter. He did not drown after all, but was trapped here by the storm after finally returning. He says that he regretted his quest, and that he should have left the treasure alone. Sterling recognizes the consequences of her obsession, and removes her

necklace, placing it in the hand of her father. They return to the *Relentless*, and report that the ship had been looted long ago.

A year later. Jane Sterling commands the *Relentless*, now rechristened the *Firedrake's Daughter*. Walsingham is now a member of the crew, and Sterling has not yet chosen either of her would-be suitors. But at least now she has the freedom to think about the choice.

Corsairs of the Cosmos

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In the distant future, in the farthest reaches of space, humanity is one of dozens of intelligent species left scattered across the stars following the collapse of the Old Federation more than a hundred standard years ago. Traders ply the dangerous space lanes between former colonies; they are the only hope for the survival of billions of people, and their own survival depends on what they can buy, what they can seize, what they can keep, and what they can sell. The line between merchant and pirate is vague at best; desperate planets ask few questions. But for all of that, life is free and fortune favors the bold. Now, though, that freedom is threatened by the rise of a new power – the Spinward Imperium.

The film opens at night on the planet Umbra, where it is always night; one side of the planet always faces the system’s sun, and survival is only possible on the dark side. Fifteen-year-old Jayne is a ward of the Traders Guild, having been left with the Guild by her parents when she was an infant. Her family name unknown, she is given the surname that all orphans of the stars are given – “Starling.” Jayne’s sole connection to her parents is a locket that contains a data chip; the Guild has told Jayne that the chip is unreadable, but she doesn’t believe them. Jayne therefore talked her technologically inclined friend Findu, a member of the elfin Desteen race, into sneaking into the Guild data repository with her to use the repository’s tools to hack the chip. They evade security – Jayne is plainly experienced at avoiding security – and Findu nervously gets to work. It is clear that he has a crush on Jayne. He manages to determine that there is a single file on the chip entitled “Asterion,” while the contents of the file are encrypted in a manner he has never seen.

Everyone knows about the *Asterion*, the starship whose disappearance marked the doom of the Old Federation. It supposedly carried a mysterious cargo that would have reunited the fragmenting galaxy – some unbelievable technology, a vast treasure, a diplomatic envoy...no one knew for sure, although there were a thousand theories. The last sighting of the ship was in the Ghost Expanse, a maze of perpetual ion storms that make navigation virtually impossible.

But before they can try anything else, the Guild Hall is attacked by the forces of the Imperium, which is seeking to dominate trade in the sector. Jayne and Findu flee but are separated in the attack. Jayne watches her home of fifteen years reduced to rubble before her eyes.

Twelve years later. Captain Jayne Starling commands the *Dawnbreaker*, a decommissioned gunship operating at the fringes of Imperium space; she scratches out a living by smuggling black market goods to Imperium worlds and occasionally raiding Imperium targets for goods for the worlds that are still free. Her small crew includes her second-in-command, wry ex-Imperium officer Dro Mardi; her new medic, Desteen technohealer Eridu; android engineer Tempus v7.0; her hotshot pilot and navigator, the thousand-degree Fire Elemental Crk’k’ss’k

(“Crackle” to its friends); and her hired muscle, the quiet Umbran shadow-knight Calango L’Ideo.

The crew is complaining about Jayne’s proposal to postpone a raid on an Imperium depot to follow up on a rumor regarding the *Asterion*. One of Crackle’s contacts sent it a message that someone on Tuin Station is selling a map of safe routes through the Ghost Expanse, and Starling wants it. But this is not the first lead that they’ve chased across the sector and beyond, and none of the others have been anything but a waste of time and their scant resources. They put it to a vote – Crackle and Starling vote to go for the map, while Mardi, Tempus and L’Ideo do not. With the Captain winning ties, Eridu has the deciding vote, and after a long look at Starling he supports her. They set course for Tuin Station.

In a briefing room aboard the Imperium dreadnought *Defiance of the Void*, special operative Caren Parrec is receiving a new mission: Track down and eliminate the terrorist Jayne Starling, wanted in connection with theft of Imperium property, trafficking in illicit and stolen goods, assault on Imperium officers, and a dozen violations of transit protocols. Parrec is a self-sufficient and tactically brilliant agent with professional pride but few emotional commitments. She is surprised that there is no murder charge against Starling given the breadth of the woman’s crimes, and learns that her target has gone out of her way to avoid fatalities – even to the extent of risking getting caught to provide treatment to her victims.

Apparently, it was that kind of behavior that led her last medic to quit, but without Starling’s protection the former crew member was quickly arrested by the Imperium. This source told them about Starling’s fascination with the *Asterion*, so when Parrec learns of an intercepted transmission referring to the Ghost Expanse, she knows where she’ll have to go. She gets in a personal shuttle and heads for Tuin Station.

The Station is a vast agglutination of ships fused together, in orbit around a gas giant in a system beyond the Imperium’s borders. It is a crossroads for pirates, smugglers, liars and thieves, offering markets for both business and pleasures of the most disturbing sorts. The *Dawnbreaker* docks and Starling heads off to find the seller of the map with Mardi and L’Ideo; Tempus also leaves the ship to purchase supplies. Crackle and Eridu remain on board, although Eridu is plainly upset about being left behind.

When Starling and crew find the seller, the former navigator on a Gholian Thought-Ship, they discover that they are not the only ones interested in the map. A long-time rival of Starling’s, the felinoid Captain Felix Harrow, is also there to bid, as is a tall, serious-looking woman wearing the garb of a Corediver. A tense auction follows, during which both Harrow’s and Starling’s crew members start getting itchy trigger fingers. It becomes clear, though, that Harrow is simply bringing more money to the table, and Starling is looking at defeat until the other woman proposes that they combine their bids and seek the *Asterion* together. Having no other choice, Starling accepts, and they win the auction together. The seller hands over a memory crystal that Crackle will be able to access.

But Harrow isn't about to let the crystal get away for mere money. After feigning a graceful defeat, he signals his crew to ambush Starling on the way back to the *Dawnbreaker*. Expecting something of the sort, Starling isn't surprised by the attack and L'Ideo demonstrates conclusively that they won't be easy pickings. Nevertheless, Starling winds up separated from her crew and in a running firefight alongside her new partner, who introduces herself as Caren Parrec. Parrec is winged in the course of the fight. Then, after crossing between two of the ship hulls that make up the station, Parrec manages to hack the station's systems while Starling provides covering fire. The hull in which Harrow's crew members are still located detaches from the station and begins to float away, and the pair make their way back to the *Dawnbreaker*.

Eridu is visibly relieved when Starling returns, and puzzled by their new passenger who needs treatment. The medic scolds Starling for her carelessness, as if she were the one who had been injured. The others had already made their way back, including Tempus, who is in engineering. They pick up Parrec's shuttle, which docks with the *Dawnbreaker*, and they hightail it away from the station.

Unbeknownst to the crew, however, Harrow's hired technowizard did a little hacking himself, infecting the android Tempus with a virus that is transmitting the *Dawnbreaker's* location back to Harrow's ship, the *Dealer's Luck*. Harrow sets off in pursuit after retrieving his drifting crew.

The *Dawnbreaker* heads for the Ghost Expanse, and along the way Starling and Parrec discuss their respective interests in the *Asterion*. Parrec's story is a forgery, of course, but she learns of Starling's drive to learn about her parents' connection to the lost ship, and what that might tell her about her own identity. Starling tells her about the destruction of the Guild Hall and Starling's hatred of the Imperium, and her hope that whatever the *Asterion* was carrying might still help to create a safe and free galaxy. Despite herself, Parrec finds herself admiring Starling, and more than admiring. For her part, Starling is fascinated by this woman who has the courage and competence to explore the galaxy all by herself, and is intrigued by her mystery.

The crew of the *Dawnbreaker* notices the chemistry and is generally supportive; after all, a happy captain means a happy crew. But Mardi warns Starling that Parrec's mannerisms suggest that she once worked for the Imperium; Starling points out that Mardi did as well. And Eridu actively dislikes Parrec, treating her with cold indifference and objecting when Starling gives Parrec a vote in the ship's affairs.

Starling eventually confronts Eridu, telling him he's got a lot of nerve objecting to her choices when he's nearly as new to the ship as Parrec. He asks if she truly does not recognize him, and reveals that he was once Findu, her teenage friend, before the transformation that all Desteen go through when they reach maturity. Ever since the night when the Guild Hall was destroyed, he had been looking for her. He did not reveal himself previously because he wanted her to see him as an adult, albeit an adult who still loves her and wants to help her achieve her dream.

At that moment, Crackle pages Starling on the comm system. They have reached the Ghost Expanse. Cutting off their conversation for now, Starling and Eridu head for the bridge with the rest of the crew. They all stare in wonder at the swirling green storms in space, as Crackle absorbs the memory crystal. On the screen in front of them a winding course is overlaid on the Expanse. Starling orders them to proceed.

The transit is not easy. Along the way they find a derelict ghost ship, evidence of travelers whose luck ran out, and engage in a brief game of cat-and-mouse with a Stellar Dragon that has made its lair in the Expanse. Crackle's navigational skills are tested to the utmost – his thermal containment unit nearly fails – and Tempus has to overclock his processor to keep up with the stresses that the journey is placing on the *Dawnbreaker*. But eventually, they reach the center of the cosmic maze, and find the *Asterion* waiting like the Minotaur in its fearsome bulk.

The dark and silent ship is massive, far more massive than any ship, Imperium or free trader, that still plies the pathways of space. Starling eyes the vessel with unalloyed eagerness, and she orders Parrec, L'Ideo, Eridu, and Tempus to accompany her in Parrec's shuttle to the other ship.

As they approach, a docking ring eerily lights up like a sleeping cat opening one eye. They dock, and their sensors reveal cool but not frigid temperatures and stale but breathable atmosphere on the other side – life support is still functioning at minimal levels more than a hundred years later. Eridu observes that he has seen similar environments on suspended animation long-haul transports. Could someone still be alive here? They open the airlock and cross into the *Asterion*.

Meanwhile, the *Dealer's Luck* has followed the *Dawnbreaker's* route through the Expanse and launches a surprise attack on Starling's ship. With only Crackle and Mardi on board, the *Dawnbreaker* is ill-prepared for a firefight, but Crackle takes evasive action as Mardi heads for one of the gun turrets and tries to contact Starling.

Outside signals do not penetrate the *Asterion's* hull, so Starling and the others have no clue what is happening outside. They reach the bridge of the *Asterion*; there is not a soul to be found and the viewscreens are dark. There is only one amber light flashing on a console above a data chip port. Shivering, and not from the cold, Starling opens her locket, takes out the data chip, and inserts it into the console. She lets out a small yelp when her finger is pricked by a needle that pops out of the data port.

Suddenly, the bridge is illuminated as the ceiling lights come on, and there is a hum of electricity as the consoles come to life. "Genetic match," intones a bodiless voice. "Decryption initiated."

A moment later, a hologram appears in the center of the bridge – an older man wearing the uniform of a captain of the Old Federation. He introduces himself as the captain of the *Asterion*, and announces that if they can hear him, then the person who used the data chip is his

direct descendant. He recorded the chip before he left, as a way to encourage his descendants to find the ship when the time was right and to explain what he had done. It turns out that the crew intentionally hid the ship because of the power of what it was carrying: teleport devices capable of connecting planets directly without the need for space travel. Military superiority in space would be meaningless, and the worlds of the galaxy would be unified as never before. But the crew knew the Old Federation was dying, and that rather than saving the galaxy the devices would prolong the death throes of a civilization that needed to fall. The last thing the crew did was use one of the devices to travel to a distant planet far beyond the Federation's reach, to live out their lives in peace and secrecy. But one day they knew that it would be time to build anew.

Parrec pulls out her pistol and aims it at Starling, claims the ship in the name of the Spinward Imperium, and asks that they please drop their weapons. She admits that she originally was assigned just to capture Starling, but that she couldn't pass up the opportunity to recover the *Asterion* when it appeared that Starling might actually succeed. The *Asterion*'s technology will make the Imperium unbeatable. She admits her feelings for Starling but states that she has to perform her duty.

Starling nods regretfully, but instead of dropping her weapon points it at Parrec instead. Parrec pulls the trigger, and Eridu dives in front of Starling – but nothing happens. Starling had taken Mardi's warning seriously and had L'Ideo neutralize Parrec's weapons, just in case. During the exchange, L'Ideo has moved behind Parrec and disarms her. Eridu wryly observes that it didn't turn out to be the noble self-sacrifice that he'd planned.

Just then the bodiless voice announces a proximity warning, and the viewscreens come on. They see the fight between the *Dawnbreaker* and the *Dealer's Luck*. Starling voices her frustration that she's not on her ship, but Tempus, who has been examining the console, says he thinks that can be arranged. The ship can open a portal from here to the *Dawnbreaker* quite easily. But Starling smirks – she has another idea.

On the bridge of the *Dealer's Luck*, Harrow is startled when a door made of light appears in the middle of his bridge and Starling and L'Ideo leap out, guns blazing. Within moments the bridge crew are stunned and Starling floods the rest of the ship with anesthetic gas. They signal the *Dawnbreaker* that the fight is over.

The crew unanimously votes to destroy the *Asterion* to prevent the Imperium from recovering it. They do, however, download the designs for the teleporters and transfer two of the devices to their hold for the time when the galaxy is ready for them; then they set the *Asterion* to self-destruct. They also clear the tracking virus from Tempus' systems and sabotage Parrec's shuttle and the *Dealer's Luck* just enough to give the *Dawnbreaker* a few days' head start as they leave the Expanse.

Starling observes that she has her answers, of a sort, and possibly even relatives in some distant part of the galaxy. More importantly, she has questions regarding Eridu that she now has the time to answer.

Bench Brief

I. Standards for a Motion to Dismiss on the Basis of Substantial Similarity

The plaintiff's basic burden in a copyright infringement claim is to demonstrate "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). The Ninth Circuit has held that this second element itself requires proof of two components, "copying" and "unlawful appropriation." *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020). "Copying" requires either (1) direct evidence of copying or (2) evidence that the defendant had access to the plaintiff's work and that there are similarities that tend to negate a claim of coincidence or independent creation; "unlawful appropriation," on the other hand, requires that the works share "*substantial* similarities." *Id.* The Second Circuit parses the plaintiff's burden similarly. *See Abdin v. CBS Broadcasting Inc.*, 971 F.3d 57, 66 (2d Cir. 2020) (second element under *Feist* requires proof of actual copying and substantial similarity).

The only issue in this hypothetical case is whether the defendant properly obtained dismissal of the plaintiff's claim under Rule 12(b)(6) on the basis of a lack of substantial similarity between *Tortuga Tides* and *Corsairs of the Cosmos*.¹ The federal circuits have generally recognized that 12(b)(6) motions may be premised on a lack of substantial similarity in appropriate cases; the Third Circuit noted that while these motions were once disfavored, there has been a growing trend toward affirming dismissals on this basis. *See Tanksley v. Daniels*, 902 F.3d 165, 171 (3rd Cir. 2018) (collecting sources). *See also Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 602 F.3d 57, 63-65 (2d Cir. 2010) (although substantial similarity can present close question of fact, in proper cases resolution of issue on motion to dismiss is consistent with Second Circuit precedent and long-standing practices of district courts in the circuit, and has been endorsed by sister circuits) (collecting cases).

The Ninth Circuit has not issued a published decision affirming the dismissal of a case alleging infringement of a literary work on substantial similarity grounds before discovery has been conducted. However, the court noted in a memorandum opinion in *Masterson v. Walt Disney Co.* that it had "affirmed such dismissals repeatedly over the past decade in unpublished memorandum dispositions," and that "other circuits have affirmed Rule 12(b)(6) dismissals on the basis of no substantial similarity when dealing with literary works." No. 19-55650, 821 Fed. App'x 779, 780-81 & n.1 (9th Cir. Aug. 3, 2020) (citing cases). *See also Benay v. Warner Bros.*

¹ Prior to the Court of Appeals' decision in *Skidmore*, the Ninth Circuit had periodically followed the "inverse ratio" rule, which had blended various elements of the infringement inquiry by allowing proof of a high degree of access to offset weak evidence of substantial similarity. Essentially, the *Skidmore* court decided that the rule improperly crossed the wires: "Access does not obviate the requirement that the plaintiff must demonstrate that the defendant actually copied the work. By rejecting the inverse ratio rule, we are not suggesting that access cannot serve as circumstantial evidence of actual copying in all cases; access, however, in no way can prove substantial similarity. We join the majority of our sister circuits that have considered the inverse ratio rule and have correctly chosen to excise it from copyright analysis." 952 F.3d at 1069.

Entertainment, Inc., 607 F.3d 620, 624 (9th Cir. 2010) (holding in summary judgment case that “[s]ubstantial similarity is a fact-specific inquiry, but it may often be decided as a matter of law.”); *Funky Films, Inc. v. Time Warner Entertainment Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006) (“Although summary judgment is not highly favored on the substantial similarity issue in copyright cases, ... substantial similarity may often be decided as a matter of law.”). *But see Astor-White v. Strong*, No. 16-55565, 733 Fed. App’x 407, 408, 410 (9th Cir. Aug. 1, 2018) (“*Astor-White I*”) (Wardlaw, J., concurring) (“[D]ismissal of a complaint for lack of substantial similarity before any discovery is virtually unheard of. ... [S]ummary judgment is not highly favored on the substantial similarity issue in copyright cases, ... and should be even more disfavored on a motion to dismiss.”).

However, the nature of the court’s inquiry varies between the federal circuits. In a case alleging that a Ricky Martin music video infringed a video submitted to a contest sponsored by Martin and Sony, the First Circuit held that a bald allegation that the videos were “almost identical” was sufficient to defeat a motion to dismiss where there was a reasonable inference that the defendant had access to the plaintiff’s work. *Cortés-Ramos v. Martin-Morales*, 956 F.3d 36, 42 (1st Cir. 2020). The Second and Third Circuits, by contrast, will look beyond the four corners of the complaint to compare the actual works at issue. *See Peter F.* at 64 (on motions to dismiss “[i]n copyright infringement actions, the works themselves supersede and control contrary descriptions of them ... , including any contrary allegations, conclusions or descriptions of the works contained in the pleadings”); *see also Montgomery v. NBC Television*, No. 19-3665, 2020 U.S. App. LEXIS 35731, *2 (2nd Cir. Nov. 12, 2020) (comparing actual works on Rule 12(b)(6)); *Tanksley* at 172 (same). The Second Circuit reviews a district court’s determination of substantial similarity *de novo*. *Abdin*, 971 F.3d at 66.

The Ninth Circuit distinguishes between an “intrinsic” and “extrinsic” test for substantial similarity, with only the extrinsic test being appropriate for resolution on a motion to dismiss. As the Ninth Circuit recently explained,

The extrinsic test involves “assess[ing] the objective similarities of the two works, focusing only on the protectable elements of the plaintiff’s expression.” [*Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118 (9th Cir. 2018).] In the extrinsic test, the court first filters out unprotectable elements, which are “primarily ideas and concepts, material in the public domain, and scènes à faire (stock or standard features that are commonly associated with the treatment of a given subject).” *Id.* The remaining protectable elements are then compared “to assess similarities in the objective details of the works.” *Id.* (emphasis added). ... The intrinsic test, on the other hand, “requires a more holistic, subjective comparison of the works to determine whether they are substantially similar in ‘total concept and feel.’” [*Id.*] “Only the extrinsic test’s application may be decided by the court as a matter of law, so that is the only test relevant in reviewing the district court’s ruling on a motion to dismiss.” *Id.*

Masterson at 781-82. Under the extrinsic test, the court may only consider “specific expressive elements: the test focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works.” *Benay*, 607 F.3d at 624. *See also Astor-White v. Strong*, No. 19-55735, 817 Fed. App’x 502, 503-04 (9th Cir. Aug. 21, 2020) (“*Astor-White II*”) (affirming dismissal after district court correctly applied extrinsic test).

Other courts do not draw that distinction, and might consider the “total concept and overall feel” on a motion to dismiss. *See, e.g., Montgomery*, 2020 U.S. App. LEXIS 35731, *3; *Tanskley* (“[S]ubstantial similarity can be grounded in a work’s ‘total concept and feel,’ ... and courts are admonished not to lose sight of material similarities by balkanizing a unified copyrighted work into constituent elements, which are then compared in isolation.”); *see also Tolbert v. Discovery, Inc.*, No. 4:18-cv-00680, 2020 U.S. Dist. LEXIS 106451, *6 (N.D. Ala. Jun. 17, 2020) (test is whether “an average lay observer would recognize that the infringer appropriated from the copyrighted work”).

In arguing this case, Andrews and Zoetrope might opt to focus on the Ninth Circuit’s “extrinsic test” and bypass considerations of the “total concept and feel” of the pictures. It would be fair, however, to ask the parties how it would change their arguments if the court were to follow the Second and Third Circuits and take “total concept and feel” into account.

II. Is an Expert Witness Necessary?

The Ninth Circuit has held that granting a motion to dismiss based on substantial similarity might be inappropriate in some cases “when the court finds it plausible that two works are substantially similar and that expert testimony could be helpful.” *Masterson* at 781. However, “where the court’s judicial experience and common sense show[] that the claims are not plausible and that a comparison of two works creates no more than a mere possibility of misconduct[,]” *id.*, then expert testimony is not relevant.

The Ninth Circuit has also suggested that expert testimony may be helpful to sort out original expression from scènes à faire, *Zindel v. Fox Searchlight Pictures, Inc.*, No. 18-56087, 815 Fed. App’x 158, 160 (9th Cir., Jun. 22, 2020), especially where older works at issue might have shaped tropes that appear common today, *see Alfred v. Walt Disney Co.*, No. 19-55669, 821 Fed. App’x 727, 729 (9th Cir., Jul. 22, 2020). It has also suggested that experts can assist with the “objective literary analysis needed to determine the extent and qualitative importance” of similarities between plot sequences and other expressive elements. *Zindel* at 160. *See also Astor-White I* at 409 (Wardlaw, J., concurring) (comparing movie treatment to finished film requires specialized knowledge a court lacks, and an expert might be able to show that apparently generic elements were not generic when written); *Irish Rover Entertainment, LLC v. Sims*, No. 20-cv-06293, slip op. at 4-5 (C.D. Cal. Jan. 21, 2021) (denying motion to dismiss, finding that expert testimony would be useful on “qualitative[] significance” of alleged similarities and that it was

difficult at the pleading stage to distinguish protectible from unprotectible material), *citing Alfred* at 728-29.

Other courts, most notably the Third Circuit, have seen such testimony as irrelevant to the comparison of dramatic works as opposed to special kinds of works like computer programs. *Tanksley* at 172 & n.3. *See also Purohit v. Legend Pictures, LLC*, 448 F. Supp. 3d 382, 387 (D. Del. 2020) (in deciding motion to dismiss on lack of substantial similarity, court noted that the plaintiff had failed to suggest that expert testimony would make a difference). The Second Circuit has left the question of whether an expert is helpful to the discretion of the district court. *Peter F.*, 602 F.3d at 65; *see also Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2nd Cir. 1992) (in case involving software copyright, “we believe that the trier of fact need not be limited by the strictures of its own lay perspective”). However, the Second Circuit has not explicitly addressed the question in a case involving dramatic works.

While the court’s expert in this case will not be offering a formal opinion, the expert may offer commentary on what role expert testimony could play in this case going forward, for either the plaintiff or the defendant. The court might ask either party how they see such testimony figuring into their cases if the court deems it relevant.

III. Comparing the Specific Elements of the Works

A common approach to presenting the plaintiff’s case on substantial similarity is to list as many elements as possible that the works share in common, looking at the “plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works.” *Benay*, 607 F.3d at 624. Sometimes this works, as in the Ninth Circuit’s decision in *Alfred*:

We agree with Plaintiffs that the screenplay shares sufficient similarities with the film to survive a motion to dismiss. *The Pirates of the Caribbean: Curse of the Black Pearl* film and the screenplay both begin with a prologue that takes place ten years prior to the main story; introduce the main characters during a battle, at gunpoint; involve treasure stories that take place on islands and in jewel-filled caves; include past stories of betrayal by a former first mate; contain fearful moments driven by skeleton crews; focus on the redemption of a young, rogue pirate; and share some similarities in dialogue and tone. To be sure, there are striking differences between the two works, as well—but the selection and arrangement of the similarities between them is more than de minimis.

821 Fed. App’x at 729.

However, many courts express skepticism of such lists as “inherently subjective and unreliable, particularly where the lists contain random similarities, and many such similarities could be found in very dissimilar works.” *Tolbert*, 2020 U.S. Dist. LEXIS 106451, *12. *See also Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045-46 (9th Cir. 1994) (“[W]e are

equally unimpressed by Kouf's compilation of random similarities scattered throughout the works, such as a lawnmower scene, a sprinkler scene, the presence of an attic, danger scenes, concerned parents, and kids sleeping outside overnight.”); *Montgomery*, 2020 U.S. App. LEXIS 35731, *5 (list is unpersuasive where it “merely emphasizes random similarities scattered throughout the works, and such a list ... fails to address the underlying issue: whether a lay observer would consider the works as a whole substantially similar to one another.”); *Masterson* at 782 (“The similarities between the Movie and the Book are more like random similarities scattered throughout the works, of which this court has been particularly cautious.”); *Carlini v. Paramount Pictures Corp.*, No. 19-cv-08306, slip op. at 15 (C.D. Cal. Feb. 2, 2021) (“In providing a list of overlapping plot points, Plaintiff adopts a general approach bound to capture superficial similarities, especially in a romantic comedy about a woman who is able to hear men’s thoughts.”).

Instead, courts have examined the specific similarities at issue and attempted to determine whether they:

- 1) represent ideas rather than expression, *see, e.g., Abdin* at 71-72 (filtering out general “themes” such as space travel or alien encounters from protectible elements); *Carlini*, slip op. at 14 (general plot devices are ideas rather than expression);
- 2) are unprotectible *scènes à faire*, i.e., “situations and incidents that flow necessarily or naturally from a basic plot premise,” *Benay* at 624-25; *see also Tanksley* at 175 (“In dramatic works, an important category of unprotected content is *scènes à faire*, or plot elements that flow predictably from a general idea. In a film about a college fraternity, for example, ‘parties, alcohol, co-eds, and wild behavior’ would all be considered *scènes à faire* and not valid determinants of substantial similarity.”); or
- 3) are unprotected because they are unoriginal, such as historical facts or stock scenes “that are staples of literature.” *Benay* at 624-25.

After conducting that analysis, the court examines the protectible elements to determine whether there are sufficient points of similarity between those elements to support a finding of substantial similarity. As the district court found in *Tolbert*,

Ms. Tolbert provided a list of 13 allegedly infringing similarities between her teaser and *Good Bones*. (Doc. 1 at 14-16). While some of these similarities are, as Discovery argues, integral to the subgenre—for example, “the show is a mother-daughter team”—some of the alleged similarities do not “necessarily follow from” the common theme of mother-daughter renovation and do not present “[i]ncidents, characters, or settings that are indispensable or standard in the treatment of” mother-daughter renovation shows. *See Herzog [v. Castle Rock Entertainment]*, 193 F.3d 1241, 1248 (11th Cir. 1999).

For example, Ms. Tolbert alleges specific visual similarities between her teaser and *Good Bones*, including the visual representation of the titles of the shows in paintbrush font and the visual image of the women sitting back-to-back in black t-shirts. ... She includes screenshots from her teaser and *Good Bones* that allege similarities in wardrobe and blocking. ... The specificity of these allegations, and the fact that they are not standard or indispensable for the genre, go beyond mere *scenes a faire* and show that Ms. Tolbert's allegations do not contain only uncopyrightable material.

2020 U.S. Dist. LEXIS 106451, *8-9.

It is not always easy to distinguish protectible and unprotectible elements. *See Alfred* at 729 (“The district court noted some of these similarities but dismissed the action largely because it concluded that many of the elements the two works share in common are unprotected generic, pirate-movie tropes. But, at this stage of the litigation, it is difficult to know whether such elements are indeed unprotectible material.”). Moreover, the Second Circuit has cautioned that although it is necessary to distinguish copyrightable elements from uncopyrightable elements, *see Peter F.*, 602 F.3d at 66 (court must be more discerning where plaintiff's work has both protectible and unprotectible elements, extracting the latter from its consideration), this does not mean that the works must be dissected and the copyrightable elements compared outside of the context in which they appear, *see id.* (“[W]e have disavowed any notion that we are required to dissect the works into their separate components, and compare only those elements which are in themselves copyrightable.”). *See also Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2nd Cir. 1995) (court was not required to consider copyrightable elements of sweater designs only after they were artificially divorced from uncopyrightable background elements). Rather, the focus of the test in the Second Circuit remains on the “total concept and overall feel” of the works. *Peter F.* at 66.

The Ninth Circuit has also recognized that even unprotectible elements can be arranged in a unique and protectible way, such as the sequence of events in a plot. *See Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002) (“[T]he presence of so many generic similarities and the common patterns in which they arise do help the Metcalfs satisfy the extrinsic test. The particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element.”). *See also Alfred* at 729 (“[E]ven when individual elements are not protected ... their original selection, coordination, and arrangement may be protectible expression.”), *citing Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 849 (9th Cir. 2012).

Failing to conduct any analysis of the selection and arrangement of unprotectible elements at all could be reversible error. *See Alfred* at 729 (“The district court erred by failing to compare the original selection and arrangement of the unprotectible elements between the two works.”). And if the defendant does copy something original and protectible about the sequence of events in the plaintiff's story, the Second Circuit has noted that the defendant “does not escape

infringement by adding original episodes somewhere along the line.” *Warner Bros. v. ABC*, 720 F.2d 231, 242 (2nd Cir. 1983).

Nevertheless, courts have been skeptical about relying upon patterns of unprotectible elements outside of clear-cut cases. *Ricketts v. CBS Corps.*, 439 F. Supp. 3d 1199, 1220-21 (C.D. Cal. 2020) (citing cases). Moreover, some courts have found that a sequence of events may flow naturally from a common unprotectible concept such that similarities should be discounted. See *Abdin* at 71 (“[C]opyright also does not protect generic ... storylines involving aliens or advanced technology.”), citing *Wavelength Film Co. v. Columbia Pictures Indus., Inc.*, 631 F. Supp. 305, 307 (N.D. Ill. 1986) (describing indispensable elements in science fiction: “an alien arrives on earth in a spaceship; all humans are afraid of the unknown alien; governmental authorities are trying to capture or destroy the alien; one human becomes friendly with the alien and tries to help it return home safely; and the alien leaves earth on a spaceship”); *Ricketts* at 1212 (premise of talented African-American football player from the “hood” who plays for a school in a “more privileged” area naturally results in certain plot points such as conflict with white football player and scenes where the protagonist goes back and forth between the “hood” and the “privileged” area); *Carlini*, slip op. at 16 (“[I]f a traumatic event causes the .. gain and loss [of a super power], a hospital scene—including the discovery of the gain and loss at the hospital— naturally flows from the general plot.”); see also *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1177 (9th Cir. 2003) (“there are only a finite number of ways to reveal the secrets behind magic tricks, and the perform and reveal sequence is the most logical ‘expression’ of this idea”).

In this case, the court might ask whether it is enough to survive a motion to dismiss that similarities are listed, and whether the significance of those similarities is better addressed on summary judgment after discovery. The court might also press the parties on whether the plot beats are original or standard tropes from adventure stories, and whether the sequence of events in the stories flows from the basic concept of the story (hero gets a lead on hidden treasure, hero follows lead, hero encounters challenges on the way, hero ultimately reaches goal) or represents something more original.

IV. The Relevance of General Plot, Themes and Genre

The general plot, theme or genre of a movie is an unprotectible idea, and therefore will not support a finding of substantial similarity. See *Funky Films*, 462 F.3d at 1081 (“At a very high level of generality, both works share certain plot similarities ...[.] But general plot ideas are not protected by copyright law; they remain forever the common property of artistic mankind.”); *Kouf* at 1045 (“We attach no significance to the fact that both works involve a life struggle of kids fighting insurmountable dangers, because general plot ideas are not protected by copyright law.”); *Masterson* at 782 (“Though the works share a general theme— i.e., every feeling has a reason—such a theme is too general to be protectible for the purposes of the extrinsic test. The fact that the Book and the Movie involve a journey through childhood emotions is also too

general to be a cognizable similarity.”); *Briggs v. Cameron*, No. 20-cv-01596, 2020 U.S. Dist. LEXIS 192450, *4 (N.D. Cal. Oct. 16, 2020) (themes such as “the primacy of family and the horror of corporate greed” not protectible).

The challenge for the court is to decide how refined the presentation of an idea must be before it crosses the line into protectible expression. As the Third Circuit explained in *Tanksley*,

The difficulty of this analysis derives from the impossibility of drawing an exact line between what constitutes an idea — which is not protected — and an expression — which is. This challenge is particularly acute in the case of dramatic works. As Judge Hand described:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.

... *Tanksley*’s complaint exemplifies these difficulties. His copyright undoubtedly protected more than the literal expression in *Cream*, but it is difficult to draw a principled line to determine at what level of abstraction the expression in *Cream* loses its protection and becomes a mere idea. Is the premise of a television show based on an African-American record executive expression or idea? What about a record executive dealing with family strife? Or dealing with family strife and his relatives’ efforts to gain control of his company?

902 F.3d at 174.

Note also that while similarity of themes and genre do not by themselves support a finding of substantial similarity, changes in genre between the plaintiff and defendant’s respective works can create a difference in the overall impression of the works that undercuts substantial similarity in those federal circuits that are not limited to the Ninth Circuit’s “extrinsic test.” In *Montgomery*, the Second Circuit noted that differences in tone and genre resulted in a “very different” “total concept and overall feel”:

The True Story is a naturalistic character sketch that closes with the mysterious disappearance of the narrator’s close friend after he moves in with a pair of elderly Nazis. The Fictionalized Story appears to be the opening portion of a

Nazi-hunting thriller. By contrast, the [defendants'] miniseries is a horror story in which a group of Satanists employ supernatural powers[.]

2020 U.S. App. LEXIS 35731, *3-4.

A challenge in this case for both parties is determining the right level of detail at which to pitch their arguments to show either similarity or dissimilarity. If the plaintiff's side speaks too generally, they risk criticism that they are attempting to protect general ideas rather than specific expression. If the defendant's side is too specific, they risk criticism that they are attempting to distract the court from the essential similarity of the works by focusing on insignificant distinctions. The court could press both sides on whether they are arguing at the right level.

The court might also press the defendant on whether the change from a sea story to a space story is really that significant, because it is a common trope to recycle dramatic works with a nautical theme into works set in space. Consider, as a light-hearted example, 1982's animated series *Gilligan's Planet*, which took the familiar castaways from *Gilligan's Island* and stranded them on a distant planet instead of the eponymous desert isle. Moreover, using nautical travel as a metaphor for space travel is a common technique, as shown by the consistent use of naval terminology throughout more than fifty years of *Star Trek* and more than forty years of *Star Wars*.

V. Prominence of Copied Elements

It is common in substantial similarity arguments for the relative prominence of particular elements of the parties' works to differ. The fact that a defendant uses a protectible element of the plaintiff's work as a minor element of its own work will generally not prevent a finding of infringement. *See Tanksley* at 174 ("Even if what was taken from *Cream* forms but a minor element in *Empire*, infringement has occurred so long as what was taken was a material part of Tanksley's work."), citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-65 (1985) ("A taking may not be excused merely because it is insubstantial with respect to the *infringing* work."). *See also Astor-White I* at 408 ("Even if a copied portion of a work be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity.").

However, the reverse is not necessarily true. In *Abdin*, the Second Circuit found it relevant in rejecting a claim of substantial similarity that an allegedly copied element (the use of a creature based on real-world tardigrades as a method of space travel) was of uncertain relevance to the plaintiff's work but was central to the defendant's story:

Most significantly, while it is unclear what role the nameless tardigrade plays in the Videogame, Ripper is very much at the center of a fully-developed story in Episodes 3, 4, and 5 of the first season of Discovery. It is given the nickname Ripper because it is first encountered attacking and killing numerous Starfleet

personnel and Klingons. App'x at 45-46. While Ripper is first believed to be “inherently hostile,” its character evolves as Burnham and her colleagues eventually discover that Ripper was violent only in self-defense and is “not a direct threat to life.” App'x at 45-46. When Burnham realizes that the crew's use of Ripper in the DASH Drive is doing it harm, she and others try to intervene. And when the jumps take too great a toll on Ripper, another crew member takes Ripper's place to facilitate the jumps. In the end, completing the story, Burnham and the Discovery crew determine to set Ripper free so that it might live long and prosper.

In sum, even assuming Abdin's original expressions of a space-traveling tardigrade may be protectible under copyright law, an independent comparison of the works reveals that there is no substantial similarity between the protectible features of Abdin's tardigrade and Ripper from Discovery.

971 F.3d at 70.

Here, some elements of *Tortuga* have particular relevance to the plot, for example, the sea serpent attack and the symbolic encounter with Simon LaRouge's ghost ship in the storm at the end. The similar scenes in *Corsairs* (the space dragon and the encounter with the abandoned ship) are more embellishments than core story beats, but the court might press the defendant on whether that matters. On the other hand, the court might press the plaintiff as to whether the fantasy-based elements in *Tortuga* are really similar to the comparable elements in *Corsairs*.

VI. Copyrightability and Infringement of a Particular Character

One issue in the hypothetical is whether the Jane Sterling character from the plaintiff's work is independently copyrightable. Indeed, the plaintiff's claim based on the defendant's theme park ride would seem to depend entirely on the “Jayne Starling” character's inclusion in that ride.

Character infringement claims present particularly difficult issues. The Second Circuit noted in *Warner Bros. v. ABC* that “[w]hen, as in this case, the claim concerns infringement of a character, rather than a story, the idea-expression distinction has proved to be especially elusive.” 720 F.2d at 240. In *Daniels v. Walt Disney Co.*, the Ninth Circuit explained the standards for granting copyright protection to characters in a dramatic work as follows:

Although characters are not an enumerated copyrightable subject matter under the Copyright Act, *see* 17 U.S.C. § 102(a), there is a long history of extending copyright protection to graphically-depicted characters. *See, e.g., Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978). However, “[n]ot every comic book, television, or motion picture character is entitled to copyright protection.” [DC

Comics v.] Towle, 802 F.3d [1012,] 1019 [(9th Cir. 2015)]. A character is entitled to copyright protection if (1) the character has “physical as well as conceptual qualities,” (2) the character is “sufficiently delineated to be recognizable as the same character whenever it appears” and “display[s] consistent, identifiable character traits and attributes,” and (3) the character is “especially distinctive” and “contain[s] some unique elements of expression.” *Id.* at 1021 (internal citations and quotation marks removed).

...

Although a character that has appeared in multiple productions or iterations “need not have a consistent appearance,” it “must display consistent, identifiable character traits and attributes” such that it is recognizable whenever it appears. *Id.*

958 F.3d 767, 771 (9th Cir. 2020). Applying these standards, the court held that the plaintiff’s “Moodsters,” a set of characters representing human emotion and each associated with a particular color, were insufficiently defined where their specific names and appearance varied across various iterations of the plaintiff’s work. *Id.* at 772-73.²

If a character has been drawn from the public domain, some courts have held that it might still be protectible if it constitutes a “distinguishable variation” apart from generic elements. *See Purohit* at 388 (discussing protectability of author’s variation of legendary Krampus character and finding elements such as “horns like those of a Walia ibex, a lack of black fur, a pronounced hunch, a long beard, glowing slanted eyes, a tattered red robe, limply bent arms, and clawed hands” to be “too common and generic.”), *citing Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927).

Even where characters are copyrightable, the similarities between characters must also exceed basic characteristics. In *Abdin*, the Second Circuit rejected a claim of character infringement based on similarities in characters’ physical characteristics and profession:

Courts in this circuit have routinely denied character infringement claims sharing far more similar characteristics and features. *See, e.g., Alexander v. Murdoch*, No. 10-cv-5613 (PAC), 2011 WL 2802923, at *5 (S.D.N.Y. July 14, 2011)

² The *Daniels* court also recognized a separate category of characters entitled to protection that it found inapplicable:

Since the 1950s, we have also extended copyright protection to characters—both literary and graphic—that constitute “the story being told” in a work. *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954); *see also Rice*, 330 F.3d at 1175-76; *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008). A character is not copyrightable under this test where “the character is only the chessman in the game of telling the story.” *Warner Bros. Pictures*, 216 F.2d at 950. This is a high bar, since few characters so dominate the story such that it becomes essentially a character study.

958 F.3d at 773-74. This category is unlikely to apply to the plaintiff’s work in the hypothetical, which is much more of a plot-driven story than a character study.

(dismissing claim where both characters shared the same sex and hair color, as well as similar mannerisms), *aff'd*, 502 F. App'x 107 (2d Cir. 2012); *Cabell v. Sony Pictures Entm't, Inc.*, 714 F. Supp. 2d 452, 454 (S.D.N.Y. 2010) (granting summary judgment where characters were both military-trained hairstylists who fight crime with hairdryers as weapons), *aff'd*, 425 F. App'x 42 (2d Cir. 2011).

Abdin, 971 F.3d at 72. As the Second Circuit explained in *Warner Bros. v. ABC*,

Ultimately, care must be taken to draw the elusive distinction between a substantially similar character that infringes a copyrighted character despite slight differences in appearance, behavior, or traits, and a somewhat similar though non-infringing character whose appearance, behavior, or traits, and especially their combination, significantly differ from those of a copyrighted character, even though the second character is reminiscent of the first one. Stirring one's memory of a copyrighted character is not the same as appearing to be substantially similar to that character, and only the latter is infringement.

720 F.2d at 242.

Because the plaintiff's work is an unmade screenplay, there is no visual portrayal to compare. And while the defendant apparently believed that its "Jayne Starling" character was distinctive enough to anchor a theme park ride (notwithstanding the district court's commentary), the independent distinctiveness of the defendant's character is not at issue. Thus, the court should press the plaintiff on whether the elements of Sterling's character in *Tortuga* are significant enough to warrant granting the character independent protection, and whether those particular elements were copied by the defendant. Meanwhile, the defendant should expect questions as to why the characters have the same basic name if one was not copied from the other.

Note that characters that are not independently copyrightable may still be considered as elements of a claim of overall substantial similarity between two works; thus, the similarity between the two St*rlings may be relevant to the infringement claim over the film even if the claim as to the theme park ride fails. *See Abdin* at 66 ("we examine the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting."); *Carlini* at 17 ("The 'gay best friend' character is common in comedies, particularly in romantic comedies, and is not a unique plot element standing alone. But the specific subplot about this supporting character ... is arguably unique and substantially similar.").

In that respect, the remarkable similarity in name between plaintiff's "Jane Sterling" and the defendant's "Jayne Starling" may carry more weight, although lesser similarities in name or designation have been held to be irrelevant in other cases. *See Ricketts* at 1216 (fact that lead character in both parties' works was an African-American high school football star who wears number 11 is not sufficient to establish substantial similarity), *citing Marcus v. ABC Signature Studios, Inc.*, 279 F. Supp. 3d 1056, 1069 (C.D. Cal. 2017) ("The fact that the families in both

works have the last name Johnson and both have son characters who are `juniors' is of no consequence, particularly where, as here, the names are generic").

Summaries of Recent Cases

This section is offered as a quick reference to recent cases involving motions to dismiss infringement claims involving audio-visual works on the basis of a lack of substantial similarity.

Courts of Appeals:

Cortés-Ramos v. Martin-Morales, 956 F.3d 36 (1st Cir. 2020)

In a copyright lawsuit asserting that the video for **Ricky Martin’s song “Vida”** infringed a video that the plaintiff submitted to a contest allegedly sponsored by Martin, the First Circuit overturned the district court’s ruling that the plaintiff had failed to plead factual copying, holding that the plaintiff’s allegation that the two works were “almost identical” was sufficient to “support a reasonable inference of similarity” and to survive a motion to dismiss.

Montgomery v. NBC Television, No. 19-3665, 2020 U.S. App. LEXIS 35731 (2nd Cir. Nov. 12, 2020)

In a copyright lawsuit alleging that two-part miniseries ***Rosemary’s Baby*** infringed the plaintiff’s copyright in two short stories, the Second Circuit affirmed the district court’s grant of a motion to dismiss, finding that the “total concept and overall feel” of the works were different. The court noted differences in tone and genre, and found that allegedly common plot elements were just random similarities.

Abdin v. CBS Broadcasting Inc., 971 F.3d 57 (2nd Cir. 2020)

In a copyright lawsuit alleging that television series ***Star Trek: Discovery*** infringed the plaintiff’s videogame concept, the Second Circuit affirmed the district court’s grant of a motion to dismiss, finding that scientific concepts and the plot ideas that flow from them are not protectible. The court also rejected alleged similarities deriving from stock science fiction themes and superficial similarities between characters.

Tanksley v. Daniels, 902 F.3d 165 (3rd Cir. 2018)

In a copyright lawsuit asserting that the television series ***Empire*** infringed the plaintiff’s three-episode television pilot ***Cream***, the Third Circuit affirmed the district court’s grant of defendants’ motion to dismiss. Considering the main characters, setting, and storylines of the two works, the Third Circuit held that the plaintiff failed to plead substantial similarity.

Astor-White v. Strong, No. 19-55735, 817 Fed. App'x 502 (9th Cir. Aug. 21, 2020) (“*Astor-White II*”)

In a copyright lawsuit asserting that television series *Empire* infringed the plaintiff's treatment for a television series, the Ninth Circuit affirmed the dismissal of the plaintiff's Third Amended Complaint. In a brief memorandum, the Court stated that “The additional alleged similarities are forms of literary expression that are unprotectable as a matter of law. ... Nor does Astor-White allege similarity in the particular way in which the artistic elements form a coherent pattern, synthesis, or design. ... The district court correctly concluded as part of the extrinsic test that the two works only share unprotectable ideas and concepts, material in the public domain, and scènes à faire.” See also *Astor-White I*, discussed below.

Masterson v. Walt Disney Co., No. 19-55650, 821 Fed. App'x 779 (9th Cir. Aug. 3, 2020)

In a copyright lawsuit asserting that film *Inside Out* infringed the plaintiff's book of poetry and movie script, the Ninth Circuit affirmed the district court's grant of a motion to dismiss, finding that all of the asserted similarities under the extrinsic test were unprotectible and that the combination of unprotectible elements showed “few, if any, similarities.” The court also noted that there are times when “judicial experience and common sense” reveal that claims are not plausible without the need for expert assistance on substantial similarity.

Alfred v. Walt Disney Co., No. 19-55669, 821 Fed. App'x 727 (9th Cir., Jul. 22, 2020)

In a copyright lawsuit asserting that film *Pirates of the Caribbean: Curse of the Black Pearl* infringed the plaintiffs' screenplay, the Ninth Circuit overturned the district court's grant of a Rule 12(b)(6) motion based on substantial similarity. The court states: “[A]t this stage of the litigation, it is difficult to know whether [the allegedly copied] elements are indeed unprotectible material. Additional evidence would help inform the question of substantial similarity. ... As Plaintiffs note, expert testimony would aid in determining whether the similarities Plaintiffs identify are qualitatively significant.”

Zindel v. Fox Searchlight Pictures, Inc., No. 18-56087, 815 Fed. App'x 158 (9th Cir., Jun. 22, 2020)

In a copyright lawsuit asserting that film *The Shape of Water* infringed the copyright in the stage play *Let Me Hear You Whisper*, the Ninth Circuit overturned the district court's grant of a Rule 12(b)(6) motion based on substantial similarity. The Court stated: “Though both works properly were presented to the district court, additional evidence, including expert testimony, would aid in the objective literary analysis needed to determine the extent and qualitative importance of the similarities that Zindel identified in the works' expressive elements, particularly the plausibly alleged shared plot

sequence. Additional evidence would also illuminate whether any similarities are mere unprotectable literary tropes or scènes à faire.”

Daniels v. Walt Disney Co., 958 F.3d 767 (9th Cir. 2020)

The creator of a group of anthropomorphized emotions named “The Moodsters” sued the defendant over film *Inside Out*, alleging that the anthropomorphized emotions depicted in the film infringed her copyrights in the Moodster characters. In an amended opinion, the Ninth Circuit affirmed the dismissal of the plaintiff’s complaint, finding that The Moodsters were not sufficiently defined to warrant copyright protection.

Astor-White v. Strong, No. 16-55565, 733 Fed. App’x 407 (9th Cir. Aug. 1, 2018) (“*Astor-White I*”)

In a copyright lawsuit asserting that television series *Empire* infringed the plaintiff’s treatment for a television series, the Ninth Circuit agreed with the district court that the plaintiff failed to plead facts to support a claim of substantial similarity but found that the plaintiff should have been granted leave to amend: “To allege striking or substantial similarity, Astor-White could have alleged facts specifically showing the similarities between the two works and therefore presented a triable issue of fact regarding substantial similarity of protected expression. ... Astor-White’s second amended complaint could focus on the similarities, particularly important where the author of a treatment alleges infringement by a now full season-long series. Even if a copied portion of a work [might] be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity.”

The panel in *Astor-White* produced three separate opinions. Judge Wardlaw wrote a concurrence stating that “dismissal of a complaint for lack of substantial similarity before any discovery is virtually unheard of” and “should be even more disfavored on a motion to dismiss” than on a motion for summary judgment. Wardlaw found that “what the district court did here illustrates that comparing a treatment to a completed work requires specialized knowledge of how treatments are developed into completed television shows,” and noted that an expert might also be able to tell whether certain elements that seem generic were actually protectable at the time the plaintiff’s work was created.

In contrast, Judge Nguyen thought that the panel should not have provided an opportunity to amend, arguing that the panel should have applied the extrinsic test itself and affirmed the district court’s finding that after filtering out unprotectible elements there was no substantial similarity.

District Courts:

Tolbert v. Discovery, Inc., No. 18-cv-00680, 2020 U.S. Dist. LEXIS 106451 (N.D. Ala. Jun. 17, 2020)

On a motion to dismiss a copyright claim asserting that home renovation television show *Good Bones* infringed the plaintiff's copyright in a teaser trailer for a mother-daughter home renovation show, the district court reviewed a list of alleged similarities between the works and after eliminating unprotectible elements found sufficient similarities to defeat the motion.

Briggs v. Cameron, No. 20-cv-01596, 2020 U.S. Dist. LEXIS 192450 (N.D. Cal. Oct. 16, 2020)

On a motion to dismiss a copyright claim asserting that films *Avatar* and *Taken* infringed the plaintiff's screenplay, the court found that after eliminating unprotectible elements such as generic plot themes the works in question were not even "remotely similar."

Carlini v. Paramount Pictures Corp., No. 19-cv-08306 (C.D. Cal. Feb. 2, 2021)

On a motion to dismiss a copyright claim asserting that film *What Men Want* infringed the plaintiff's script, the district court considered a list of sixteen plot points that the works allegedly shared but ultimately held that they were all "superficial rather than substantial, with the possible exception of a minor subplot." The court also found that the selection and arrangement of unprotectible elements, all of which were "an obvious outgrowth" from the script's premise, did not form an original pattern substantially similar to the defendant's film. Similar alleged similarities in characters, mood, pace, setting, theme and dialogue were also rejected. Accordingly, the court granted the motion to dismiss.

Irish Rover Entertainment, LLC v. Sims, No. 20-cv-06293 (C.D. Cal. Jan. 21, 2021)

On a motion to dismiss a copyright claim asserting that television show *Stranger Things* violated the plaintiff's screenplays, the district court found that "additional evidence such as expert testimony may help inform the question of substantial similarity in this case," and that "at this stage of the litigation, it is difficult to know whether such elements are indeed unprotectible material." It therefore denied the motion.

Ricketts v. CBS Corps., 439 F. Supp. 3d 1199 (C.D. Cal. 2020)

On a motion for judgment on the pleadings in a case involving a claim that television show *All American* infringed the plaintiff's series of films featuring a talented African-American football player, the district court conducted an extensive evaluation of asserted similarities in the plot, theme, characters, setting, mood, pace, dialogue, and sequence of events, and concluded that any similarities were superficial and that the differences were

substantial. It also rejected a claim based on the pattern of unprotectible elements, and granted the defendants' motion.

Purohit v. Legend Pictures, LLC, 448 F. Supp. 3d 382 (D. Del. 2020)

On a motion to dismiss a copyright claim asserting that the film ***Krampus*** infringed the plaintiff's book "The Krampus Night Before Christmas" (itself a parody of Clement Clarke Moore's 1823 poem "A Visit from St. Nicholas"), the district court found that the book's portrayal of the legendary Krampus character did not include sufficiently original and distinctive elements to be protectible, and that the film did not copy the exact illustrations in the book in a manner that would support a finding of substantial similarity.