

- The denouement and nature of Sterling'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

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 *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

(“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.

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

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.

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 work that is original and sufficiently creative to merit copyright protection; (2) copying of the plaintiff's work by the defendant; and (3) copying of the plaintiff's work by the defendant in a manner that is not a fair use." *See* 17 U.S.C. § 102.

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

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

Other courts, most notably

equally unimpressed by Kouf's compilation of random similarities scattered throughout the works,

For example, Ms.

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 ET al. v. BTFTF 1024 B8 Tm QG (JET Q B 20*

general to be a cognizable similarity.”

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:

(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

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)

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)
Alfred v. Walt Disney Co. ~~1002~~ *Thether II*

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 n> antial\$ \$ toc m

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.