

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 22 2020

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

ARTHUR LEE ALFRED II; et al.,

No. 19-55669

Plaintiffs-Appellants,

D.C. No.

v.

2:18-cv-08074-CBM-AS

THE WALT DISNEY COMPANY; et al.,

MEMORANDUM\*

Defendants-Appellees.

Appeal from the United States District Court  
for the Central District of California  
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted July 6, 2020  
Pasadena, California

Before: PAEZ and BADE, Circuit Judges, and MELGREN,\*\* District Judge.

Plaintiffs A. Lee Alfred, II, Ezequiel Martinez, Jr., and Tova Laiter appeal the district court’s 12(b)(6) dismissal of their copyright infringement suit against Defendant-Appellees (collectively, “Defendants”). They argue that the court (1) erred in granting Defendants’ motion to dismiss because Plaintiffs’ screenplay is

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Eric F. Melgren, United States District Judge for the District of Kansas, sitting by designation.

substantially similar to Defendants' *Pirates of the Caribbean: Curse of the Black Pearl* film; (2) abused its discretion in denying Plaintiffs leave to amend their complaint; and (3) abused its discretion in taking judicial notice of the Disney World Pirates of the Caribbean theme park ride as it existed in 2005. We have jurisdiction over the court's dismissal under 28 U.S.C. § 1291. For the reasons that follow, we reverse and remand.

1. To state a claim for copyright infringement, Plaintiffs must show that (1) they owned a valid copyright in their screenplay, and (2) Defendants copied protected aspects of their work. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). The element prohibiting Defendant from copying protected aspects requires that Plaintiffs demonstrate that there are, in short, "substantial similarities" between the two works. *Skidmore v. Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc). At the pleading stage, district courts apply only the "extrinsic test" for similarity, which asks whether the defendant's work shares objective similarities of specific expressive elements with the allegedly infringed piece. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018), *overruled on other grounds by Skidmore*, 952 F.3d 1051. Defendants moved to dismiss Plaintiffs' copyright infringement claims solely on the ground that the two works were not substantially similar as a matter of law.

When evaluating the two works, courts must generally distinguish between protectible and unprotectible elements, and “ask only whether the protectible elements in two works are substantially similar.” *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 849 (9th Cir. 2012), *abrogated on other grounds as recognized by Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 959 F.3d 1194 (9th Cir. 2020). But—even when individual elements are not protected—their “[o]riginal selection, coordination, and arrangement . . . may be protectible expression.” *Id.* Summary judgment or dismissal is appropriate if, taken as a whole, “no reasonable jury could find that the works are substantially similar using the objective criteria of the extrinsic test.” *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994).

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. *See Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1439 (9th Cir. 1994).

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. Additional evidence would help inform the question of substantial similarity. *Cf. Rentmeester*, 883 F.3d at 1123 (“This is not a case in which discovery could shed light on any issues that actually matter to the outcome.”). As Plaintiffs note, expert testimony would aid in determining whether the similarities Plaintiffs identify are qualitatively significant. *See Newton v. Diamond*, 388 F.3d 1189, 1196 (9th Cir. 2004). This would be particularly useful in this circumstance, where the works in question are almost twenty years old and the blockbuster *Pirates of the Caribbean* film franchise may itself have shaped what are now considered pirate-movie tropes.

The district court erred by failing to compare the original selection and arrangement of the unprotectible elements between the two works. Because Plaintiffs sufficiently allege that there are substantial similarities between the works to survive Defendants’ motion-to-dismiss, we reverse the district court’s dismissal and remand.

2. The district court did not err by failing to apply the inverse-ratio rule. Sitting en banc, we overruled the inverse-ratio doctrine after the district court's decision. In *Skidmore*, we concluded that the rule “is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties,” and “abrogate[d] the rule in the Ninth Circuit and overrule[d] our prior cases to the contrary.” 952 F.3d at 1066. Even if Plaintiffs are correct that the court should have applied the doctrine, *Skidmore* has since mooted their argument.

3. The court also did not err by failing to accord broad copyright protection to Plaintiffs' screenplay. Plaintiffs are correct that the idea of pirate films or stories are entitled to broad—not narrow—copyright protection, *see, e.g., Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010), but the district court did not once state that the screenplay was entitled to thin protection or require Plaintiffs to show that the two works were virtually identical. We cannot conclude that the court erred by treating the screenplay as entitled to thin protection.

4. Finally, in light of the above disposition, we need not address whether the district court abused its discretion either in denying Plaintiffs leave to amend their complaint or in taking judicial notice of the Disney World theme park ride. These issues are now moot. On remand, Plaintiffs may again request leave to amend

their complaint, and both sides will be able to produce additional, relevant evidence as is needed.

**REVERSED and REMANDED.**

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
Form 10. Bill of Costs**

*Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>*

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The Clerk is requested to award costs to (*party name(s)*):

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