

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 18-56087

DAVID ZINDEL, as Trustee for the David Zindel Trust
and the Lizabeth Zindel Trust,
Plaintiff – Appellant,

v.

FOX SEARCHLIGHT PICTURES, INC., a Delaware corporation, et al.,
Defendants – Appellees.

PLAINTIFF-APPELLANT DAVID ZINDEL’S REPLY BRIEF

Appeal the Judgment of the United States District Court
for the Central District of California,
Case No. 2:18-CV-01435-PA-KS
(Honorable Percy Anderson)

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INTRODUCTION

Sometimes, the law requires us to guess what a reasonable person or an ordinary juror might think. But here we don't have to. When *The Shape of Water* was released, countless ordinary people immediately spotted the core similarities it bore to the play *Let Me Hear You Whisper* by Pulitzer-prize winning author Paul Zindel.

SFcrowsnest.info commenter: "As soon as I saw the creature slap the window of his container, I knew that the cleaning lady was going to sneak him out in the laundry hamper. I had seen the 1969 airing of *Let Me Hear You Whisper* and even though I had not given it a thought since I saw it (I was nine years old at the time), I recognized that I was watching it again."

Leo Doroschenko: "[T]here is NO WAY someone involved in the [Film] was unfamiliar with the play. There are way too many similarities."

TCM.com commenter: "The Shape of Water looks like it was pretty much lifted from a play by Paul Zindel ..."

Facebook commenter posted Film trailer, stating: "So it's a movie version of Paul Zindell's [sic] 'Let me hear you whisper'?"

Paul Bernhart: "Do the film's credits acknowledge the television play from the 1960's, 'Let Me Hear You Whisper,' which was broadcast on Public Television in at least two versions?"

David Bain: “The source for the problem seems to be a Chicago YA novelist, Daniel Kraus ... If he forgot the source of inspiration he certainly retained all the plot points.”

Dave Marshall: “So The Shape of Water was not inspired by the TV play Let Me Hear You Whisper? ... Kraus is of an age to have been within Zindel’s target audience. Come on, ’fe[s]s up.”

Barbara Kahn: “I saw The Shape of Water.[] It reminded me very much of the wonderful play by Paul Zindel called ‘Let Me Hear You Whisper.’”

Jonathan Yee: “The new [D]el [T]oro movie reminds me of Paul Zindel’s ‘Let Me Hear You Whisper.’”

RogerEbert.com commenter: “I remember reading that in seventh grade; it definitely came to mind when I first read the summary of the movie.”

Zack Smith: “THE SHAPE OF WATER’s plot is a LOT like this play that was reprinted in several English class books when I was growing up called LET ME HEAR YOU WHISPER ... There were two filmed versions on PBS.”

Edward: “Is it just me or does the ‘The Shape of Water’ trailer seem way to similar to the play ‘Let Me Hear You Whisper’ by Paul Zindel?”

Danielle Gee: “Am I the only one who just thought of ‘Let Me Hear You Whisper’ during ‘The Shape of Water’? Surely it wasn’t just me!”

Shana Lodge: “Quick Google search indicates that I am not the only one to

see the similarity between this film and the [Zindel play].”

RPG.net commenter: “*The Shape of Water* actually kinda feels like the weirdest remake of *Let Me Hear You Whisper* possible.”

John Podhoretz (editor of *Commentary* magazine): “whoa. Sounds like ‘The Shape of Water’ has a sourcing problem.”

Scott Fitz: “Not sure I buy the ‘he never saw it’ line. We watched *Let Me Hear You Whisper* in 8th grade English class in the late ’80s. The play was in our anthology book.”

Marcallen Bell: “The similarities are too close ... it’s exactly like another artist’s work.”

Alfred Brock: “The Shape of Plagiarism? ‘Let Me Hear You Whisper’”
ER 342-345.

These are just some of the spontaneous reactions that the “The Shape of Water” (ER 189 (physical exhibit) (the “Film”)) stole the heart of Paul Zindel’s celebrated play “Let Me Hear You Whisper” (the “Play”). *Id.*

A court may not dismiss a copyright infringement action on summary judgment, unless, viewing the works in the light most favorable to the plaintiff, “no reasonable juror” could find for plaintiff. Of course, this standard is even more stringent on a Rule 12(b)(6) motion, safeguarding a copyright plaintiff’s right to due process. Tellingly, both Defendants and the district court’s decision (ER 2-17;

“Order”) ignored this governing standard. Under the reductive gauntlet selectively advocated by Defendants and adopted by the district court, Zindel’s son (“Plaintiff”) never stood a chance of reaching a reasonable juror.

In ignoring fundamental principles such as the “no reasonable juror” and “selection and arrangement” standards, and emphasizing added differences over similarities, the Order adopts Defendants’ skewed legal framework under which most literary infringement would go unchecked.

The Order purports to evaluate creative literary elements such as characters, plot, dialogue, setting, theme, mood or pace of a literary work. Yet how can there really be copyright protection of an isolated mood, theme, setting or pace? And, according to the Order, dialogue requires extended verbatim passages, characters are rarely copyrightable and as to plot, there is no protection for “mere story ideas” or anything viewed as “naturally flowing” therefrom. In short order, Zindel’s wonderfully idiosyncratic Play was reduced to an ink blot, leaving nothing to satisfy any test. Once wrung through Defendants’ stacked sieves, no literary work, no matter how original, can survive. The race is over before it is even run.

As misapplied in the Order, the “extrinsic test” is vague, self-contradictory and subjective on its face. The Order grossly undervalues an author’s creative choices and misconceives the true legal issues in a legitimate copyright case.

From such decisions, many believe that there is no legal recourse for literary

copyright infringement in this Circuit, long regarded as a beacon of copyright law. The growing district court trend to dismiss literary infringement cases on the pleadings has put this already esoteric body of law at a crossroad, jeopardizing authors' due process. Frivolous copyright cases may always be filed, but without guidance and clarity from this Court, the district courts will dismiss an increasing number of meritorious ones. This case marks a good place to draw the line.

ARGUMENT¹

I. DEFENDANTS IGNORE THE “NO REASONABLE JUROR” STANDARD

A. Unless “No Reasonable Juror” Could Find Substantial Similarity The Court May Not Decide This Factual Question.

“Although summary judgment is not highly favored on questions of substantial similarity in copyright cases, summary judgment is appropriate if the court can conclude, after viewing the evidence and drawing inferences in a manner most favorable to the non-moving party, that no reasonable juror could find substantial similarity of ideas and expression.” *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004); *Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 774 (9th Cir. 2018) (same) (citing *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990)).

¹ Due to space constraints, Plaintiff focuses on Film defendants' Answering Brief (“FAB”) because Macmillan's brief concerning their novelization of the Film (ER 223 (physical exhibit) (the “Book”)) is largely duplicative. Plaintiff therefore asks that this brief be considered as replying to both briefs.

The unprompted reactions of regular people sampled above are a sobering reminder of just what a “reasonable juror” might find after comparing the Play and Film. Substantial similarity is “a question of fact uniquely suited for determination by the trier of fact.” *Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981), *incorp’d by ref*, 698 F.2d 966 (9th Cir. 1982). As such, the “no reasonable juror standard” is not just important, but vital to due process.

It was not the district court’s role to decide whether “the works are, in fact, substantially similar,” but only to decide whether “reasonable minds could differ as to the issue.” *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987) (reversing summary judgment for defendant). *See also Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 n.6, 1330 (9th Cir. 1983) (reversing summary judgment; viewing works in light most favorable to non-movant, reasonable minds could differ whether *Battlestar: Galactica* infringed *Star Wars*).

This vital standard is Defendants’ *Achilles’ heel*. Tellingly, they completely ignore it, as did the district court.

If this unwavering standard applies on summary judgment, it is even more stringent on a Rule 12(b)(6) motion, where Plaintiff was cut off at the knees, with no opportunity to develop the record, take discovery as to Defendants’ actual copying or proffer illuminating expert testimony. Instead, the district court, with no particular literary expertise, zealously sliced and diced the Play into isolated

abstractions, substituting its interpretations for those of a jury.

This is evident from the Order itself. *See e.g.*, ER 10 (“There are some minor similarities in the two works’ expressive choices, such as the fact that the main character is a janitorial worker, that the test subject is of interest for military purposes, and that the escape plan involves the use of a laundry cart. However, the similarities generally end there.”); *id.* (“In the Play, Helen does not appear to develop a unique attachment to the dolphin. Rather, Helen disapproves of animal testing ...”); *id.* (“Whereas Helen simply speaks to the dolphin and once tried to give it a piece of her sandwich, Elisa treats the Film’s creature as a friend and brings it eggs that she made for it.”); *id.* (“Plaintiff contends that music plays a similar part in the works, but Elisa plays the creature records from her personal music collection . . . while in the Play, scientists repeatedly play a single song”); ER 11 (“despite some superficial similarities”); ER 12 (“Although both works to some extent include the theme that one must look beyond appearance and status to a person’s true character, that theme follows naturally from the works’ shared basic premise and therefore does not show substantial similarity.”); ER 14 (“The Play’s Helen is a relatively undeveloped character who speaks tersely ...”); *id.* (“The Play’s dolphin is an ordinary dolphin that can speak ...”); *id.* (“The dolphin does not form a personal connection with any character; when it speaks the word ‘love,’ it appears to be a general love among living creatures.”); *id.* (“[N]one of the Play’s

characters are independently copyrightable”)

Instead of viewing the works in the light most favorable to Plaintiff, the district court compared them in the light most favorable to Defendants, adopting their mischaracterizations almost verbatim as to nearly every aspect of its literary analysis. As a result, most of the Order’s statements as to the substance and meaning of the Play’s literary elements and expression are plainly wrong.

B. No Ninth Circuit Precedent Dismisses A Literary Infringement Case On A 12(b)(6) Motion

Nearly all precedent cited by Defendants arose on **summary judgment**, on a well-developed record. Defendants subtly elide this, describing the cases as having been “dismissed” (FAB-48-56), but that is not quite right: in those cases, judgment was entered. This Court “has **never** affirmed the dismissal of a case alleging infringement of a literary work without discovery in a published opinion.” *Astor-White v. Strong*, 733 Fed.Appx. 407, 409 n.2 (9th Cir. 2018) (Wardlaw, J., concurring) (emphasis added). The only published cases affirming a 12(b)(6) dismissal for lack of substantial similarity compared two photographs, *Rentmeester v. Nike Inc.*, 883 F.3d 1111 (9th Cir. 2018), and maps, *Christianson v. West Pub. Co.*, 149 F.2d 202 (9th Cir. 1945).

But photographs and maps are protected under an entirely separate section of the Copyright Act, 17 U.S.C. § 102(a)(5), and even more fundamentally, comparing maps or photographs is an inherently simpler task (better suited for a

12(b)(6) motion) than comparing three literary works. Yet, even in that simpler context, *Rentmeester* drew a dissent: “[Substantial similarity] is an inherently factual question which is often reserved for the jury, and rarely for a court to decide at the motion to dismiss stage.” 883 F.3d at 1123 (Owens, J., dissenting).

II. DEFENDANTS’ CONTINUE TO MIS-CHARACTERIZE THE MEANING AND EFFECT OF THE PLAY’S OBJECTIVE ELEMENTS

When considering this matter in the light most favorable to Zindel, it is easy to see the similarities to the accused works. The only way to avoid that conclusion is to describe the Play at the highest imaginable level of generality, or mischaracterize it altogether. Defendants do both, and Judge Anderson’s Order follows their lead.

To begin, the Order adopts Defendants’ mantra that the Play is “about the evils of animal experimentation” (ER 13-14, FAB-7-8), which is a bit like saying that *E.T.* is a film about the virtues of calling home. But what makes the Play memorable, what it is “about,” is the surprising *relationship* between its main characters. When a story’s central dramatic conceit is a relationship between a *talking* aquatic creature and a woman working the most menial job in a laboratory where he is imprisoned, we are well into territory where the “totality” of the works’ similarities far exceeds the “necessities” of general ideas, and enters the realm of “protected expression.” *Shaw*, 919 F.2d at 1363. *See Metcalf v. Bochco*,

294 F.3d 1069, 1073-74 (9th Cir. 2002). Defendants label such similarities “random” (FAB-27), but there is nothing random about them—in the Play, Film and Book, they are **core dramatic elements** which uniquely animate the works.

A playwright chooses from an “an infinite variety of novel or creative expression,” *Shaw*, 919 F.2d at 1360; thus the Play is “accorded ‘thick’ copyright protection” under the extrinsic test. *Fleener v. Trinity Broadcasting, Inc.*, 203 F. Supp. 2d 1142, 1149-50 (C.D. Cal. 2001). The extrinsic test assesses whether the author is seeking to protect genuine creativity—the “touchstone of copyright protection today.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991). A court is to “consider[] in relation to one another” the “numerous aesthetic decisions embodied in the plaintiff’s [work].” *Tufenkian Imp./Exp. Vent., Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2nd Cir. 2003).

A close look at the plot, characters, setting, themes, mood, and dialogue of the stories at issue confirms that Plaintiff has stated a claim for relief that is more than “plausible”—all that is needed at this stage.

A. Plot

The first major set of similarities between the works concerns “concrete” plot elements, beyond “basic ideas,” “[e]ven if none of these plot elements is remarkably unusual.” *Shaw*, 919 F.3d at 1362-63.

Defendants’ principal strategy for obscuring plot similarities, adopted in

Judge Anderson's Order, is to focus on events added to the Film and Book, especially this new, post-escape Third Act, and on ancillary stock characters. That is not how this works. Even on summary judgment, when a "comparison of the plots of both works reveals significant similarities and differences," then the case goes to the jury so long as, setting aside the "dissimilarities," the "respective plots do parallel each other." *Shaw*, 919 F.2d at 1357-58. The Film's Third Act is characteristic of a derivative work—a kind of Zindel fan-fiction imagining a happy ending—"what would have happened if the characters *had* escaped?" Defendants argue that "the works do not share any meaningful similarity in sequence of events [], except for a laundry hamper" (FAB-26), an assertion Judge Anderson also adopted (ER 10). The Order similarly agreed that the works' parallel use of love songs (from 1940's film musicals) played on a gramophone in a scientific laboratory, precisely when the bond between their main characters deepens, is of no moment—because, we are told, in the *Play*, the same song is *repeated*. *Id.* Ah, well, in *that* case ...

Truth be told, this illustrates the perils of amateur literary criticism and why it is often necessary to have expert assistance. The point is not whether the song is played once or twice. The point is the romantic juxtaposition of a gramophone playing a nostalgic love song in a modern scientific laboratory which is the site of the most modern sort of cruelty. We hear a tender unexpected thing in a cold

place, just at the moment when our two heroes are forging a tender and unexpected bond. Again, at this stage, these elements need only reasonably lend themselves to such interpretation.

The Order, like Defendants, belabors the fact that Elisa's escape plan succeeds. ER 10. But in both works, the laundry-cart escape plan to free the creature at a river dock is presented as hare-brained, and the Film's would have failed but for the surprising intercession of Hoffstetler at a critical moment. *Id.* Judge Anderson similarly adopts Defendants' puzzling argument that the Play's heroine develops no relationship with the Dolphin.² *Id.* ("Helen does not appear to develop a unique attachment to the dolphin. Rather Helen disapproves of animal testing ...").

Defendants claim there is nothing romantic about Helen's bond with the Dolphin, but nowhere do they explain why their interactions (*e.g.*, on a moon-lit night), are oddly bookended by the 1940's love song ("Let me call you sweetheart, I'm in love with you, Let me hear you whisper, That you love me too."). ER 166. Nor can they explain why, when the Dolphin is fixated on Helen, "[s]he pretends to look away and sings Let Me Call You Sweetheart ... but her eyes return to

² Defendants' argue that Helen does not love the Dolphin because "she leaves the laboratory after calling it a coward" (FAB-23). But this evokes a "lover's quarrel." Perhaps, Helen loves him too much to stay.

[him]”, “still looking at her.” (ER 164); or why Helen, like Elisa, would risk her job to sneak into the lab to be with him (ER 174); or why, when Helen finally strokes him, “she is half-afraid and half-happy[,]” as he emits gleeful noises, ER 168.; or why the Dolphin always stares at her so “intensely” and, when they are finally alone again, says “Whisper ... Whisper to me.” ER 169-170. These and many more of the playwright’s unique choices are trampled by the Order which goes so far as stating: “The dolphin does not form a personal connection with any character; when it speaks the word ‘love’ [as Helen is about to leave], it appears to be a general love among living creatures.”) ER 14.

Finally, after emphasizing their Third Act romance, Defendants ironically state (FAB-32 n.13) that “[e]ven if the Play did feature a romance,” “love between humans and non-humans is a common unprotectable idea in literature. *See, e.g., Splash, The Little Mermaid and Beauty and The Beast.*” This illustrates how easy it is to render nearly anything unprotectable under Defendants’ elastic version of the extrinsic test. Any story, no matter how unique, can be reduced to elemental ideas found elsewhere. The result is like saying Mozart’s compositions are unoriginal because “a B-sharp quarter-note is a common unprotectable note in music.” A Seurat is a bunch of colorful dots, but take a step back and it’s a lovely lakeshore scene.

B. Characters

As to the heroines Helen/Elisa, Defendants' principal strategy, which succeeded in the district court, is to assert that their sole similarity is that they are cleaning women. ER 14. But the two share myriad similarities. *See* AOB-17. The Order misapplies the extrinsic test in ignoring these similarities, while emphasizing traits added to the Film/Book. ER 14.

Defendants emphasize Elisa's purported additional traits, and in particular argue that Elisa is non-human, based on the Film's final scene where she breathes underwater. But Elisa's scars are "keloid" (ER 223 at 6), meaning caused by cutting, not "gills." An expert would point out that the Creature transforms Elisa's "keloid" scars into gills with his (Third-Act) magical powers. Regardless, this addition does not retroactively erase the abundant similarities of Helen/Elisa's character traits and arcs in the Play's/Film's first two Acts. AOB-17-19.

To avoid the similarities between the creatures Defendants replace the Play's otherworldly Dolphin, of superior moral intelligence, with *The Creature from the Black Lagoon* (1954) (an almost-identical aquatic creature captured in the Amazon who is erotically attracted to an American woman); throw in some magical powers, and call him an "Amazonian river deity." FAB-50. In truth, their argument is that the Film's Creature and the Play's Dolphin *look* different—but this Court long ago rejected that argument. *DC Comics v. Towle*, 802 F.3d 1012, 1025 (9th Cir. 2015)

(substantial similarity can still exist where film “versions of the [character] look substantially different”). *See also Danjaq, LLC v. Universal City Studios, LLC*, 2014 WL 7882071, at *3-4 (C.D. Cal. Oct. 2, 2014) (despite “many differences between [main] characters” similarities precluded dismissal). That is a sensible rule: a character may look very different and yet still play a similar role or have a substantially similar impact on a story, as here.

Just as they do with Helen, Defendants mischaracterize the Play’s incredible English-speaking Dolphin as an “ordinary dolphin” (FAB-8-9). Moreover, their Creature emits “dolphin-like” sounds and moves like a dolphin (ER 189 at 33:08); its sound editor “used those dolphin-like noises” for the Creature’s vocalizations (ER 339 ¶ 46); its visual effects supervisor relied on dolphin footage for his movements (*id.*); and the Book **explicitly compares him to a dolphin** (ER 223 at 11-12, 92, 126, 143, 258).³

Finally, Defendants rely on a grab-bag of supporting characters, but this is misplaced.⁴ More importantly, the addition or subtraction of characters “is not of

³ Even Defendants’ reliance on their Third Act’s sexual content is overstated. Defendants refer to **dolphin-human sex** in their Book, creating an obvious parallel. ER 223 at 11-12, 216. The Film (ER 189 at 1:25:35-52) even gives the Creature a dolphin’s retractable sexual anatomy.

⁴ Plaintiff, for example, never argued that “Moray is the same character ... as Strickland” (FAB-35), but simply noted that numerous supporting character traits in the Play are re-assigned to other Film/Book characters.

major significance when considering both stories in their entirety.” *Shaw*, 919 F.2d at 1357. *See Wilson v. The Walt Disney Company*, 2014 WL 4477391 at *2 (N.D. Cal. July 30, 2014) (despite character differences, the works “enjoy a parallelism” precluding dismissal).

C. Setting

The Play and Film/Book both take place in a scientific facility. Ah, yes, say Defendants—but our scientific facility is *bigger*. FAB-13. It is hard to see why Judge Anderson adopted this reasoning. ER 11. For one thing, the Play’s describes its scientific facility, replete with a “natatorium,” as significant, spanning many floors of a large urban building. ER 162, 178, 181. For another, if all a Hollywood studio needs to do to comply with the Copyright Act is to make things in movies big, not much will be left of the Act. And while it is true that the military aspects of the Film’s facility are accentuated (another cinematic cliché), both scientific facilities engage in covert military experiments. ER 178-179.

Defendants once again try to dilute key similarities by pointing to additions to their Film. But a stage play naturally depicts fewer settings, evoking a broader world through plot/dialogue, whereas a film version depicts those settings. “In comparing a play to a motion picture ‘dissimilarities result ... principally from the film’s enlarged means to express in a wider latitude incidents necessarily requiring a wider range of settings than a play restricted to the narrow confines of a theatrical

stage””. 4 David Nimmer, *Nimmer on Copyright* (“Nimmer”) § 13.03[E][2] at 13:101 (quoting *Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F.2d 579, 583 (9th Cir. 1944)). Furthermore, the Film’s extra settings (*e.g.*, Elisa, lonesome on a bus) support the core story shared by the works. *See* ER 163, 171.

D. Themes

Defendants say almost nothing about the works’ common themes (AOB-38) and endorse the Order which misinterpreted numerous themes **shared** by the Play and Film/Book as unique to one or the other. ER 12 (“Only the Play implicates the triumph of empathy and communication over fear and authority; the supremacy of individuality over conformity; real advancement is impossible without an open mind; our false view of ‘progress’ neglects genuine progress of the human condition; and one must stand up against what is wrong, no matter one’s station in life.”) This is simply wrong. And it only confirms that substantial similarity should not be decided as a matter of law without the benefit of expert literary analysis.

E. Mood/Pace.

Defendants make fun of Plaintiff’s descriptions of the works’ moods, but their mischaracterizations do not even describe moods. FAB-39. Defendants likewise fail to distinguish the works’ pace in relying on film techniques like cross-cutting, when that difference in presentation results from differing media and does

not obscure that the story unfolds at a similar pace over a similar period in the works' first two Acts.

F. Dialogue

Defendants argue that there must be “extended similarity of dialogue,” citing *Olson v. NBC*, 855 F.2d 1446 (9th Cir. 1988). But *Olson* required such similarity only because no *other* extrinsic element was shared by the works, unlike here. It is not necessary in these circumstances to demonstrate extended similarity of dialogue. See *Metcalf*, 294 F.3d at 1073-74 (substantial similarity based on extrinsic elements other than dialogue); *Cabell v. Zorro Prods. Inc.*, No. 5:15-CV-00771-EJD, 2017 WL 2335597, at *8 (N.D. Cal. May 30, 2017) (same).

Defendants also accuse Plaintiff of “mix[ing] and match[ing] multiple versions of the Play” (FAB-7 n. 2, 40-41), after conceding that the Play’s unabridged and slightly abridged versions are “identical ... in all material respects,” except the former is all-female. ER 158. Plaintiff explicitly relied on the unabridged version. ER 111 n.1. Defendants’ counter-focus on the abridged version and their vague attempts to sully the unabridged version (FAB-7 n.2) are equally unavailing as both are protected by copyright.

III. GIVEN THE DIFFICULTY OF COMPARING CREATIVE ASPECTS OF THREE DIFFERENT MEDIUMS, THIS CASE IN PARTICULAR WOULD BENEFIT FROM EXPERT OPINION

The comparison of an unperformed two-Act stage play to a fully-realized

three-Act feature film (and novelization) is uniquely suitable for expert analysis, because the “extrinsic test” for substantial similarity requires “analytic dissection” “measured by external objective criteria.” *Swirsky*, 376 F.3d at 845 (citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000)(“extrinsic test often requires ... expert testimony”)). *See also Shaw*, 919 F.2d at 1356-58 (same); *Folkens*, 882 F.3d at 774 (same); *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996) (same); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994) (“expert testimony” is very “helpful” to extrinsic analysis).

Defendants never meaningfully address this argument. Instead, they argue that a court can never dismiss a copyright infringement case without expert opinion. But Plaintiff did not argue this. Rather, the point is that **this** kind of copyright case is particularly well-suited to expert opinion, unlike, for example, when a court must simply compare two maps as in *Christianson*, 149 F.2d at 203. Even here, Defendants continue to place heavy reliance on unpublished decisions (FAB-47-49), but these are not much help: none of them compare works, as here, from three different literary mediums. The only published decisions cited—*Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1130 (C.D. Cal. 2007) (comparing cooking shows) and *Christianson*, *supra*, nowhere mention expert testimony.

Defendants rely on *Gable v. NBC*, 727 F. Supp. 2d 815, 836-37 (C.D. Cal. 2010) *aff’d*, 438 F. App’x 587 (9th Cir. 2011) where the court on summary

judgment simply “reject[ed] the declaration of Plaintiff’s expert [] as it d[id] not meet the requirements of [Rule] 702.” *Gable* agreed, however, that “[t]he extrinsic test requires an ‘analytic dissection’ of the works, and is often aided by expert testimony.” *Id.* at 831 (citing *Swirsky* 376 F.3d at 845). These cases illustrate that Defendants can potentially win on summary judgment, not that they can avoid having to do so.

Defendants make much of the fact that *Smith v. AMC Networks*, No. 18-CV-03803-LHK, 2019 U.S. Dist. LEXIS 15930, at *17 (N.D. Cal. Jan. 31, 2019) left out the word “often” in quoting *Three Boys Music* (“The extrinsic test often requires ... expert testimony.”). FAB-49 n. 22. The *Smith* Court, in comparing works in **two different mediums**, a graphic novel and TV series, denied AMC’s 12(b)(6) motion holding that the record is “insufficient[ly]” developed “to conduct the extrinsic test” and that “expert testimony” would be helpful. *Id.* It further noted that cases like *Silas v. HBO, Inc.*, 201 F. Supp. 3d 1158, 1166 (C.D. Cal. 2016) (cited by Defendants here) were non-binding and unpersuasive because they “offer little justification for why certain elements are generic or scenes-a-faire, and thus unprotectable.” *Id.*

Defendants also rely on *Benay v. Warner Bros.*, another summary judgment case, and one involving notably weaker similarities than the present one—both works were simply “based on the same historical events” and person. 607 F.3d

625, 629 (9th Cir. 2010). But even there, *Benay* found insufficient evidence of substantial similarity only after fully considering expert opinions. *Id.* at 629. And, *Shame on You Prods., Inc. v. Banks*, 690 F. App'x 519 (9th Cir. 2017) (FAB-48) simply concluded that expert reports should not be admitted on a Rule 12(b)(6) motion.⁵ While correct, Plaintiff does not ask for this. Given the above, Defendants' assertion that "[t]his Court has rejected numerous prior attempts to require consideration of expert testimony" is misleading. FAB-51.

This case should proceed to discovery where expert reports can aid the court's analytic comparison of literary elements from three different mediums "measured by external objective criteria." *Swirsky*, 376 F.3d at 845. An author's aesthetic choices and expression of interwoven literary elements are subtle and complex, and by their very nature subject to differing interpretations. This is particularly true where, as here, a district judge with no particular expertise must objectively compare an unperformed two-Act Play to the audio-visual experience of a fully-performed three-Act Film.

⁵ Defendants also misrely on *Tanksley v. Daniels*, 902 F.3d 165, 172 (3d Cir. 2018) (FAB-50) which held "[o]n substantial similarity, the question is how the works 'would appear to a layman'... and we have rejected the usefulness of experts in answering this question." This "ordinary observer test" is akin to our "intrinsic test," which is a pure jury question. It is the "extrinsic test" for which expert opinion is helpful. At any rate, this argument would prove (if anything) that the case should get to the jury, not be resolved on a 12(b)(6) motion.

Whereas a printed play comes alive every time it is directed and performed on stage before a live audience, a film is a finished product with each nuance articulated. Whereas, in a play each scene runs to completion before the next, a film employs complex camera movements to elicit emotion, and cross-cuts between locales and characters at ease. There are also inherent differences in scope between a lean, low-budget play and a lavish studio film. It is precisely to avoid letting such differences in presentation obscure core similarities that expert testimony can be useful.⁶

A true expert may well explain how the idiosyncratic elements that animate this Play are the heartbeat of the Film and Book.

IV. THE DISTRICT COURT ERRED IN FOCUSING ON ADDED DIFFERENCES RATHER THAN CLAIMED SIMILARITIES

A court's evaluation of specific alleged similarities of course entails whether they are similar or different. But the Order strays far beyond that and improperly focuses on differences in the works (ER 10-16), contrary to the principle that the extrinsic test analyzes similarities, not differences. *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 849 (9th Cir. 2012). The district court erred in

⁶ Experts are also helpful as to the range of expressive alternatives, standard literary tropes, the degree of originality, and how works are distinguishable from those in their genre. See 2 William F. Patry, *Patry On Copyright*, § 9.79 n. 8.

overlooking that “[e]ven if a copied portion be relatively small in proportion to the entire work, if qualitatively important,” the jury “may properly find substantial similarity.” *Shaw*, 919 F.2d at 1363 (quoting *Baxter*, 812 F.2d at 425).

Defendants argue that the court “primarily” emphasized differences to counter alleged similarities. The Order itself shows otherwise. ER 10-16. Defendants seek cover by broadly arguing that “the extrinsic test requires an overall analysis of the works[’]” “differences.” FAB-54. That directly conflicts with longstanding precedent, not to mention common sense. As Learned Hand memorably remarked, an infringer cannot “excuse the wrong by showing how much of his work he did not pirate.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936).

Compounding this error, Defendants and Judge Anderson overly abstract the Play to “filter out” purportedly uncopyrightable “ideas” and anything that in their view “flows naturally” from Zindel’s ideas, while highlighting unprotected Film elements shot through with *scènes à faire* and film clichés (ER 11-16).⁷ But such “stock elements” added to Defendants’ work “play no role in the substantial

⁷ Defendants urge dismissal because the Play does not feature stock elements or stereotypes like: (i) a sadistic speechifying villain (FAB-35); (ii) female lead’s artistic, closeted gay-friend (FAB-13, 35); (iii) smart-talking, full-figured work-friend (FAB-33); (iv) gruff General barking orders (FAB-35); (iv) Cold War paranoia (FAB-37); and (v) Soviet spies seeking U.S. military secrets (FAB-33-34).

similarity analysis.” *Dillon v. NBC Universal Media LLC*, 2013 WL 3581938, at *6 (C.D. Cal. June 18, 2013). Like Defendants, the Order deploys an inequitable double-standard: The Film/Book’s generic additions support dismissal, whereas the Play’s purportedly generic elements, no matter how originally arranged, also support dismissal. “Heads I win, tails you lose.”

Even though Plaintiff did not claim that the Film’s Third Act infringed (*see* ER 110-134) the Order and Defendants emphasize the Film’s Third Act. Indeed, over half of the Order’s description of the Film is devoted to its Third Act. ER 9-10. Defendants argue that you need to compare the entire Film to understand its characters, but the Order primarily emphasizes the Film’s plot/pacing differences in its Third Act. ER 10, 13. Defendants quip that one cannot analyze half a theme or character but this misses the point: “It is entirely immaterial that, in many respects ... works are dissimilar, if in other respects, similarity as to a substantial element of plaintiff’s work can be shown.” *Nimmer* § 13.03 at 13:67-68 (citing, *inter alia*, *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978)).

Change is inevitable when a feature-length studio Film is derived from a modest two-Act Play, but “the defendant will not be immunized from liability by reason of the addition in his work of different characters or additional and varied incidents, nor generally by reason of his work proving more attractive or saleable” *Id.*

Defendants again rely on *Rentmeester*, mischaracterizing it with partial out-of-context quotes. FAB-55. When the *Rentmeester* majority noted that “stark differences are readily apparent,” it was evaluating the specific claimed similarity that the two photos “[we]re taken outdoors” featuring a “lone hoop and backboard.” 883 F.3d at 1121. Nowhere does *Rentmeester* advocate surveying a **literary** work for any and all differences so as to claim that its substantially similar portions do not infringe, nor could it, as this contravenes binding precedent.

V. THE DISTRICT COURT ERRED IN FAILING TO APPLY THE “SELECTION AND ARRANGEMENT” STANDARD

Analytic dissection requires the court to separate unprotectable facts and ideas from protectable expression. However, “filt[rati]on” “must not obscure the general proposition” that “selection and arrangement of unprotected components” may itself constitute protected expression. *Nimmer* § 13.03 n.342. But this is precisely what transpired below.

“[T]o disregard” numerous creative elements when performing the extrinsic test, as the Order and Defendants do here, “is to ignore the fact that substantial similarity can be found in a combination of elements, even if those elements are individually unprotected.” *Swirsky*, 376 F.3d at 84. *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003)(same); *Apple Computer, Inc.*, 35 F.3d at 1446 (same); *Three Boys Music*, 212 F.3d at 485 (same); *Metcalf*, 294 F.3d at 1073-74 (same, comparing teleplay to TV series); *Shaw*, 919 F.2d at 1363 (same, comparing

teleplay to TV series); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 826 (9th Cir. 2002) (same, comparing book to books and TV series).⁸ No Ninth Circuit case holds otherwise.⁹

Defendants’ argument that the extrinsic test for literary works excludes the “selection and arrangement” standard is plainly wrong. Thus “[e]ven if Defendant[s] could succeed in characterizing each element as too general, copyright also protects the expressive act of arranging completely unprotected works.” *Fleener*, 203 F. Supp. 2d at 1149-50 (denying summary judgment in comparing novel to book/film). *See L.A. Printex Indus.*, 676 F.3d at 849 (finding “selection, coordination, and arrangement” sufficiently “[o]riginal” to preclude summary judgment). Plaintiff documented, and the works objectively reflect, dozens of extrinsic elements that, in combination and as-arranged, are substantially similar, readily overcoming a 12(b)(6) motion. *See* AOB-15-24.

Moreover, the first two Acts of the Play/Film feature strikingly similar plot points in nearly the same sequence. *Id* at 15-16.¹⁰ There is nothing “vague” (FAB-

⁸ Even “a directory of factual matter may claim a copyright therein.” *Nimmer* § 2.11[D] (citing *Feist*, 499 U.S. at 348).

⁹ *E.g.*, *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006), relied upon by Defendants for the extrinsic test cites *Metcalfe*, *Three Boys Music* and *Feist*.

¹⁰ Notably, the Order intersperses Third-Act elements throughout the copied portion of the Film’s story, giving the false impression that the first two Acts of the Play/Film follow dissimilar sequencing. ER 9-11.

43) about it. Like the Play, the Film/Book tell the unusual story of a seemingly insignificant janitorial cleaning woman working the graveyard shift at an urban scientific facility where she encounters a superior aquatic creature confined to a glass tank in a lab, and studied for covert military purposes. As she feeds him from her lunch-bag, and the two bond to vintage 1940s Hollywood music playing on a phonograph, the remarkable creature recognizes in her a kindred spirit and will communicate only with her. When the heroine learns that scientists will soon “vivisect” the creature, she vows to free him in her laundry hamper and release him at a river dock leading to the sea.¹¹

These and many other shared specific elements are reduced in Judge Anderson’s Order to abstract ideas and “filtered out” along with all related elements, with no regard for the Play’s originality and the works’ similar selection and arrangement, contrary to binding precedent. ER 10-17.

Defendants attack the straw man that Plaintiff “appears to reject th[e] [extrinsic] test” for “selection and arrangement.” FAB-3, 42-43. This contradicts Plaintiff’s express argument that the test **includes** “selection and arrangement”

¹¹ That the works here share these sequential similarities distinguishes them from the works in *Funky Films* where similarity was confined to the work’s starting “premise,” and then diverged. 462 F.3d at 1078-80. *See Wilson* 2014 WL 4477391 at *2 (distinguishing *Funky Films* on the same basis).

analysis. Defendants imply that the “filtration test” overrules this analysis or that a Court must choose one over the other, when they are readily harmonized. For example, *Cavalier*, widely cited for “filtration,” faithfully performed the “selection and arrangement” test, and reversed summary judgement as to substantially similar combinations of independently unprotectable elements. 297 F.3d at 827.

Defendants protest too much in vaguely arguing that “*Metcalf* has been limited by subsequent Ninth Circuit cases,” citing *Rentmeester*, 883 F.3d 1118 and *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1179 (9th Cir. 2003).¹² FAB-44 n. 20. Not so. *Rentmeester*, like *Cavalier*, expressly supported the “selection and arrangement” test. 883 F.3d at 1119 (“What *is* protected by copyright is the [author’s] selection and arrangement of the [work’s] otherwise unprotected elements.”). *Metcalf* is not an isolated decision and stands in good company with both prior and subsequent precedent cited above.

Defendants misportray *Rentmeester* as holding that “selection and arrangement” analysis does not apply to novels, plays and films (FAB-45) but it says nothing of the sort. *Id.* (finding only that it is harder to dissect a photograph than literary works). *Rentmeester* did not, nor could it, overrule the above precedent which consistently apply the “selection and arrangement” standard to

¹² *Rice*, which was decided on summary judgment, did not limit *Metcalf*. It applied it, holding that there was no discernable “pattern of generic similarities.” *Id.*

literary works as part of the “extrinsic test.”

Finally, Defendants half-heartedly argue that the district court “considered Plaintiff’s contention.” FAB-41-42.¹³ But after a passing reference, the Order never analyzes the works’ similar selection and arrangement and instead, disposes of it by concluding erroneously “that the Play and the Film [] do not share many similarities, protected or not.” ER 17.

CONCLUSION

Imagine that a rival Studio released a film about a cleaning woman at an urban scientific facility who encounters an otherworldly aquatic creature being studied in a lab for military purposes, develops a deep connection with him, while feeding him from her lunch-bag and playfully moving to 1940s Hollywood music playing on a phonograph; and then, when she learns that scientists will soon “vivisect” the creature, vows to free him in her rolling laundry cart and release him at a river dock to the sea.

It is unimaginable that Defendants would stand still for such infringement. They would be in court before the film’s trailer finished. Yet under their version of the extrinsic test, the copycat producer would prevail. Unsurprisingly, when

¹³ The Order narrowed the standard to a “particular sequence.” ER 17. But “[e]ven in the absence of a similar sequence of events ... a combination of many different elements of similarity may be sufficient to constitute infringement.” *Nimmer* § 13.03 n.25.

movie studios are *plaintiffs* in infringement suits, they rediscover this Circuit’s actual law of copyright infringement pleading, which ensures that colorable cases survive. *See Twentieth Century-Fox Film Corp.*, 715 F.2d at 1329 (reversing summary judgment against plaintiff); *Towle*, 989 F. Supp. 2d at 969-71 (granting plaintiff DC summary judgment; “Batmobile” is a protectable “character”); *Sony Pictures Entertainment, Inc. v. Fireworks Entertainment Group Inc.*, 156 F. Supp. 1148 (C.D. Cal. 2001) (granting plaintiff summary judgment; alleged infringement of *Zorro*); *MGM, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1293 (C.D. Cal. 1995) (granting MGM preliminary injunction; alleged infringement of *James Bond*); *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1190 (C.D. Cal. 1998) (enjoining film trailers).

What is sauce for the goose is sauce for the gander. The dismissal should be reversed. Given that Judge Anderson has already reached final conclusions as to the merits this is an appropriate case to re-assign on remand.

Dated: May 31, 2019

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 6,996 words, as determined by Microsoft Word 2013, including the headings and footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief also complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because the text appears in 14-point Times New Roman, a proportionally spaced serif typeface.

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