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IT'S A PIRATE'S LIFE FOR ME: STEALING SCRIPTS INSTEAD OF JEWELS

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ABSTRACT

When Arthur L. Alfred, II and his co-Plaintiffs sued Disney for copyright infringement for Disney's *Pirates of the Caribbean* franchise, the parties represented a modern-day David and Goliath. Disney is Goliath, with its ownership of big-name companies, such as Marvel, Star Wars, and Pixar. The Mickey Mouse has certainly made its own name in copyright law. The Ninth Circuit Court of Appeal's decision in *Alfred v. Walt Disney*, while consistent with past case law, provides underdogs, such as the Plaintiffs, with surer footing when entering the pleading stage of copyright infringement cases. Further, the Ninth Circuit correctly held that the lower court erred when it did not compare the Plaintiff's screenplay to Disney's copied final product. Plaintiffs had, in fact, sufficiently alleged substantial similarities to survive a motion to dismiss.



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IT'S A PIRATE'S LIFE FOR ME: STEALING SCRIPTS INSTEAD OF JEWELS

ALEXA BUECHLER*

I. INTRODUCTION

Even in the Supreme Court, the Walt Disney Company is a household name.¹ Its movies are a staple in our society on a national and international level,² and everyone is familiar with Mickey Mouse's ears, which withstand the test of time.³ Commonly known as "Disney," the media syndicate owns notable companies, such as ABC, Marvel, Lucasfilm, and Pixar.⁴ What you might not know about Disney is that the company was sued for copyright infringement of one of their landmark franchises: *Pirates of the Caribbean*.⁵

The Plaintiffs in the lawsuit were Arthur Lee Alfred, II, Ezequiel Martinez, Jr., and Tova Laiter.⁶ Alfred and Martinez are screenplay writers, and Laiter is a film producer.⁷ The Defendant, the Walt Disney Company, is a multinational mass media and entertainment conglomerate.⁸ Disney has television shows, motion pictures, radio stations, and amusement parks.⁹

In 2000, Alfred and Martinez wrote a pirate screenplay, and submitted it to Disney.¹⁰ Concurrently, Plaintiffs were also working with Disney on another project, *Red Hood*.¹¹ Disney rejected Plaintiffs' pirate screenplay, but, in 2003, it released *Pirates of the Caribbean: Curse of the Black Pearl*.¹² Thereafter, Plaintiffs asserted five copyright infringement claims.¹³

* © 2022 Alexa Buechler, Juris Doctor Candidate, May 2023, UIC School of Law; B.A. in Journalism and Mass Communication, Arizona State University (2020). I would like to thank my editor, Marisa Schutz, and the entire Review of Intellectual Property Law staff. I dedicate this article to every person who taught me how to love writing.

¹ See Carly Hallman, *Every Company Disney Owns: A Map of Disney's Worldwide Assets*, TITLE MAX, <https://www.titlemax.com/discovery-center/money-finance/companies-disney-owns-worldwide/> (last visited March 24, 2022).

² *Id.*

³ See generally Timothy B. Lee, *Mickey Mouse will be public domain soon – here's what that means*, ARS TECHNICA (Jan. 1, 2019), <https://arstechnica.com/tech-policy/2019/01/a-whole-years-worth-of-works-just-fell-into-the-public-domain/>.

⁴ *Id.*

⁵ Alfred v. Walt Disney Co., 821 Fed. App'x. 727, 730 (9th Cir. 2020).

⁶ See Complaint and Jury Demand, Alfred v. Walt Disney Co., No. 2:18-cv-08074 (D. Colo. 2017), <https://storage.courtlistener.com/recap/gov.uscourts.cacd.723259/gov.uscourts.cacd.723259.1.0.pdf> at 6.

⁷ *Id.*

⁸ See Hallman, *supra* note 1.

⁹ *Id.*

¹⁰ Compl., *supra* note 6, at 6.

¹¹ *Id.* at 6-7.

¹² *Id.* at 9.

¹³ Alfred v. Walt Disney Co., 388 F. Supp. 3d 1174, 1180 (C.D. Cal. 2019). Plaintiffs asserted five claims under copyright infringement: (1) Reproduction of Copyrighted Work; (2) Preparation of Derivative Works; (3) Distribution of Copyrighted Work; (4) Public Performance of Copyrighted Work; and (5) Public Display of Copyrighted Work.

Four more movies followed *Pirates of the Caribbean: Curse of the Black Pearl*: (1) *Pirates of the Caribbean: Dead Man's Chest*; (2) *Pirates of the Caribbean: At World's End*; (3) *Pirates of the Caribbean: On Stranger Tides*; and (4) *Pirates of the Caribbean: Dead Men Tell No Tales*.¹⁴ Plaintiffs claimed that each of these movies infringes upon their screenplay.¹⁵

Plaintiffs had the burden of proof to establish an actionable copyright infringement claim.¹⁶ They were required to show that they owned a valid copyright of their screenplay, and that Defendant copied protected aspects of their work.¹⁷

The California Central District Court granted a motion to dismiss in Disney's favor.¹⁸ The Ninth Circuit reversed and remanded.¹⁹ The Ninth Circuit's opinion on *Alfred v. Walt Disney Co.* is discussed in this case note.²⁰

The Ninth Circuit held that the District Court erred when it failed to compare the unprotectable elements between the two works and that Plaintiffs sufficiently alleged substantial similarities between the two works, enough to survive a motion to dismiss.²¹ It also held that the District Court did not err in refusing to apply the inverse-ratio rule.²² Finally, the court held that Plaintiffs were correct that pirate films are entitled to broad protection, but the District Court did not discuss whether the screenplay was entitled to narrow protection.²³

The Ninth Circuit was correct in its opinion. The District Court failed when it did not compare the two works, and Plaintiffs sufficiently alleged substantial similarities to survive a motion to dismiss.²⁴ It was appropriate for the Ninth Circuit to uphold the District Court's decision to not apply the inverse-ratio rule, and it was appropriate to afford the screenplay broad copyright protection.²⁵

Section II of this case note will provide the relevant legal foundation necessary to understand copyright principles, including the 1976 Copyright Act, *Nimmer* on Copyrights, and applicable case law. Next, section III of this case note will detail the background of *Alfred v. Walt Disney Co.*, including a summary of the facts, procedural history, and holdings. Moreover, section IV will provide an analysis of whether the Plaintiffs' screenplay was protectable, whether the protected elements of the Plaintiffs' screenplay were objectively similar to Defendant's film, and whether dismissal of the claim was inappropriate. Finally, section V will reiterate the important points of the case note.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995).

¹⁷ *Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

¹⁸ *Alfred*, 388 F. Supp. 3d at 1191.

¹⁹ *Alfred*, 821 Fed. App'x. at 730.

²⁰ *Id.*

²¹ *Id.* at 729-30.

²² *Id.* at 729-30.

²³ *Id.* at 729-30.

²⁴ *Alfred*, 821 Fed. App'x. at 730.

²⁵ *Id.*

II. DISCUSSION

The United States Constitution's Patent and Copyright Clause states: "Congress shall have Power To . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."²⁶ Copyright law is statutory in nature, so Congress passes laws pursuant to the authority conferred under the Patent and Copyright Clause of the Constitution.²⁷ These statutes should be viewed through the lens of Congress's purpose and intent.²⁸

In 1976, Congress updated the Copyright Act under Title 17 of the United States Code to better conform with ongoing technological changes.²⁹ The Copyright Act of 1976 was the first major change to United States copyright law since 1909, when motion pictures debuted.³⁰ Congress realized that this new technology meant that there would be new methods of reproduction for copyrighted works and new patterns for business relations among authors.³¹

The Copyright Act of 1976 protects original works of authorship in the following categories: "literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works."³²

The Copyright Act defines "literary works" as works, "other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks or cards, in which they are embodied."³³

The Copyright Act defines motion pictures as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any."³⁴

Copyright protection does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery" no matter the form that it comes in however.³⁵ For an author to receive copyright protection, their work must be original; courts have inferred this requirement from the Copyright Act's use of the term "authors" because an author is defined by the Copyright Act as a "creator" or "originator."³⁶ Nimmer defines originality as work that "owes its origin to the author, i.e., work that is independently created rather than copied from other works."³⁷

²⁶ U.S. CONST. art. I, § 8, cl. 8.

²⁷ *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908).

²⁸ *Id.* The statutes "ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant."

²⁹ H.R. Rep. No. 94-1476 (1976).

³⁰ *Id.*

³¹ *Id.*

³² 17 U.S.C. § 102(a) (2022).

³³ *Id.* at § 101.

³⁴ *Id.*

³⁵ *Id.* at § 102(b).

³⁶ See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (2021) (citing *Feist*, 499 U.S. at 351-52.)

³⁷ *Id.* at § 2.01 (citing *Feist*, 499 U.S. at 345).

Originality does not require novelty.³⁸ Backed by congressional intent and judicial construction, a work should not be denied its copyright protections “simply because it is substantially similar to a work previously produced by others.”³⁹ As for the relation between originality and creativity, in *Luck’s Music Library, Inc. v. Ashcroft*, the court stated that originality requires “independent creation” and “just a scintilla of creativity.”⁴⁰ Despite this clarification, many courts use originality and creativity interchangeably.⁴¹

A. *The General Copyright Infringement Test*

For plaintiffs to successfully bring a copyright infringement suit, they must prove “(1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original.”⁴²

The second element of the copyright infringement test stems from the originality requirement discussed above.⁴³ Originality requires the author to create something independently, without copying from someone else’s work.⁴⁴ Additionally, producing a work, without copying, demands at least a small amount of creativity.⁴⁵ As a result, a work is considered original if it is “independently created by the author” and “possesses at least some minimal degree of creativity.”⁴⁶

These statutory requirements provide a test for the “originality” aspect of the modern rule seen today in court opinions: “copying of constituent elements of the work that are original.”⁴⁷ But, what about copying?

³⁸ *Id.* at § 2.01.

³⁹ *Id.*; *Fin. Info., Inc. v. Moody’s Inv. Serv., Inc.*, 751 F.2d 501, 507 (2d Cir. 1984), *aff’d*, 808 F.2d 204 (2d Cir. 1986).

⁴⁰ *See* 1 Nimmer, *supra* note 36, at § 2.01; *Luck’s Music Libr., Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 118 (D.D.C. 2004), *aff’d sub nom. Luck’s Music Libr., Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005).

⁴¹ *See* 1 Nimmer, *supra* note 36, at § 2.01.

⁴² 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.01 (2021); *Feist*, 499 U.S. at 361.

⁴³ *Feist*, 499 U.S. at 358-61.

⁴⁴ *Id.* at 358.

⁴⁵ *Id.*

⁴⁶ *Id.* at 345; *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1212 (2021). In *Google LLC*, instead of literary works, the case involved lines of code; however, code is encompassed by copyright because code is expressed in “words, numbers, or other verbal or numerical symbols,” so they are authored works. The debate in this opinion partly surrounds whether code can pass the originality requirement because the lines of code can be created in varying ways.

⁴⁷ *See* 4 Nimmer, *supra* note 42, at § 4.01; *Feist*, 499 U.S. at 361; *L.A. Printex Indus. v. Aeropostale, Inc.*, 676 F.3d 841, 846 (9th Cir. 2012); *Latin Am. Music Co. v. Media Power Grp., Inc.*, 705 F.3d 34, 38 (1st Cir. 2013); *Perea v. Ed. Cultural, Inc.*, 13 F.4th 42, 55 (1st Cir. 2021).

B. The Test for Copying

Usually, direct evidence of copying is unavailable, so a plaintiff must find another way to establish copying.⁴⁸ The test is twofold.⁴⁹ Plaintiffs “can establish copying by showing (1) that the defendant had access to the plaintiff’s work; and (2) that the two works are substantially similar.”⁵⁰

Access to the plaintiff’s work means that the defendant had the opportunity to see and/or copy the plaintiff’s work.⁵¹ This has been described as a “reasonable opportunity” or a “reasonable possibility” to examine the work.⁵² In other words, it cannot be “merely a bare possibility” that the defendant had the chance to view the piece of work.⁵³ Plaintiffs can prove access by either demonstrating “a ‘chain of events’ linking the plaintiff’s work and the defendant’s access” or by showing that the work has been widely disseminated.⁵⁴

The second prong of the copying test is a showing of substantial similarity between the two works.⁵⁵ To determine substantial similarity, the Ninth Circuit analyzes the works using an extrinsic test and an intrinsic test.⁵⁶

C. The Extrinsic Test for Substantial Similarity

For the extrinsic test, a plaintiff must demonstrate substantial similarity “as measured by external, objective criteria.”⁵⁷ Therefore, when analyzing this part of the substantial similarity test, courts must look to the protected elements of the copyrighted work.⁵⁸ “It is axiomatic that copyright protects only an author’s expression, not his ideas.”⁵⁹

In *Tisi v. Patrick*, the court demonstrated that a common melody and harmony is not original enough to qualify as protectable.⁶⁰ For an author’s work to be protected, it must have some “distinctive characteristic” and individuality.⁶¹ However, even if

⁴⁸ *L.A. Printex Indus.*, 676 F.3d at 846.

⁴⁹ *Id.*; *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996).

⁵⁰ *L.A. Printex Indus.*, 676 F.3d at 846; *Smith*, 84 F.3d at 1218.

⁵¹ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977)).

⁵² *Id.*

⁵³ *L.A. Printex Indus.*, 676 F.3d at 846 (quoting *Art Attacks Ink, LLC v. MGA Ent. Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009)). There is an exception to this rule. If the two works are “so strikingly similar as to preclude the possibility of independent creation,” copying can be proven without demonstrating access, but this is the law in the Second Circuit, not the law in the Ninth Circuit, where *Alfred v. Walt Disney* was decided. *Tisi v. Patrick*, 97 F. Supp. 2d 539, 546 (S.D.N.Y. 2000) (quoting *Ferguson v. NBC, Inc.*, 584 F.2d 111, 113 (5th Cir. 1978); *Gaste v. Kaiserman*, 863 F.2d 1061, 1067-68 (2d Cir. 1988)).

⁵⁴ *L.A. Printex Indus.*, 676 F.3d at 846-47 (quoting *Three Boys Music*, 212 F.3d at 482).

⁵⁵ *Id.* at 841; *Smith*, 84 F.3d at 1218.

⁵⁶ *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018); *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004).

⁵⁷ *Swirsky*, 376 F.3d at 845.

⁵⁸ *Id.*

⁵⁹ *Gaste*, 663 F.2d at 1071; *Swirsky*, 376 F.3d at 845.

⁶⁰ *Tisi*, 97 F. Supp. 2d at 549.

⁶¹ *Id.* (quoting *Supreme Rec., Inc. v. Decca Rec., Inc.*, 90 F. Supp. 904, 908 (S.D. Cal. 1950)).

individual aspects of the work are not protected, they may be protected as a combination.⁶²

The extrinsic test also considers “whether two works share a similarity of ideas and expression as measured by external, objective criteria” and dissects the work’s “constituent elements.”⁶³ This is done by comparing the objective similarities of “specific expressive elements” between a plaintiff’s work and a defendant’s work.⁶⁴ Expert testimony can be particularly helpful in determining whether the similarities between two works are qualitatively significant.⁶⁵

If the similarities are only present to “nonessential matters,” then no substantial similarity should be found.⁶⁶ However, this is more reflective when looking at music samplings, which trend toward having many similarities.⁶⁷ If, looking at each of the works as a whole, no reasonable jury would find that the works are substantially similar using the objective extrinsic test, summary judgment or dismissal is appropriate.⁶⁸

D. The Intrinsic Test for Substantial Similarity

The intrinsic test deciphers “whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.”⁶⁹ The intrinsic test is subjective.⁷⁰ The factfinder, such as a jury, applies the intrinsic test; the Ninth Circuit finds that the intrinsic test is “uniquely suited” for determination by the trier of fact.⁷¹

However, at the pleadings stage, the intrinsic test is unnecessary; only the extrinsic test for substantial similarities is used during the pleadings stage.⁷² The extrinsic test, unlike the intrinsic one, is a matter of law decided by the court because it does not depend upon the trier of fact.⁷³ Therefore, the extrinsic test is the only relevant test when a judge is deciding on a motion to dismiss.⁷⁴

⁶² *L.A. Printex Indus.*, 676 F.3d at 849. The “original selection, coordination, and arrangement” could turn the unprotected elements into protectable expression. An example of this is in *Metcalf v. Bochco*. “Each note in a scale . . . is not protectable, but a pattern of notes in a tune may earn copyright protection.” *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002).

⁶³ *Id.*

⁶⁴ *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020).

⁶⁵ *Newton v. Diamond*, 388 F.3d 1189, 1194 (9th Cir. 2003).

⁶⁶ *Id.* at 1195 (quoting 4 *Nimmer* § 13.03[A][2]; *cf.* *Warner Bros v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983)).

⁶⁷ *Newton*, 388 F. 3d at 1195.

⁶⁸ *Kouf v. Walt Disney Pictures & TV*, 16 F.3d 1042, 1045 (9th Cir. 1994).

⁶⁹ *Three Boys Music*, 212 F.3d at 485 (quoting *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991)).

⁷⁰ *Three Boys Music*, 212 F.3d at 485.

⁷¹ *Id.*

⁷² *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118 (9th Cir. 2018).

⁷³ *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 319 (9th Cir. 1987) (quoting *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1164).

⁷⁴ *Id.*

E. The Inverse-Ratio Rule

The inverse-ratio rule considers the relationship between substantial similarity and access, but it has been overruled by many circuits.⁷⁵ The rule dictates that “a lower standard of proof of substantial similarity” is acceptable when “a high degree of access is shown.”⁷⁶ Presently, the Second, Fifth, Seventh, and Eleventh Circuits have rejected the inverse-ratio rule.⁷⁷ The Ninth Circuit, in its *Skidmore v. Led Zeppelin* decision, effectively rejected the inverse-ratio rule as well.⁷⁸ At the trial, Skidmore asked the judge for an inverse ratio rule instruction, and the judge refused.⁷⁹ The Ninth Circuit claimed that “the very nature of the rule spawned uncertainty in its application.⁸⁰ Additionally, accessibility has become “increasingly diluted in our digitally interconnected world... [where] access is often proved by the wide dissemination of the copyrighted work.”⁸¹

F. Broad and Thin Protection of Copyrights

Different types of works are typically entitled to different levels of copyright protection.⁸² “The distinction between “thin” and “broad” copyright protection is based on the principle that copyright protects expressions and not ideas.”⁸³

Historically, ideas, by themselves, are not protected under copyright law, so this gave an author leeway to copy an idea and incorporate it into his or her work.⁸⁴ In

⁷⁵ *Led Zeppelin*, 952 F.3d at 1065-66.

⁷⁶ *Id.* at 1066; *Three Boys Music*, 212 F.3d at 485 (quoting *Smith*, 84 F.3d at 1218).

⁷⁷ *Peters v. West*, 692 F.3d 629, 634-35 (7th Cir. 2012) (circuit never endorsed this idea); *Positive Black Talk, Inc. v. Cash Money Rec., Inc.*, 394 F.3d 357, 371 (5th Cir. 2004); *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 460 (11th Cir. 1994); *Arc Music Corp. v. Lee*, 296 F.2d 186, 187-88 (2d Cir. 1961). The Ninth Circuit in *Led Zeppelin* looked to the Second Circuit when determining the lack of logic behind this rule. This opinion allowed for the Ninth Circuit to join the rest of these circuit court’s rejection of the inverse ratio rule. The Second Circuit stated that “access will not supply [similarity’s] lack, and an undue stress upon the one feature can only confuse and even conceal this basic requirement.” *Arc Music Corp.* 296 F.2d at 187-88.

⁷⁸ *Led Zeppelin*, 952 F.3d at 1069. Additionally, there was a lot of trouble with applying the inverse ratio rule because a layperson sitting on the jury would have to understand the rule and apply it. The Ninth Circuit decided that this was “totally impossible.” *Id.*

⁷⁹ *Id.* at 1066.

⁸⁰ *Id.*

⁸¹ *Id.* at 1068.

⁸² *Mattel, Inc. v. MGA Ent., Inc.*, 616 F.3d 904, 913 (9th Cir. 2010). This case arose out of a dispute between the company who produces Barbie dolls (Mattel) and the company who produces Bratz dolls (MGA Ent.). Apparently, Bryant, the man who created the Bratz dolls, had previously worked at Mattel. *Id.*

⁸³ See Dr. Dariush Adli, *Commentary: ‘Thin’ vs. ‘Broad’ Protection for Music Works*, LAW JOURNAL NEWSLETTER (June 2018), <https://www.lawjournalnewsletters.com/2018/06/01/commentary-thin-vs-broad-protection-for-music-works/?slreturn=20220810110754>. See also Brian Welk, *Disney Settles ‘Pirates of the Caribbean’ Copyright Suit With Writers Who Claimed Film Franchise Was Their Idea*, THE WRAP (Sept. 2, 2022), <https://www.thewrap.com/disney-settles-pirates-caribbean-copyright-lawsuit/>.

⁸⁴ *Mattel, Inc.*, 616 F.3d at 913-914. As discussed above, ideas and scenes-a-faire, which means standard features, are not protected. The creation of a different standard for different works stems from the fact that there are numerous ways to express ideas. However, sometimes there are less ideas

Mattel, Inc. v. MGA Entm't, Inc., the court explains that there are numerous ways to make an aliens-attack movie, and thus, works that fall within the same category are given “broad protection.”⁸⁵ This means that copyright infringement is present only if the alleged infringing work is substantially similar to the copyrighted work.⁸⁶

On the other hand, there is also “thin” copyright protection.⁸⁷ The court in *Mattel* explains that there are only “so many ways to paint a red bouncy ball on blank canvas.”⁸⁸ Therefore, in cases like *Mattel*, the copyrighted work must be “virtually identical” to be considered an infringement.⁸⁹ Whether a work receives broad or thin protection determines this standard; then it is applied to both the extrinsic and intrinsic tests.⁹⁰

III. THE CASE

Alfred, II, Martinez, Jr., and Laiter filed a claim for copyright infringement against the Walt Disney Company, stating that their screenplay was substantially similar to Disney's *Pirates of the Caribbean: Curse of the Black Pearl* film.⁹¹

Alfred and Martinez wrote a pirate screenplay, and Laiter helped produce it.⁹² Around the time of the creation of the screenplay, the trio worked alongside Disney on a script called *Red Hood*.⁹³ In August 2000, Plaintiffs handed over a copy of their pirate screenplay to Brigham Taylor at Disney because he had shown enthusiasm toward the idea, and the Plaintiffs had worked alongside him for the *Red Hood* project.⁹⁴

The Plaintiffs did not hear for many weeks, even though it is industry standard to hear back within one to two weeks.⁹⁵ At this point, the Plaintiffs finally learned that Disney passed on their screenplay.⁹⁶ On November 26, 2002, over two years later, Disney returned the screenplay to the Plaintiffs.⁹⁷ Then, in July 2003, *Pirates of the Caribbean: Curse of the Black Pearl* debuted in theaters, with four movies following.⁹⁸

available to an author for one type of work than another. An author can go anywhere with a playscript, but a musical artist must work within the chords he is given.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 914.

⁸⁸ *Id.*

⁸⁹ *Mattel, Inc.*, 616 F.3d at 914.

⁹⁰ *Id.* The Ninth Circuit held that the district court erred in affording broad protection to the dolls due to the narrow range of “expression on an attractive young, female fashion doll with exaggerated proportions.” Therefore, the court believed that applying thin copyright protection (using the “virtually identical” standard) was necessary.

⁹¹ *Alfred*, 821 Fed. App'x. at 728.

⁹² Compl., *supra* note 6, at 6.

⁹³ *Id.* at 6-7.

⁹⁴ *Id.* at 6-8.

⁹⁵ *Id.* at 8.

⁹⁶ *Id.* at 9.

⁹⁷ Compl., *supra* note 6, at 9.

⁹⁸ *Id.* at 9; *Alfred*, 388 F. Supp. 3d at 1180. These movies include: *Pirates of the Caribbean: Curse of the Black Pearl*. These were *Pirates of the Caribbean: Dead Man's Chest*, *Pirates of the Caribbean: At World's End*, *Pirates of the Caribbean: On Stranger Tides*, and *Pirates of the Caribbean: Dead Men Tell No Tales*.

The movie and its sequels became a billion-dollar franchise.⁹⁹ Plaintiffs claimed that each of these movies infringe upon their pirate screenplay.¹⁰⁰

The United States District Court for the Central District of California dismissed the case under Federal Rule of Civil Procedure 12(b)(6): “failure to state a claim upon which relief can be granted.”¹⁰¹ Plaintiffs appealed the court’s dismissal.¹⁰² In their appeal, Plaintiffs argued that the district court erred in granting the motion to dismiss, abused its discretion in denying them leave to amend their complaint, and abused its discretion in “taking judicial notice of the Disney World Pirates of the Caribbean theme park ride as it existed in 2005.”¹⁰³

The Ninth Circuit published this opinion, deciding upon the following issues:¹⁰⁴ (1) whether the district court failed when it did not compare the unprotectable elements; (2) whether the two works are substantially similar enough to survive a motion to dismiss using the objective, extrinsic test; (3) whether the district court erred in failing to apply the inverse-ratio rule; and (4) whether pirate films are entitled to broad copyright protection, rather than thin copyright protection.¹⁰⁵

The Ninth Circuit detailed the similarities between the Plaintiffs’ pirate screenplay and the Defendant’s film.¹⁰⁶ The two works both included: a prologue with a setting ten years before the main story begins; an introduction of the main characters during a battle at gunpoint; treasure stories taking place on islands; caves filled with jewels and other treasures; skeleton crews or supernaturally cursed pirates; and a young, rogue pirate yearning for redemption.¹⁰⁷ Additionally, both of the scripts share similarities in dialogue, tone, and theme.¹⁰⁸

⁹⁹ Compl., *supra* note 6, at 6.

¹⁰⁰ *Alfred*, 388 F. Supp. 3d at 1180.

¹⁰¹ *Alfred*, 821 Fed. App’x. at 728; FED. R. CIV. P. 12(b)(6). The full rule is “every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion ... (6) failure to state a claim upon which relief can be granted.”

¹⁰² *Alfred*, 821 Fed. App’x. at 728.

¹⁰³ *Id.* at 728-30. The Ninth Circuit had jurisdiction over the lower court’s dismissal under 28 U.S.C. § 1291 (courts of appeals “shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court”). The Ninth Circuit does not address whether the district court abused its discretion in either the amendment or the matter regarding the Disney World theme park ride. The appellate court deemed these issues moot, but it stated that plaintiffs could try to request leave to amend their complaint again on remand. The leave to amend rooted in the plaintiffs’ desire to change their complaints now that they had a chance to review the original scripts of Disney’s movies. *Alfred*, 388 F. Supp. 3d at 1190-91. The lower court deemed the amendment “futile” because they had not prevailed under the extrinsic test. *Id.* at 1191.

¹⁰⁴ *Alfred*, 821 Fed. App’x. at 728.

¹⁰⁵ *Id.* at 728-30.

¹⁰⁶ *Id.* at 729.

¹⁰⁷ *Id.* The District Court characterized the idea of cursed pirates as “scenes-a-faire” and unprotectable. *Alfred*, 388 F. Supp. 3d at 1183. The District Court also pointed out that many aspects of the screenplay featured elements of Defendant’s *Pirates of the Caribbean* ride. The theme park ride has skeleton pirates speaking and steering the ship. The participants search for the ‘lost treasure.’ The District Court deemed that the plot upon “closer inspection reveals that they tell very different stories.” *Id.* (quoting *Benay v. Warner Bros. Ent., Inc.*, 607 F.3d 620, 625 (9th Cir. 2010)).

¹⁰⁸ *Alfred*, 821 Fed. App’x. at 1174. The two main characters of each of the two authored works do share similarities as well. *Alfred*, 388 F. Supp. 3d at 1185. The defendant’s main character is Jack Sparrow who is portrayed as funny, cocky, and a drunk who enjoys rum; on the other hand, the

The district court noted these similarities but dismissed the action because it deemed these traits to be common, unprotected, pirate movie tropes.¹⁰⁹ However, the Ninth Circuit countered this, stating it is difficult to determine whether the elements are protectable or unprotectable at this point in the litigation.¹¹⁰

The Ninth Circuit believed that these similarities were “qualitatively significant,” and that more discovery would be required, especially when these works are about twenty years old.¹¹¹ The *Pirates of the Caribbean* franchise could also be considered as a franchise that set the mold for pirate movie tropes.¹¹²

As for the inverse-ratio rule, it was overruled in the *Skidmore* decision.¹¹³ The Ninth Circuit determined that the inverse-ratio rule “defies logic” and “creates uncertainty.”¹¹⁴ Therefore, the Ninth Circuit held that the district court did not err when refusing to apply the inverse-ratio rule to this case.¹¹⁵ The Ninth Circuit also briefly discussed broad versus thin copyright protection.¹¹⁶ The district court did not mention thin protection, nor did it require Plaintiffs to show that the two works were “virtually identical” instead of showing substantial similarity.¹¹⁷

Overall, the Ninth Circuit held the district court erred when it did not compare the unprotectable elements between the two works, and that there were substantial similarities, enough to survive a motion to dismiss.¹¹⁸ The Ninth Circuit also affirmed the lower court’s refusal to apply the inverse-ratio rule.¹¹⁹

Finally, the Ninth Circuit held that Plaintiffs were correct about the idea that pirate films are entitled to broad, not narrow, copyright protection.¹²⁰ Accordingly, the Ninth Circuit cannot determine whether the district court erred because it did not require a showing that the works are “virtually identical.”¹²¹ The Ninth Circuit

plaintiff’s main character is Davey Jones, who is considered a “dashing young rogue” that is cocky and brave, but also a drunk. *Id.* The district court deemed “cockiness, bravery, and drunkenness” as “generic, non-distinct characteristics.” *Id.* Therefore, the lower court stated that they are not protectable. *Id.* The themes were similar in that there was betrayal; however, plaintiffs’ theme includes a redemption arc where the main character gives up piracy for love. *Id.* at 1187-89.

¹⁰⁹ *Alfred*, 821 Fed. App’x. at 729. The similarities that the District Court deemed “pirate tropes” include “treasure maps, ghost pirates, ‘the undead,’ the supernatural, ships flying black sails, skeletons, privateers, naval attacks, dark fog, the ‘pirate code,’ ghosts, and sea monsters.”

¹¹⁰ *Id.* Discovery and the gathering of additional evidence would help to shed light on what would likely be considered protectable versus unprotectable. Also, “even when individual elements are not protected – their ‘original selection, coordination, and arrangement . . . may be protectable [sic] expression.” *L.A. Printex*, 676 F.3d at 849.

¹¹¹ *Alfred*, 821 Fed. App’x. at 729; see also *Newton*, 388 F.3d at 1196.

¹¹² *Alfred*, 821 Fed. App’x. at 729.

¹¹³ *Id.*

¹¹⁴ *Id.* (quoting *Led Zeppelin*, 925 F.3d at 1066).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 729-730; *Mattel*, 616 F.3d at 913-14. Broad protection follows the “substantial similarity” standard; however, thin protection follows the “virtually identical” standard. In *Alfred*, the District Court had not enforced a “virtually identical” standard. Because the lower court had not mentioned even once that the screenplay should be given thin protection (and therefore must show that the two works are “virtually identical”), the Ninth Circuit could not conclude whether the lower court had erred on this point.

¹¹⁷ *Alfred*, 821 Fed. App’x. at 729.

¹¹⁸ *Id.* at 728-29.

¹¹⁹ *Id.* at 729.

¹²⁰ *Id.* at 729-30.

¹²¹ *Id.*

reversed and remanded the *Alfred v. Walt Disney Co.* decision back to the district court.¹²²

On remand, the California Central District Court denied Disney's Motion for Summary Judgment.¹²³ Finally, the case concluded with Disney settling.¹²⁴

IV. ANALYSIS

This section will argue that the Court correctly decided *Alfred v. Walt Disney Co.* when it held that Plaintiffs' screenplay should have survived a motion to dismiss.¹²⁵ This section will detail how the two works, Plaintiffs' screenplay and Defendant's *Pirates of the Caribbean* films, are substantially similar.¹²⁶

When viewing the similarities between the two works, the Ninth Circuit correctly decided, based on current case law, that Plaintiffs should survive a motion to dismiss.¹²⁷ This section will also argue that Plaintiffs' screenplay is protectable and that the protected elements are objectively similar to elements within Defendant's films.¹²⁸

A. Plaintiffs' Screenplay was Protectable

An idea alone is unprotectable; there must be some originality that goes into the work.¹²⁹ Additionally, the "original selection, coordination, and arrangement" could turn the unprotected elements into protectable expression.¹³⁰

If courts only examined each separate component of a work to determine its protectability, it would be very difficult to find a work copyrightable.¹³¹ For example, the court would find "no originality in a painting because all colors of paint have been used somewhere in the past."¹³² Each similarity of Plaintiffs' screenplay compared to Defendant's film franchise should be considered as a whole, instead of each element being considered individually. Instead of combining reds, blues, and yellows to create a painting, Plaintiffs created the characteristics of the main character, the skeletons, and the supernaturally cursed crew.¹³³

¹²² *Alfred*, 821 Fed. App'x. at 730.

¹²³ *Alfred v. Walt Disney Pictures*, 2021 U.S. Dist. LEXIS 253308, at *16 (C.D. Cal. Dec. 16, 2021).

¹²⁴ See Welk, *supra* note 83.

¹²⁵ *Alfred*, 821 Fed. App'x. at 729. The Ninth Circuit was correct in holding that "[b]ecause Plaintiffs sufficiently allege that there are substantial similarities between the works to survive Defendant's motion-to-dismiss, we reverse the district court's dismissal and remand."

¹²⁶ *L.A. Printex Indus.*, 676 F.3d at 846; *Smith*, 84 F.3d at 1218.

¹²⁷ *Alfred*, 821 Fed. App'x. at 729.

¹²⁸ *L.A. Printex Indus.*, 676 F.3d at 849.

¹²⁹ *Tisi*, 97 F. Supp. 2d at 549.

¹³⁰ *L.A. Printex Indus.*, 676 F.3d at 849.

¹³¹ *Id.*

¹³² *Id.* (quoting *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995)).

¹³³ *Alfred*, 388 F. Supp. 3d at 1183.

In *L.A. Printex Indus.*, a designer created a floral fabric design called C30020.¹³⁴ This fabric had “a repeating pattern of bouquets of flowers and three-leaf branches.”¹³⁵ While the floral fabric design idea is unprotectable, because there are numerous ways to “combine petals, buds, stems, leaves, and colors” in the design, the combination of individual elements makes the design protectable.¹³⁶

Alfred's screenplay has similarities to Defendant's *Pirates of the Caribbean* films, including a prologue taking place ten years prior to the storyline, the main characters meeting during a battle over gunpoint, among others.¹³⁷ In addition, there are shared similarities in dialogue and tone.¹³⁸ These individual elements may resemble typical pirate tropes, which are no more than ideas.¹³⁹ However, in combination, these individual elements transform the pirate tropes from unprotectable ideas to a protected screenplay.¹⁴⁰

In *Metcalf v. Bochco*, the plaintiffs wrote a story about “a county hospital in inner-city Los Angeles and the struggles of its predominantly black staff.”¹⁴¹ The plaintiffs then transformed the story into a screenplay and pitched it to Bochco and the Columbia Broadcasting System (“CBS”), but both declined. Eight years later, CBS premiered a show, produced and written by Bochco, about a “county hospital in inner-city Los Angeles with a predominantly black staff.”¹⁴²

Other similarities included themes of “poverty, race relations, and urban blight;” good looking and muscular surgeons who grew up in the same neighborhood as the hospital; a struggle to choose between private practice and working in the inner-city;

¹³⁴ *L.A. Printex Indus.*, 676 F.3d at 845. The design was created by Moon Choi, an L.A. Printex designer. C30020 is part of a group of five textile designs, called Small Flower Group. The Copyright Office issued a certificate of registration for it on July 17, 2002.

¹³⁵ *Id.* at 850. In 2008, L.A. Printex discovered this pattern on Aeropostale shirts. The President of L.A. Printex claimed, “the only difference between C30020 and the design on the Aeropostale shirts is that the latter was printed using cruder, lower-quality techniques and machinery.”

¹³⁶ *Id.* at 850-51. It is because there are a multitude of ways to design a floral pattern that makes it possible for this combination to become protectable. In contrast, there are a “limited number of ways to . . . paint a red bouncy ball on black canvas.”

¹³⁷ *Alfred*, 821 Fed. App'x. at 729. Further similarities include jewel-filled caves, betrayal of a former first mate, and skeleton crews. This is not an extensive list of the similarities found between the two works.

¹³⁸ *Id.* Plaintiffs claim that dialogues from the screenplay were copied practically verbatim into *Pirates of the Caribbean*; Compl., *supra* note 6, at 10.

¹³⁹ *Id.* The District Court thought that the two works only shared unprotectable material and that all of the similarities between Plaintiffs' screenplay and Defendant's films were simply generic tropes found in every pirate movie.

¹⁴⁰ *Id.* This argument is consistent with the Ninth Circuit's opinion: “the selection and arrangement of the similarities between them is more than de minimis.” The court and this case note rely upon the opinion of *L.A. Printex Indus.* to come to this conclusion by applying the rule that an “original selection, coordination, and arrangement . . . may be protectable [sic] expression.” *L.A. Printex Indus.*, 676 F.3d at 849.

¹⁴¹ *Metcalf*, 294 F.3d at 1071. The writers Jerome and Laurie Metcalf wanted to develop their story into a screenplay for a motion picture. The Metcalfs wrote a project summary to present to Bochco. Bochco liked it, but he declined due to lack of time. CCA, the Metcalf's corporation, hired someone to write a screenplay. Bochco rejected the screenplay again for the same reason: he was too busy with other projects. The Metcalfs revised the screenplay and submitted it to Bochco and CBS. Both rejected the screenplay. CBS denied it because it already had a hospital series being developed. This was in 1992. In 2000, CBS aired a television show, called “City of Angels,” produced by Bochco, featuring an inner-city hospital in Los Angeles with a predominantly black staff.

¹⁴² *Id.* at 1072.

romance with a young, professional woman and the hospital administrator leading to conflict; and a hospital “bid for reaccreditation [that] is vehemently opposed by a Hispanic politician.”¹⁴³ The Ninth Circuit held that these elements were protectable due to “the presence of so many generic similarities and the common patterns in which they arise.”¹⁴⁴

In *Alfred*, the plot and sequence of events have similarities to Defendant’s *Pirates of the Caribbean* films, such as supernaturally cursed pirates with skull faces, ships flying black sails, naval attacks, dark fog, the ‘pirate code,’ ghosts, and sea monsters.¹⁴⁵ The main characters in both of the works are “funny, not feared,” referred to frequently as a “good man,” cocky but has a “heart of gold,” and a drunk who loves rum.¹⁴⁶

Both works have a rival, described as sinister, pale, wearing a black baroque pirate suit, and who is “charismatic but in an evil way.”¹⁴⁷ This rivalry started out as friendship, captain and first mate, before one of them betrays the other.¹⁴⁸ Additionally, Plaintiffs can also point to similar dialogue and themes.¹⁴⁹

Plaintiffs’ plight was comparable to the Metcalf’s circumstances. The similarities create a lengthy, and incomplete, list of unprotected elements, which becomes protected when joined together.¹⁵⁰ The love triangle in the Metcalf’s screenplay would be considered an unprotected element because love triangles are commonly found in various forms of media.¹⁵¹ However, the love triangle is protectable in combination with other elements included in the work. There are numerous pirate tropes, many of which were created by *Pirates of the Caribbean*; however, the combination of these elements transforms the work from an unprotectable idea to protectable expression.¹⁵²

When executing its analysis, the District Court separated these elements, looking at the characters, theme, dialogue, mood, setting, and pace individually, as opposed to

¹⁴³ *Id.* at 1073-74.

¹⁴⁴ *Id.* at 1074.

¹⁴⁵ *Alfred*, 388 F. Supp. 3d at 1183. The District Court concluded by using an objective analysis that the plot and sequence of each of these elements are not similar. The defendant’s film is focused on finding and returning treasure, and the plaintiffs’ screenplay focuses on merely finding the treasure. However, both the Plaintiffs’ screenplay and the Defendant’s films are about breaking a curse which is the main plot point of both the defendant’s first film of the *Pirates of the Caribbean* series and the Plaintiffs’ screenplay.

¹⁴⁶ *Id.* at 1185.

¹⁴⁷ *Id.* at 1185-86. The two characters, the Defendant’s Captain Barbossa and Plaintiffs’ Jack Nefarious, are not considered “bargainers” either. The District Court stated that this was an inaccurate similarity, but without further discovery, it would be difficult to come to this conclusion.

¹⁴⁸ *Id.* at 1186.

¹⁴⁹ *Id.* at 1187-88. There is a common motif between the two works: ten years in time. Plaintiffs’ screenplay consistently uses “ten years.” Defendant’s film has the Flying Dutchman only allowed on land once every ten years. There are also themes of betrayal and mutiny. Plaintiffs allege “extended similarity in dialogue.” The District Court states in one breath that Plaintiffs failed to prove this and, in another breath, deny Plaintiffs the opportunity to amend their complaint after seeing the original scripts used by Defendant for its films. *Id.* at 1191.

¹⁵⁰ *Alfred*, 821 Fed. App’x. at 729; *L.A. Printex Indus.*, 676 F.3d at 849.

¹⁵¹ *Metcalf*, 294 F.3d at 1073-74. The Ninth Circuit stated that the “similarities proffered by the Metcalfs are not protectable when considered individually; they are either too generic or constitute ‘scenes à faire.’” Specifically, the court used these as examples: “One cannot copyright the idea of an idealistic young professional choosing between financial and emotional reward, or of love triangles among young professionals that eventually become strained, or of political forces interfering with private action.”

¹⁵² *Alfred*, 821 Fed. App’x. at 729.

viewing the elements collectively.¹⁵³ This analysis contradicts the rule that the “original selection, coordination, and arrangement” could turn the unprotected elements into protectable expression.¹⁵⁴

Plaintiffs’ work should be protected because it satisfies the first prong of the objective, extrinsic test for substantial similarity.¹⁵⁵ In combination, these elements are more than just common ideas.¹⁵⁶

B. The Protected Elements are Objectively Similar to Defendant’s Film

The second prong of the extrinsic test considers “whether two works share a similarity of ideas and expression as measured by external, objective criteria” and analyzes the work’s “constituent elements.”¹⁵⁷

In *Kouf v. Walt Disney Pictures & TV*, the plaintiff wrote a screenplay, which he argued was similar to the defendant’s film, *Honey, I Shrunk the Kids*.¹⁵⁸ However, the Ninth Circuit disagreed because the defendant Disney’s film and the plaintiff’s screenplay had “substantially different plots, themes, and sequences of events.”¹⁵⁹ The characters were shrunk to different sizes, and the method of shrinking was different as well.¹⁶⁰ Additionally, *Honey, I Shrunk the Kids* demonstrates family values, and the plaintiff’s work has a theme of the “triumph of good over evil.”¹⁶¹

At first glance, *Kouf* and *Alfred* might seem comparable because the main characters’ endings in the respective works are dissimilar.¹⁶² Plaintiffs’ main character, Davey Jones, renounces piracy while Jack Sparrow, Defendant’s main character, does not.¹⁶³ Also, some of the plot points between the two works are different.¹⁶⁴ In *Pirates of the Caribbean: Curse of the Black Pearl*, pirates are seeking

¹⁵³ *Alfred*, 388 F. Supp. 3d at 1183-90.

¹⁵⁴ *L.A. Printex Indus.*, 676 F.3d at 849.

¹⁵⁵ *Id.*; *Rentmeester*, 883 F.3d at 1117; *Gaste*, 663 F.2d at 1071; *Swirsky*, 376 F.3d at 845.

¹⁵⁶ *Gaste*, 663 F.2d at 1071; *Swirsky*, 376 F.3d at 845.

¹⁵⁷ *L.A. Printex Indus.*, 676 F.3d at 849.

¹⁵⁸ *Kouf*, 16 F.3d at 1043.

¹⁵⁹ *Id.* at 1045.

¹⁶⁰ *Id.* In *Honey, I Shrunk the Kids* the main characters shrink to a quarter inch, and the main characters in the plaintiff’s screenplay shrink to one foot. In Disney’s film, the main characters become smaller by means of a ray gun machine, and the shrinking was an accident. By contrast, in the plaintiff’s screenplay, the characters purposely shrink after consuming a liquid formula. Also, in the Disney film, the characters shrink once, while in the plaintiff’s screenplay the characters shrink multiple times.

¹⁶¹ *Id.* *Honey, I Shrunk the Kids* emphasizes family values, such as “love between spouses, parents and children, and neighbors.” The plaintiff’s screenplay has tough guys, and the main characters triumph against the antagonists. This also leads to different conclusions between the two works. At the end of *Honey, I Shrunk the Kids*, the scene depicts a happy family, and at the end of the plaintiff’s screenplay, the gangsters are dead.

¹⁶² *Alfred*, 388 F. Supp. 3d at 1185.

¹⁶³ *Id.* Plaintiffs’ Davey Jones gives up piracy and the treasure he is hunting all in the name of love, while Defendant’s main character, Jack Sparrow, does not have a love interest and continues his life as a pirate.

¹⁶⁴ *Id.* at 1184.

to return the treasure to break the curse.¹⁶⁵ On the other hand, in Plaintiffs' screenplay, Davey Jones is searching for the treasure like a typical pirate.¹⁶⁶

This is a surface-level comparison of the two works. In reality, the two main characters are at odds with each other over treasure.¹⁶⁷ Undoubtedly, what they are fighting over is different.¹⁶⁸ Defendant's main characters are fighting over the *Black Pearl*, while Plaintiffs' characters are fighting over a map. However, it is still a treasure in each of these characters' eyes.¹⁶⁹

Once the supernaturally cursed pirates, the tentacled sea monster, and the attributes of the main character and his rival are taken into consideration, there are significantly more similarities between Plaintiff Alfred's screenplay and Defendant Disney's *Pirates of the Caribbean* movie than the similarities between the movie *Honey, I Shrank the Kids* and Kouf's screenplay. *Pirates of the Caribbean* and Plaintiffs' screenplay share more than a "compilation of random similarities scattered throughout the works."¹⁷⁰

While there are differences between the two works, the similarities are more than enough to survive a motion to dismiss.¹⁷¹

C. Dismissal was Inappropriate

It is rare for copyright infringement cases to be dismissed at the pleadings stage, but that was what happened in *Alfred*.¹⁷² Typically, dismissal occurs at the summary judgment stage, after discovery occurs.¹⁷³ Dismissal is considered appropriate in the pleading stage if discovery is unneeded because the two works are properly before the court, so they can be examined and compared.¹⁷⁴

In *Rentmeester v. Nike*, the Ninth Circuit compared two photos to determine whether they were substantially similar.¹⁷⁵ The court was able to consider dismissal during the pleadings stage because it had both photos available for examination.¹⁷⁶

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1184.

¹⁶⁷ *Alfred*, 388 F. Supp. 3d at 1185.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Kouf*, 16 F.3d at 1045.

¹⁷¹ *Alfred*, 821 Fed. App'x. at 729.

¹⁷² *Id.* at 728. "Rentmeester contends that dismissal at the pleading stage is rarely appropriate in copyright infringement cases." *Rentmeester*, 883 F.3d at 1123.

¹⁷³ *Rentmeester*, 883 F.3d at 1123. This does not mean that dismissal cannot happen during the pleadings stage.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1115-23. This case involved a 1984 photograph of Michael Jordan "leaping toward a basketball hoop with a basketball raised above his head in his left hand, as though he is attempting to dunk the ball." Rentmeester, the photographer, had instructed Jordan on the specific pose he wanted. This pose was "inspired by ballet's grand jeté, in which a dancer leaps with legs extended, one foot forward and the other back." Rentmeester took the photo from below Jordan at the top of the jump, so "that the viewer looks up at Jordan's soaring figure silhouetted against a cloudless blue sky." Then, Nike had Michael Jordan do the same pose as part of its marketing campaign.

¹⁷⁶ *Id.* at 1119-23. The Ninth Circuit determined that Nike was not liable for copyright infringement of Rentmeester's photograph. "With novels, plays, and motion pictures . . . even after filtering out unprotectable elements like ideas and scenes à faire, many protectable elements of

This was not the case in *Alfred*.¹⁷⁷ The Ninth Circuit was correct in believing that “additional evidence would help inform the question of substantial similarity.”¹⁷⁸ Plaintiffs’ screenplay and Defendant’s films are not two photographs that the court can easily hold side-by-side to determine substantial similarity.¹⁷⁹

Expert testimony is typically necessary to aid courts in “determining whether the similarities plaintiffs identify are qualitatively significant.”¹⁸⁰ *Alfred* and his co-plaintiffs did not reach the discovery stage in litigation.¹⁸¹ In other words, experts were not called to determine whether the similarities between Plaintiffs’ screenplay and Defendant’s films are “qualitatively significant.”¹⁸² Therefore, dismissal was inappropriate because the Court did not have enough information, without expert testimony, to determine substantial similarity.¹⁸³

expression remain that can be objectively compared . . . photographs cannot be dissected into protected and unprotected elements in the same way.” The Ninth Circuit admitted that Michael Jordan’s pose was one of the “highly original elements” of the photo, but the court held that Rentmeester “cannot copyright the pose itself and thereby prevent others from photographing a person in the same pose.”

¹⁷⁷ *Alfred*, 821 Fed. App’x. at 729.

¹⁷⁸ *Id.*

¹⁷⁹ *Rentmeester*, 883 F.3d at 1118. Sometimes, photos are also entitled to only thin copyright protection “because the range of creative choices available in selecting and arranging the photo’s elements is quite limited.” Due to this, even the subtlest differences make two photos non-infringing. On the other hand, movies are typically given broad protection.

¹⁸⁰ *Newton*, 388 F.3d at 1196. In this case, the plaintiff was fighting summary judgment, arguing that the experts’ testimony created “a genuine issue of material fact on the substantiality of the copying.” Jazz flutist, James W. Newton had composed a “six-second, three-note segment,” and the defendants, a musical group known as the Beastie Boys, used this composition. The District Court held that the segment was original but not actionable because it was *de minimis*. The Ninth Circuit agreed after reviewing the expert testimony.

¹⁸¹ *Alfred*, 821 Fed. App’x. at 729. The Plaintiffs appealed the district court’s 12(b)(6) dismissal, and this type of dismissal occurs during the pleading stage. FED. R. CIV. P. 12(b)(6), *supra* note 101. Pleading stage occurs before the discovery stage, and it will not consider matters outside of the pleadings. FED. R. CIV. P. 12(d). Otherwise, it would have to be treated as a motion for summary judgment pursuant to Rule 56. *Id.*

¹⁸² *Alfred*, 821 Fed. App’x. at 729-30; *Newton*, 388 F.3d at 1196. The Ninth Circuit was correct in its opinion that expert testimony would be useful in *Alfred* because both of the individual pieces are almost twenty years old, and the “*Pirates of the Caribbean* film franchise may itself have shaped what are now considered pirate-movie tropes.” This concerns stems from protectability. Pirate movie tropes are considered *scènes à faire*, but if the *Pirates of the Caribbean* film franchise created those tropes, and Disney infringed upon *Alfred* and co-plaintiffs’ copyright, then the issue becomes even more complicated. The Ninth Circuit sees the value in having experts dissect both the Plaintiffs’ work and Disney’s end-product to determine whether the elements at issue are more than a trope. This speaks to how discovery is necessary in this case. Additionally, the Ninth Circuit did not make any decision on whether the lower court should allow Plaintiffs to amend their complaints now that they had the chance to view the scripts used by Defendant, but they left the option open on remand.

¹⁸³ *Alfred*, 821 Fed. App’x. at 729. This could be considered as a huge win for the Plaintiffs because they now stand a chance of standing up to a huge multimedia conglomerate that has a history of unchecked copyright infringement. Compl., *supra* note 6, at 10. Plaintiffs alleged that “Defendant’s unauthorized copying and appropriation of ‘The Screenplay’ is just another misappropriation of intellectual property of others in their longstanding history of copying other’s original material.” *Id.* The Complaint also alleges that *The Lion King*, *Toy Story*, *Monsters, Inc.*, *Up*, *Frozen*, *Inside Out*, and *Zootopia* are potential infringements. *Id.* *Alfred* and co-plaintiffs are standing up to a defendant that has “a long history of disregarding Copyright law and making a tremendous profit without compensating the very individuals that created these original expressions.” *Id.*

V. CONCLUSION

Keeping the analysis illustrated above in mind, the Ninth Circuit Court correctly decided *Alfred v. Walt Disney Co.* when it held that Plaintiffs' screenplay should have survived a motion to dismiss.¹⁸⁴ Plaintiffs' screenplay and Defendant's *Pirates of the Caribbean* franchise were, in fact, substantially similar, and therefore, should have survived Defendant's motion to dismiss.¹⁸⁵

As detailed above, the Ninth Circuit's decision is consistent with current case law.¹⁸⁶ In accordance with case law, Plaintiffs' screenplay was protectable, despite the number of pirate tropes it includes.¹⁸⁷ Furthermore, these protected elements are objectively similar to Defendant's *Pirates of the Caribbean* film.¹⁸⁸ Therefore, dismissal by the district court was inappropriate.¹⁸⁹

Additionally, public policy dictates that Plaintiffs' copyright infringement suit should survive a motion to dismiss.¹⁹⁰ The district court examined Plaintiffs' screenplay in separate components, but if every court were to do this, it would be difficult to find any work copyrightable.¹⁹¹

Hopefully, when looking to the future of copyright law, we can see further accountability of big names, such as the Walt Disney Company.¹⁹² Disney is a multi-billion-dollar company that runs multiple industries with an iron fist.¹⁹³ It is a media conglomerate that has a troublesome history with copyright infringement claims.¹⁹⁴

In Plaintiffs' initial complaint, they pointed to *The Lion King*, *Toy Story*, *Monsters, Inc.*, *Up*, *Frozen*, *Inside Out*, and *Zootopia* as examples of potential copyright

¹⁸⁴ *Alfred*, 821 Fed. App'x. at 729. "Plaintiffs sufficiently allege[d] that there are substantial similarities between the works to survive Defendant's motion-to-dismiss, we reverse the district court's dismissal and remand."

¹⁸⁵ *Id.*; *L.A. Printex Indus.*, 676 F.3d at 846; *Smith*, 84 F.3d at 1218.; *Rentmeester*, 883 F.3d at 1123.

¹⁸⁶ *L.A. Printex Indus.*, 676 F.3d at 849; *Kouf*, 16 F.3d at 1045; *Metcalf*, 294 F.3d at 1071-74; *Rentmeester*, 883 F.3d at 1123.

¹⁸⁷ *Tisi*, 97 F. Supp. 2d at 549; *L.A. Printex Indus.*, 676 F.3d at 849. There was originality found to be in Plaintiffs' screenplay because the "original selection, coordination, and arrangement" turned the unprotected elements into protectable expression. *L.A. Printex Indus.*, 676 F.3d at 849; *Alfred*, 821 Fed. App'x. at 729.

¹⁸⁸ *Kouf*, 16 F.3d at 1043-45. The analysis section details how objectively there are similarities between the work's "constituent elements." *L.A. Printex Indus.*, 676 F.3d at 849.

¹⁸⁹ *Rentmeester*, 883 F.3d at 1123. As stated above, it is rare for dismissal of copyright infringement to occur at the pleading stage, which is what happened in *Alfred*. *Alfred*, 821 Fed. App'x. at 728.

¹⁹⁰ *Rentmeester*, 883 F.3d at 1123; *L.A. Printex Indus.*, 676 F.3d at 849.

¹⁹¹ *Alfred*, 388 F. Supp. 3d at 1183-90; *L.A. Printex Indus.*, 676 F.3d at 849. Instead, the lower court in *Alfred* analyzed the characters, theme, dialogue, mood, setting, and pace individually. This contradicts the public policy of seeing a work to determine copyright infringement protectability.

¹⁹² Compl., *supra* note 6, at 10. Copyright rules should be made with the need for "diverse forms of expression from diverse creators." See Cory Doctorow, *In Serving Big Company Interests, Copyright Is In Crisis*, ELECTRONIC FRONTIER FOUNDATION (Jan. 21, 2020), <https://www.eff.org/deeplinks/2020/01/serving-big-company-interests-copyright-crisis>. This becomes problematic when looking at big names, such as Disney.

¹⁹³ See Hallman, *supra* note 1.

¹⁹⁴ Compl., *supra* note 6, at 10. There is certainly hope on behalf of the Plaintiffs and artists like them can stand against media giants such as Disney or Amazon. See also Doctorow, *supra* note 192.

infringements by Defendant.¹⁹⁵ Due to this extensive history, public interest would be best served by allowing discovery to determine if the discovery process leads to a fuller picture of the claim before the Court.¹⁹⁶ Perhaps the Plaintiffs in *Alfred* will inspire further action against the media conglomerate, but only time will tell.¹⁹⁷

The Ninth Circuit's decision in *Alfred* allows future plaintiffs a chance to stand up to companies that hold an enormous amount of power.¹⁹⁸ On the other hand, the decision does so without expanding the law and opening the door to future frivolous claims.¹⁹⁹ Therefore, when looking at the full picture, the Ninth Circuit's holdings are correct.

¹⁹⁵ Compl., *supra* note 6 at 10.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* See generally Brooks Barnes, *Disney Sues to Keep Complete Rights to Marvel Characters*, N.Y. TIMES (Sept. 24, 2021), <https://www.nytimes.com/2021/09/24/business/media/disney-marvel-copyright-lawsuits.html>. Walt Disney is currently trying to defend its rights to huge money-making characters like Iron Man, Spider-Man, and Thor, but also characters like Doctor Strange, Black Widow, Hawkeye, Captain Marvel, Falcon, Blade, and the Wizard. It would seem that Disney is constantly fighting some type of copyright battle.

¹⁹⁸ *Id.*

¹⁹⁹ *L.A. Printex Indus.*, 676 F.3d at 849; *Kouf*, 16 F.3d at 1045; *Metcalfe*, 294 F.3d at 1071-74; *Rentmeester*, 883 F.3d at 1123. The Ninth Circuit limits frivolous claims by staying consistent with the current case law.