

19-3160-CV

United States Court of Appeals
for the
Second Circuit

ANAS OSAMA IBRAHIM ABDIN,

Plaintiff-Appellant,

– v. –

CBS BROADCASTING INC., NETFLIX, INC.,
CBS CORPORATION, CBS INTERACTIVE, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees CBS Broadcasting, Inc., CBS Corporation, CBS Interactive Inc. and Netflix, Inc., by and through their undersigned counsel, state as follows:

Defendant-Appellee CBS Broadcasting Inc. is an indirect wholly owned subsidiary, and Defendant-Appellee CBS Interactive Inc. is a direct wholly owned subsidiary, of Defendant-Appellee CBS Corporation n/k/a ViacomCBS Inc. (collectively, “CBS”), a publicly traded company.¹ National Amusements, Inc., a privately held company, beneficially owns the majority of the Class A voting stock of ViacomCBS Inc. ViacomCBS Inc. is not aware of any publicly held corporation owning 10% or more of its total common stock, i.e., Class A and Class B on a combined basis.

Defendant-Appellee Netflix, Inc. (“Netflix”) is a publicly traded company. No publicly held corporation owns 10% or more of Netflix’s stock.

¹ On December 4, 2019, Viacom Inc. merged with and into CBS Corporation, with CBS Corporation renamed as “ViacomCBS Inc.” and continuing as the surviving corporation.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
COUNTER-STATEMENT OF ISSUES PRESENTED	3
COUNTER-STATEMENT OF THE CASE	3
I. RELEVANT FACTS AND ALLEGATIONS	3
A. Tardigrades’ Well-Known Ability to Survive in Space.....	4
B. Comparison of the Parties’ Works and Tardigrade Characters.....	7
1. Abdin’s <i>Tardigrades</i> Game	7
a) Abdin’s Plot, Themes and Characters	8
b) Abdin’s Tardigrade.....	9
2. The <i>Star Trek: Discovery</i> Series	11
C. Other Alleged Character “Similarities”	15
II. THE DISTRICT COURT’S DECISION.....	16
SUMMARY OF ARGUMENT	18
STANDARD OF REVIEW	20
ARGUMENT	20
I. APPLICABLE STANDARDS FOR DETERMINING SUBSTANTIAL SIMILARITY	20
II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THERE IS NO ACTIONABLE SIMILARITY BETWEEN THE PARTIES’ WORKS	23
A. Abdin Does Not Own the Basic Concept of an Enlarged Space- Traveling Tardigrade.....	23
B. That Abdin’s Tardigrade Contains Copyrightable Expression Is Irrelevant to the Substantial Similarity Determination	28

TABLE OF CONTENTS
(cont'd)

C.	None of the Other Character “Similarities” Identified by Abdin Are Actionable	30
D.	There Are No Other Actionable Similarities Between the Parties’ Works	32
	CONCLUSION	35

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alexander v. Murdoch</i> , 502 F. App'x 107 (2d Cir. 2012)	23
<i>Alexander v. Murdoch</i> , No. 10 Civ. 5613, 2011 U.S. Dist. LEXIS 79503 (S.D.N.Y. July 14, 2011), <i>aff'd</i> , 502 F. App'x 107 (2d Cir. 2012)	31
<i>DiTocco v. Riordan</i> , 496 F. App'x 126 (2d Cir. 2012)	23
<i>Eden Toys, Inc. v. Florelee Undergarment Co.</i> , 697 F.2d 27 (2d Cir. 1982)	29
<i>Eden Toys, Inc. v. Marshall Field & Co.</i> , 675 F.2d 498 (2d Cir. 1982)	3-4, 24
<i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991).....	20, 28-29
<i>Folio Impressions, Inc. v. Byer California</i> , 937 F.2d 759 (2d Cir. 1991)	24
<i>Gaiman v. McFarlane</i> , 360 F.3d 644 (7th Cir. 2004)	32
<i>Green v. Harbach</i> , 750 F. App'x 57 (2d Cir. 2019)	23, 27
<i>Green v. Proctor & Gamble, Inc.</i> , 709 F. Supp. 418 (S.D.N.Y. 1989)	26
<i>Hoehling v. Universal City Studios, Inc.</i> , 618 F.2d 972 (2d Cir. 1980)	22, 25
<i>JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.</i> , 412 F.3d 418 (2d Cir. 2005)	33

Klauber Bros., Inc. v. Bon-Ton Stores, Inc.,
557 F. App'x 77 (2d Cir. 2014)34

Knitwaves, Inc. v. Lollytogs Ltd.,
71 F.3d 996 (2d Cir. 1995)22

Magnoni v. Smith & Laquercia,
483 F. App'x 613 (2d Cir. 2012)3

Mattel, Inc. v. Azrak-Hamway Int'l, Inc.,
724 F.2d 357 (2d Cir. 1983)24

McDonald v. West,
669 F. App'x 59 (2d Cir. 2016)3

N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.,
497 F.3d 109 (2d Cir. 2007) 21-22, 25

Nichols v. Universal Pictures Corp.,
45 F.2d 119 (2d Cir. 1930)32

Nobile v. Watts,
747 F. App'x 879 (2d Cir. 2018) 20, 21, 23, 26-27

Ollie v. Domino's Pizza, Inc.,
No. 95 Civ. 10333, 1997 U.S. Dist. LEXIS 12781
(S.D.N.Y. Aug. 22, 1997)26

Perry v. Mary Ann Liebert, Inc.,
No. 17-cv-5600, 2018 U.S. Dist. LEXIS 93513
(S.D.N.Y. June 4, 2018), *aff'd*, 765 F. App'x 470 (2d Cir. 2019)22

Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.,
602 F.3d 57 (2d Cir. 2010)*passim*

Satava v. Lowry,
323 F.3d 805 (9th Cir. 2003)24

Silberstein v. John Does 1-10,
242 F. App'x 720 (2d Cir. 2007) 21, 27-28

Tarshis v. Riese Org.,
211 F.3d 30 (2d Cir. 2000)3

Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.,
338 F.3d 127 (2d Cir. 2003)30

Twentieth Century Fox Film Corp. v. Marvel Enters.,
155 F. Supp. 2d 1 (S.D.N.Y. 2001), *aff'd in part, rev'd in part on
other grounds*, 277 F.3d 253 (2d Cir. 2002).....4

United States v. Bari,
599 F.3d 176 (2d Cir. 2010)3

Wager v. Littell,
549 F. App'x 32 (2d Cir. 2014)3

Walker v. Time Life Films, Inc.,
784 F.2d 44 (2d Cir. 1986) 31-32

Warner Bros., Inc. v. Am. Broad. Cos.,
720 F.2d 231 (2d Cir. 1983)28, 33, 34

Williams v. Crichton,
84 F.3d 581 (2d Cir. 1996)21, 22, 27, 33

Zalewski v. Cicero Builder Dev. Inc.,
754 F.3d 95 (2d Cir. 2014)21

Other Authorities

Fed. R. Civ. P. 12(b)(6).....16, 20

INTRODUCTION

This appeal presents a single straightforward issue: whether the copyright claims at issue were properly dismissed on the grounds that the parties' works are not substantially similar as a matter of law — a foundational requirement of any copyright infringement claim. For the reasons explained in the District Court's thorough and well-reasoned decision, they were.

CBS is the creator of the television series *Star Trek: Discovery* (“*Discovery*”), a recent installment in the storied *Star Trek* franchise. Two episodes of *Discovery*'s first season includes a space-traveling creature based on the tardigrade, an actual Earth species well-known for its unique ability to survive in space without any protection. In July 2017, just two months before *Discovery*'s release, Plaintiff-Appellant Anas Abdin (“Abdin”) posted an online video teaser on YouTube for an unreleased videogame concept titled *Tardigrades*, which includes a short 13-second clip that also depicts a space-traveling tardigrade.

According to Abdin, the tardigrade as depicted in this 13-second clip is the “heart” of his work and lies at the center of this dispute. (A.218, 222).² Based on

² Citations to “A. __” are made to Abdin's Appendix. Citations to “AOB” are made to Abdin's opening brief on this appeal. Citations to “SA. __” are made to Defendants-Appellees' Supplemental Appendix.

During the parties' discussions to agree upon a joint appendix, Abdin's counsel refused to include parts of the record that Defendants-Appellees identified as relevant to the disposition of this appeal, including, most significantly, the

the parties' common use of a space-traveling tardigrade, Abdin commenced this action on the premise that those involved in the creation of *Discovery* saw and resolved to copy his 13-second clip, and then somehow scripted, produced, shot, edited and broadcast the first season of *Discovery* to incorporate his tardigrade in the mere months between the posting of his video and *Discovery*'s release.

Accepting this fantastical premise as true (for purposes of Defendants-Appellees' motion to dismiss only), the District Court correctly held that Abdin's copyright infringement claims fail as a matter of law because the parties' works are not even remotely — much less *substantially* — similar in their protectable expression. Abdin of course owns no copyright monopoly over the depiction of tardigrades, or tardigrades that can travel in space — a generic and unprotectable idea flowing naturally from tardigrades' well-known ability to *survive* in space and, indeed, a concept appearing in numerous works that predate Abdin's. Beyond this unprotectable commonality, the District Court correctly concluded that a comparison of the parties' disparate works provides no basis to deem them substantially similar, and that Abdin's claims thus fail as a matter of law.

The District Court's judgment should be affirmed in all respects.

parties' respective works that were submitted with Abdin's own operative Third Amended Complaint ("TAC") and the Declaration of Wook Hwang ("Hwang Decl.") on Defendants-Appellees' motion to dismiss. Other portions of the TAC and Hwang Decl. as submitted in the Appendix are mislabeled and/or out of order. Accordingly, the TAC and Hwang Decl., with relevant exhibits, are submitted in the accompanying Supplemental Appendix pursuant to Local Rule 30.1(g).

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Did the District Court properly rule that Defendant-Appellees' *Star Trek: Discovery* series is not substantially similar to Abdin's videogame concept upon its review of the parties' works?

COUNTER-STATEMENT OF THE CASE

I. RELEVANT FACTS AND ALLEGATIONS

The facts set forth herein are taken from the allegations and materials referenced and/or relied upon in Plaintiff's Third Amended Complaint ("TAC"), including the works at issue,³ as well as publicly available materials of which judicial notice may be taken.⁴

³ On a motion to dismiss a copyright claim, the law in this Circuit is settled that the Court can and should review the parties' works to resolve the issue of substantial similarity. *See, e.g., Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010) (on motions to dismiss "[i]n copyright infringement actions, the works themselves supersede and control contrary descriptions of them, including any contrary allegations, conclusions or descriptions of the works contained in the pleadings") (citations and quotation marks omitted); *McDonald v. West*, 669 F. App'x 59, 60 (2d Cir. 2016) (same); *Wager v. Littell*, 549 F. App'x 32, 34 (2d Cir. 2014) (same).

⁴ On a motion to dismiss, the Court may also consider materials "of which judicial notice may be taken," *Tarshis v. Riese Org.*, 211 F.3d 30, 39 (2d Cir. 2000), including publicly available materials on the Internet showing the commonly known attributes of tardigrades. *See, e.g., United States v. Bari*, 599 F.3d 176, 180 (2d Cir. 2010) (affirming judicial notice of Internet materials and explaining that "a judge need only take a few moments to confirm his intuition by conducting a basic Internet search"); *Magnoni v. Smith & Laquercia*, 483 F. App'x 613, 616 (2d Cir. 2012) (District Court properly took judicial notice of websites); *Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498, 500 n.1 (2d Cir. 1982)

A. Tardigrades' Well-Known Ability to Survive in Space

Tardigrades (commonly known as “water bears”) are near-microscopic animals known for their ability to survive in Earth’s most inhospitable environments and, indeed, in space. As is relevant here, tardigrades have been discussed in the scientific literature for their unique ability to survive without any protection in space since at least 2007, when Swedish and German scientists launched the Tardigrades in Space (TARDIS) project to study the effects of space radiation exposure on tardigrades aboard the European Space Agency’s FOTON-M3 mission.⁵

Since that discovery, the concept of tardigrades in space (and traveling in space) has been explored and discussed extensively within the scientific community. For example, in 2009, the Russian Federal Space Agency carried the

(“The traditional features of a snowman are known generally and thus appropriate for judicial notice.”); *see also, e.g., Twentieth Century Fox Film Corp. v. Marvel Enters.*, 155 F. Supp. 2d 1, 41 & n.71 (S.D.N.Y. 2001) (on motion to dismiss, taking judicial notice of prior works showing that plaintiff’s plot concept is common in “science fictional works in particular”), *aff’d in part, rev’d in part on other grounds*, 277 F.3d 253 (2d Cir. 2002).

⁵ *See* K. Ingemar Jönsson et al., *Tardigrades survive exposure to space in low Earth orbit*, 18 *Current Biology* 17 (Sept. 9, 2008) (available at <https://www.sciencedirect.com/science/article/pii/S0960982208008051>) (A.139-142; SA.64-67); <http://tardigradesinspace.blogspot.com/> (discussing TARDIS program and linking to relevant articles from 2007-2009) (A.143-47; SA.68-72); Joseph Stromberg, *How Does the Tiny Waterbear Survive in Outer Space?*, *Smithsonian Magazine* (Sept. 11, 2012) (available at <https://www.smithsonianmag.com/science-nature/how-does-the-tiny-waterbear-survive-in-outer-space-30891298/>) (A.148-51; SA.73-76).

Living Interplanetary Flight Experiment (LIFE) containing samples of Earth life, including tardigrades, to the innermost moon of Mars.⁶ In May 2011, tardigrades were carried aboard the NASA space shuttle Endeavor for further space-based experimentation by the Italian Space Agency, as discussed in a contemporaneous BBC article that includes the following image of a tardigrade:⁷



A simple Internet search for “tardigrades” reveals dozens, if not hundreds, of articles concerning tardigrades’ ability to survive in space.⁸

The fascination with tardigrades has extended beyond the scientific community to works of fiction (and layperson non-fiction), including numerous examples that predate Plaintiff’s *Tardigrades* game concept. Among them:

⁶ See JR Minkel, *Phobos-Grunt Probe to Put Microbial Life in Mars Orbit*, *Scientific American* (Sept. 1, 2009) (available at <https://www.scientificamerican.com/article/phobos-grunt-mars/#googDisableSync>) (A.152-56; SA.77-81).

⁷ See Emma Brennand, *Tardigrades: Water Bears in Space*, BBC (May 17, 2011) (available at <http://www.bbc.co.uk/nature/12855775>) (A.157-60; SA.82-85).

⁸ The Court can take judicial notice of such information for the purpose of confirming the widespread interest in tardigrades among the scientific community. *See* fn 4 *supra*.

- Tony DiTerlizzi’s 2010 book titled *The Search for WondLa*, an inter-planetary children’s tale about aliens and foreign lands, features an enlarged tardigrade named Otto described as “gargantuan” and “behemoth,” and with a brethren herd of “giant tardigrades” that are “carried by strange and wondrous currents.” (See A.161-77; SA.86-102).
- The 2013 book titled *The Science of Discworld IV: Judgment Day* by Sir Terry Pratchett, Ian Stewart and Jack Cohen, a story of wizards traveling between Discworld and Roundworld, features a discussion of tardigrades’ ability to resist radiation. (See A.178-188; SA.103-13).
- The non-fiction television series *Cosmos: A Spacetime Odyssey* presented by Neil deGrasse Tyson includes two episodes that aired in March and May of 2014, respectively, featuring descriptions of tardigrades’ unique ability to survive in space. (See SA.116-17).
- Beginning on May 7, 2015, animator Ian Michael Miller posted a series of animated comedic shorts featuring a humanoid space-faring tardigrade dubbed “Captain Tardigrade, Defender of the Multiverse” to YouTube. (See A.189; SA.118, 120).

The idea of tardigrades in connection with the *Star Trek* franchise was also posited by the well-known publication Scientific American in a 2013 article titled *How Tardigrades Saved the Enterprise* (A.190-98; SA.121-29),⁹ well before Plaintiff created his *Tardigrades* game concept.

⁹ See Kyle Hill, *How Tardigrades Saved the Enterprise*, Scientific American (May 31, 2013) (opining that Captain Kirk should have used tardigrades to save U.S.S. Enterprise in 2013 film *Star Trek: Into Darkness*) (available at <https://blogs.scientificamerican.com/but-not-simpler/how-tardigrades-saved-the-enterprise/>).

B. Comparison of the Parties' Works and Tardigrade Characters

1. *Abdin's Tardigrades Game*

Abdin is the creator of an unreleased but allegedly “greenlit” video game called *Tardigrades* — originally titled *Epoch* — which he posted online between May 2014 and July 2017 in the form of “articles, artwork and audio/video.” (SA.4 ¶ 9; *see also* SA.1 ¶ 1). Abdin compiled these materials on a video file submitted with the TAC (the “Video Compilation,” at SA.55).¹⁰ The Video Compilation first runs through an approximately 30-minute series of 23 short YouTube videos, and follows with approximately 13 minutes of additional video showing static posts taken from Abdin’s blogs on the Websites <https://www.adventuregamestudio.co.uk> and <http://anas-tronaut.blogspot.com>. None of the videos or blog posts contained in the Video Compilation are alleged to be registered for copyright.

Abdin’s game concept is also distilled into a treatment that was also annexed to the TAC (the “Distillation,” at SA.25-48; A.71-94). (*See* SA.1 ¶ 1). Abdin registered the Distillation for copyright on June 28, 2018 (*see* SA.24), after *Discovery* first aired in September 2017. (*See* SA.1 ¶ 1).

Together, the Video Compilation and Distillation comprise the totality of works Abdin claims have been infringed. (*See* A.234; SA.1-10 ¶¶ 1, 9, 11, 25).

¹⁰ The materials in the Video Compilation are identified in the TAC as Exhibits H and K (*see* SA.4 ¶ 11; SA.10 ¶ 25), and were submitted with the TAC as a single video file labeled “Exhibit K-H.” (*See* A.234 (Opinion and Order)).

a) Abdin's Plot, Themes and Characters

As described in the Distillation, Abdin's game concept is a single-player user-driven video game set on a space station orbiting Jupiter in the year 20,000 BC, when Earth's civilizations are "about to discover intergalactic travel." (A.71). The video game follows Carter, a blonde male botanist who lives on the space station *Marsi 3*. Other than Carter, the Distillation also includes short vignettes depicting and briefly describing seven of the game's characters, with no description spanning more than a few sentences. (A.73-76). The Distillation describes the game as including an unspecified "plot twist" and general themes spanning "slavery, secrecy, and espionage" (A.71), without any details.

The materials included in the Video Compilation likewise provide little information concerning the plot or thematic elements to be explored in Abdin's videogame. Rather, it consists of short, disjointed video teasers and one-off blog posts with no cohesive plot framework, other than that the game centers on the *Marsi-3* space station. The only other overarching theme running through these materials is that the game will feature pharaonic Egyptian elements, in keeping with the ancient timeline in which the game is based. For example, the game's logo is described in one post as "a combination of the water bear posing as the ancient Egyptian scarab holding a crook and a flail, accessorized with two wings." (Video Compilation (SA.55) at 40:02).

b) Abdin's Tardigrade

The Distillation depicts two pictures of Abdin's tardigrade relevant to this appeal, which show a large blue tardigrade enveloping Carter. (A.71, 78; SA.25, 32). No explanation is provided of this "tardigrade hug" other than a short description of scientific facts concerning actual tardigrades, including that "[t]hey can survive higher doses of radiation and the vacuum of space." (*Id.*).

The Video Compilation also includes scant depictions of Abdin's tardigrade or its relevance to his game concept. As an initial matter, the blog posts (Video Compilation (SA.55) at 29:49-42:39) feature no tardigrades except as shown in the YouTube videos. As to these YouTube videos, the first set of 14 videos relate to Abdin's original *Epoch* game concept (*id.* at 0:00-20:18), none of which depict any tardigrades. Only the final nine (9) videos, lasting a total of less than 10 minutes (*id.* at 20:19-29:49), relate to Abdin's rebranded *Tardigrades* game concept.¹¹ In totality, the approximately 10-minute sequence of *Tardigrades*-related videos contains only two distinct video snippets depicting Abdin's tardigrade.

The longest sequence is a short, 13-second clip that appears in only a single video (*id.* at 29:20-33), in which an enlarged blue tardigrade envelops Carter:

¹¹ The first *Tardigrades*-related video takes directly from the opening monologue of the 1984 David Lynch film *Dune* (based on the Frank Herbert novel), with a female narrator stating: "The beginning is a very delicate time. Know then that it is the year 20,191...." (*Compare* Video Compilation (SA.55) at 20:22, with <https://www.youtube.com/watch?v=6H5jeLxUy-0> (opening of *Dune*)).



This is the same “tardigrade hug” sequence shown in the Distillation. (A.71, 78; SA.25, 32). This video was first posted to YouTube on July 12, 2017 (see SA.62-63 ¶ 14; SA.134-35; <https://www.youtube.com/watch?v=ikHgCwM84LY>), only two months before *Discovery*’s release.

The Video Compilation’s only other depiction of a tardigrade is an even shorter, less-than-one-second closing sequence in several of Abdin’s videos (Video Compilation (SA.55) at 23:24, 24:29, 25:51, 26:40, 28:06, 28:37 and 29:33), each time showing a small, poorly defined tardigrade fading into the background:



Of the materials in the Video Compilation, only a single blog post provides any relevant information concerning the significance of Abdin's tardigrade, noting the proven scientific facts that tardigrades can "survive extreme conditions of radiation and the vacuum of space." (Video Compilation (SA.55) at 38:49). Apparently for these reasons, Abdin's tardigrade-hug system works to protect the human occupant while floating through space. Though this blog post references "space travel," no mention is made anywhere in the Distillation or the Video Compilation that Abdin's tardigrade is capable of "instantaneous" space travel, as incorrectly alleged in the TAC. (SA.9-10 ¶ 24; A.235).

2. The *Star Trek: Discovery* Series

Defendants-Appellees own the rights to *Discovery*, a recent addition to the *Star Trek* franchise. *Discovery* tells various interweaving storylines about the adventures of the starship U.S.S. Discovery and its crew through the 15 episodes of its first season, which aired between September 2017 and February 2018.¹² The series begins with the commencement of a war with the Klingons prompted by the actions of *Discovery*'s protagonist, Michael Burnham, a Vulcan-raised human played by an African-American female. The Klingon war is the underlying thread

¹² These 15 episodes were attached as Ex. 14 to the Hwang Decl. (A.138 ¶ 15; SA.63 ¶ 15), but also have been omitted from Abdin's Appendix. Accordingly, they are provided to the Court with the accompanying Supplemental Appendix. (SA.136-66). Space limitations prevent a full explication of the approximately 11 hours of content making up these episodes. Thus, the description provided herein focuses on the appearance of the Ripper tardigrade character in episodes 4 and 5.

throughout most of the season. Later episodes also focus on the Discovery's attempts to escape a "mirror" universe in which they have become stranded.

One of the many storylines enmeshed within these two primary story arcs involves a rescued creature named Ripper (of a species considered cousin to the Earth-based tardigrades), whose DNA is used to aid the functioning of the U.S.S. Discovery's experimental "mycelial spore network drive" space travel technology. The Federation has discovered a type of fungus called mycelium that has a root system extending "throughout subspace," which can be used as a platform to "jump" instantaneously to any location in the universe. The mycelial spore drive — referred to as the DASH (Displacement Activated Spore Hub) drive — is an experimental propulsion system that uses mycelial spores as its power source to travel along this subspace network. Lieutenant Paul Stamets leads the DASH research team aboard the U.S.S. Discovery. As described in episodes 3 and 4, however, the DASH drive can only jump short distances reliably across the mycelial network, defeating its primary purpose and benefit to the Federation.

Discovery's tardigrade creature, Ripper, makes its first appearance near the beginning of episode 4. (SA.143-44, Ep. 104 at 7:30). Ripper was discovered aboard the starship U.S.S. Glenn (the only other Federation ship equipped with the experimental DASH drive) in episode 3, when the Discovery's crew investigates the Glenn's destruction and learns that the ship was destroyed by an unidentified

creature. The audience learns in episode 4 that the creature was Ripper. Assigned by U.S.S. Discovery Captain Gabriel Lorca to study it, Burnham determines that Ripper — a large greenish-brown animal with four pairs of clawed limbs, and body armor segments with tentacles — is a cousin of the Earth species tardigrade:



While everyone else naturally assumes that Ripper is inherently violent (hence the moniker), Burnham comes to understand that Ripper is a peaceful, sensitive creature and that its acts of violence have been in self-defense. Burnham deduces through her investigation that Ripper has an affinity for mycelial spores, a hypothesis she confirms and shares with Lieutenant Stamets. (*Id.* at 31:15-35:48). Further investigation reveals that Ripper was used by the crew of the U.S.S. Glenn as the missing link necessary to operate the Glenn’s own DASH drive. (*Id.*). As described in episode 5, Ripper is able to overcome the mycelial spore drive’s limitations because, “like its microscopic cousins on Earth, the tardigrade is able to incorporate foreign DNA into its own genome via horizontal gene transfer. When

Ripper borrows DNA from the mycelium, he's granted an all-access travel pass.” (SA.145-46, Ep. 105 at 20:09-21:01).

Having made this discovery, Stamets connects Ripper to the DASH drive to facilitate several mycelial jumps. However, Burnham becomes concerned when it becomes apparent that the jumps are taking an adverse toll on Ripper. After one jump made in an effort to rescue Captain Lorca (who has by then been captured by the Klingons), Ripper enters a state of “cryptobiosis,” a process by which Ripper reduces its body water content to less than 1% and curls up into a self-protective ball, depleted and unable to move (*id.* at 29:38-30:50, 42:33-43:00):



With the help of medical officer Hugh Culber, Lieutenant Stamets's partner, Burnham convinces Stamets to find an alternative means to run the drive. Under pressure to save Captain Lorca from the Klingons, Stamets injects himself with Ripper's DNA, giving him the same horizontal gene transfer capability as Ripper and thereby allowing Stamets to connect himself to the DASH drive in Ripper's place. This proves successful, and the Discovery's crew have found an alternative means of operating the mycelial spore drive. At the conclusion of episode 5,

Burnham thus releases Ripper into open space, and Ripper departs through the subspace mycelial spore network. (*Id.* at 42:08-43:27).

Episodes 4 and 5 are the only episodes of the 15-episode series in which Ripper (the only tardigrade-like creature in *Discovery*) makes an appearance. As shown in the images above, unlike Abdin’s tardigrade, Ripper is not blue, and it is only the mycelial spores in which Ripper at times appears that are blue. (*See also* A.237, 244 (Opinion and Order)). Unlike Abdin’s tardigrade, *Discovery* does not employ a “tardigrade-hug” method, but rather uses the tardigrade’s DNA to navigate a universal subspace mycelial spore network that has *no* analog in Abdin’s work. (A.242).

In sum, other than the common use of a tardigrade, the *only* “similarities” are that both tardigrades are enlarged and can move through space. Space-traveling tardigrades — including enlarged fictional tardigrades — are, of course, not original to Abdin. (SA.86-102, 118-20).

C. Other Alleged Character “Similarities”

In addition to the common use of an enlarged space-traveling tardigrade, Abdin identifies a few other purported “similarities” alleged to exist between his works and random elements plucked from the approximately 11 hours comprising *Discovery*’s first season. (SA.10-14 ¶¶ 27-30, SA.56). On appeal, however, Abdin only addresses (*see generally* AOB) a mish-mash of stock character attributes

shared by some of his characters and some of the characters appearing in *Discovery*, namely: (i) a “Blond White Male” who works in the field of biology (in different fields); (ii) a “darker complexion homosexual male with black hair” and facial hair (of different ethnic backgrounds); (iii) an African-American female; and (iv) a redhead. (SA.12 ¶¶ 30(a-e); SA.56 at 1:35-2:42).

II. THE DISTRICT COURT’S DECISION

Abdin commenced this action on August 19, 2018, asserting three claims for copyright infringement, all based on the same underlying facts but seeking different remedies.¹³ In its thoroughly reasoned Opinion and Order, entered on September 20, 2019, the District Court granted Defendants-Appellees’ Rule 12(b)(6) motion to dismiss Abdin’s copyright claims on the grounds that the parties’ works are not substantially similar as a matter of law.

With respect to the tardigrade characters, the District Court rightly concluded that the elements common to the parties’ tardigrades are “not original to Plaintiff’s work.” The only similarities in appearance, for example, are based on “non-protectable facts about the [real-world] tardigrade and cannot provide the basis for copyright infringement.” (A.243). The tardigrades’ shared ability to “fly through space” has also regularly been used in third-party works that predate Abdin’s, and this obvious extension of tardigrades’ ability to survive in space thus

¹³ Abdin also asserted a common-law claim for an accounting, but withdrew this claim in response to Defendants-Appellees’ motion to dismiss. (A.210).

“cannot constitute the basis for a copyright infringement.” (A.241-42). Other than the unprotectable and generic concept that both tardigrades are “large space traveler[s], ... the similarities end there.” (A.244). Accordingly, the District Court concluded, “the differences between Plaintiff’s and Defendants’ tardigrades defeat any finding of substantial similarity.” (*Id.*).

As to the other alleged character “similarities” identified by Abdin, the District Court explained that the generic character similarities identified by Abdin (e.g., “black woman,” “red hair,” characters who are “gay and have black hair and facial hair”) fall well short of establishing substantial similarity under applicable Second Circuit authority. (A.244).

More broadly comparing the works as a whole, the District Court also contrasted *Discovery*’s “[o]verarching themes [drawn] from prior renditions” of *Star Trek* — built on more than “five decades of Star Trek movies and television shows to represent Star Fleet adventures in a new era” — with the “disparate videos and images” comprising Abdin’s work that fail to “evinced a single coherent plotline.” (A.246). On its review of the works, the District Court thus concluded that the parties’ works are not substantially similar in their “overall feel.” Finally, the District Court held that the other random, scattershot commonalities identified by Abdin (e.g., “uniforms [that] delineate status and rank”), even if original to

Abdin (they are not), “do not provide a sufficient basis to find substantial similarity between the works’ ‘total concept and feel.’” (A.246-47).

Accordingly, the District Court granted Defendants-Appellees’ motion to dismiss. (A.247). Judgment was entered on September 23, 2019. (A.248).

SUMMARY OF ARGUMENT

The District Court’s dismissal of this action should be affirmed because the parties’ works are not substantially similar as a matter of law under settled and controlling Second Circuit authority. Abdin’s arguments on appeal are unavailing, for multiple reasons.

First, with respect to the claimed “heart” of this dispute (A.218, 222), a simple comparison of the works reveals that there are *no* actionable similarities between the parties’ tardigrade characters. As the District Court correctly ruled, the commonalities that do exist are based upon the unprotectable characteristics of actual tardigrades, including tardigrades’ physical features and their known ability to survive in space. That the parties’ tardigrades can also travel in space is not protectable either, as multiple works predating Abdin’s have featured large, flying, space-faring tardigrades. Even ignoring these prior works entirely, the extension of tardigrades’ well-known ability to *survive* in space into the ability to *travel* in space is nothing more than an unprotectable idea, as well as an obvious and unprotectable *scènes à faire* naturally and necessarily flowing from the use of any

fictional tardigrade character in space. As the District Court correctly concluded, beyond these unprotectable commonalities, “the differences between Plaintiff’s and Defendants’ tardigrades defeat any finding of substantial similarity.” (A.244).

Second, Abdin’s principal argument on appeal — that his tardigrade character contains enough original expression to warrant copyright protection in the first instance (AOB 10-25) — does not support his claims in any way. Under the long-standing and settled elements, a copyright infringement claim requires both copyrightability of the plaintiff’s work and substantial similarity between the parties’ protectable expression. That Abdin’s work contains copyrightable material is entirely irrelevant to the dispositive question in this action and on this appeal of whether *Discovery* is substantially similar to the protectable elements of Abdin’s videogame concept. As the District Court correctly held, they are not.

Third, the other purported character “similarities” identified by Abdin — all based on race, facial hair, sexual orientation, and hair color — are stock character elements over which Abdin obviously holds no copyright monopoly. Abdin’s attempt to claim that his characters were “dissected” too finely in the District Court’s analysis (AOB 8) is easily dispelled on a comparison of the parties’ works. Far from “dissecting” his characters, the District Court properly concluded that the only common attributes between *Discovery*’s characters and the undeveloped character vignettes in Abdin’s game concept are the stock and unprotectable

character attributes identified by Abdin that cannot support a substantial similarity determination. This is not a close call, as Second Circuit courts routinely reject character infringement claims based on far greater similarities than exist here.

STANDARD OF REVIEW

The District Court's determination that the parties' works are not substantially similar and grant of a Rule 12(b)(6) motion on that basis are subject to *de novo* review. *See, e.g., Nobile v. Watts*, 747 F. App'x 879, 880 (2d Cir. 2018); *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 61 (2d Cir. 2010).

ARGUMENT

I. APPLICABLE STANDARDS FOR DETERMINING SUBSTANTIAL SIMILARITY

To establish a claim of copyright infringement, “two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). With respect to the second element, a plaintiff must prove not only that “the defendant has actually copied the plaintiff's work,”¹⁴ but also that

¹⁴ Abdin asserts in his opening brief “plaintiff provided the lower Court with evidence of access to plaintiff's work” and that “copying was admitted” by Defendants-Appellees. (AOB 18). That is false. None of the cited “evidence” remotely suggests that Defendants-Appellees had access to Abdin's works, nor is there any other evidence (or reason to believe) that copying or even viewing of Abdin's work occurred. For purposes of their motion to dismiss only, access is not

“the copying is *illegal* because a substantial similarity exists between the defendant’s work and the *protectible* elements of plaintiff’s.” *Peter F. Gaito*, 602 F.3d at 63 (emphasis added) (citation omitted).

“It is ‘a principle fundamental to copyright’ law that ‘a copyright does not protect an idea,’” *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996), only an author’s original expression of that idea. Under this long-standing idea/expression dichotomy, “[i]n a copyright action . . . the similarity between two works must concern the expression of ideas, not the ideas themselves.” *Peter F. Gaito*, 602 F.3d at 67. Also unprotectable are *scènes à faire*, which includes stock elements that are “indispensable, or at least standard, in the treatment of a given topic,” *Zalewski v. Cicero Builder Dev. Inc.*, 754 F.3d 95, 102 (2d Cir. 2014) (citation omitted), as well as elements that “flow naturally from [an] unprotectible premise.” *Nobile v. Watts*, 747 F. App’x 879, 881 (2d Cir. 2018); *see also, e.g., Silberstein v. John Does 1-10*, 242 F. App’x 720, 722 (2d Cir. 2007) (“Scenes a faire are unprotectible elements that follow naturally from a work’s theme....”).

Copyright law also does not protect scientific facts, because “facts do not owe their origin to an act of authorship.” *N.Y. Mercantile Exch., Inc. v.*

challenged to address the issue that Abdin’s claims fail for lack of substantial similarity, irrespective of Abdin’s allegations of access and copying. *See, e.g., Peter F. Gaito*, 602 F.3d at 63 (“for purposes of defendants’ motion to dismiss, the district court assumed (as do we) that actual copying by defendants occurred,” and affirming dismissal for lack of substantial similarity).

IntercontinentalExchange, Inc., 497 F.3d 109, 114 (2d Cir. 2007) (citation omitted); *see also, e.g., Perry v. Mary Ann Liebert, Inc.*, No. 17-cv-5600, 2018 U.S. Dist. LEXIS 93513, at *14 (S.D.N.Y. June 4, 2018) (“copyright law does not protect facts, including scientific facts”), *aff’d*, 765 F. App’x 470 (2d Cir. 2019); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980).

In applying these principles to works containing both protectable and unprotectable elements, the Second Circuit applies the “more discerning” ordinary observer test to resolve the substantial similarity determination. This test requires the Court “to extract the unprotectible elements from ... consideration and ask whether the protectible elements, *standing alone*, are substantially similar” to the allegedly infringing work. *Peter F. Gaito*, 602 F.3d at 66 (emphasis added; citation omitted); *Williams*, 84 F.3d at 588 (“we must take care to inquire only whether the protectable elements, standing alone, are substantially similar”) (underline in original; citation and quotations omitted); *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) (same). After extracting such unprotectable elements, courts ask whether the “works as a whole [are] substantially similar,” *Williams*, 84 F.3d at 590, by examining “similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting....” *Id.* at 588. In undertaking this analysis, “the works themselves supersede and control contrary descriptions of them, including any contrary allegations, conclusions or

descriptions of the works contained in the pleadings.” *Peter F. Gaito*, 602 F.3d at 64 (citation and quotation marks omitted).

Applying these standards, courts in this Circuit routinely dismiss copyright claims on the pleadings where a comparison of the works at issue shows that “the similarity between two works concerns only non-copyrightable elements of the plaintiff’s work, or [that] no reasonable jury, properly instructed, could find that the two works are substantially similar.” *Id.* at 63 (citations and quotation marks omitted); *see also, e.g., Green v. Harbach*, 750 F. App’x 57, 59 (2d Cir. 2019); *Nobile*, 747 F. App’x at 881; *Alexander v. Murdoch*, 502 F. App’x 107 (2d Cir. 2012); *DiTocco v. Riordan*, 496 F. App’x 126 (2d Cir. 2012).

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THERE IS NO ACTIONABLE SIMILARITY BETWEEN THE PARTIES’ WORKS

A. Abdin Does Not Own the Basic Concept of an Enlarged Space-Traveling Tardigrade

The claimed “heart” of this dispute is Abdin’s contention that *Discovery’s* Ripper character infringes the 13-second clip depicting the tardigrade-hug sequence (Video Compilation (SA55) at 29:20-33) that was first posted on July 12, 2017 (Hwang Decl., Ex. 13). That fundamental premise fails completely.

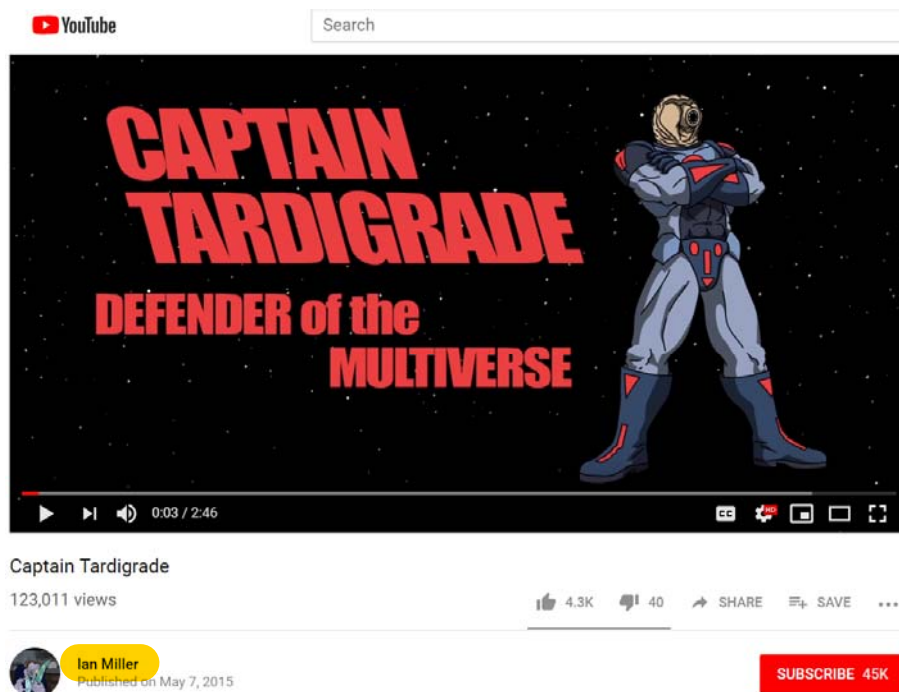
As an initial matter, the *only* similarities in physical appearance that exist are based on the real-world tardigrade, a creature with eight appendages and a uniquely round mouth:

Actual TardigradeAbdin's TardigradeDiscovery's Ripper

As the District Court explained (A.243), and consistent with settled law, these “non-protectable facts about the [real-world] tardigrade ... cannot provide the basis for copyright infringement” because they are not original to Abdin. *See, e.g., Mattel, Inc. v. Azrak-Hamway Int’l, Inc.*, 724 F.2d 357, 360 (2d Cir. 1983) (no similarity because, “[t]hough the dolls’ bodies are very similar, nearly all of the similarity can be attributed to the fact that both are artist’s renderings of the same unprotectable idea”); *Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498, 500 (2d Cir. 1982) (no infringement where “any similarity between [the parties’ snowmen] would appear to the ordinary observer to result solely from the fact that both are snowmen”); *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 765-66 (2d Cir. 1991) (no infringement of rose design because “by the rose’s very nature one artist’s rendering of it will closely resemble another artist’s work”); *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (plaintiff “may not prevent others from depicting jellyfish with tendril-like tentacles or rounded bells, because many jellyfish possess those body parts”). Abdin further concedes that he relied upon tardigrades’ unique ability to survive in space to create his tardigrade

character (A.210 (“Plaintiff used this well know[n] ability in the creation of his game/storyboard”)) — a scientific fact that also resides in the public domain. *See, e.g., N.Y. Mercantile Exch.*, 497 F.3d at 114; *Hoehling*, 618 F.2d at 979.

Once these unprotected attributes of real-world tardigrades are extracted from the analysis, *all* that remains of the purported “similarity” at the “heart” of this dispute is that the parties have enlarged the tardigrade and given it the ability to travel in its well-documented space environment. Neither of these adaptations are original to Abdin either, as both enlarged flying tardigrades (*see, e.g., SA.59-60 ¶ 6; SA.86-102* (excerpts from 2010 children’s novel *The Search for WondLa*)) and enlarged space-traveling tardigrades (*SA.61 ¶ 10; SA.118-20* (screenshot and video of Captain Tardigrade)) have been featured in third-party works well *before* Abdin posted his 13-second clip in July 2017, including the following:



But even ignoring these preexisting works entirely, and assuming that Abdin had been the first to come up with the idea of an enlarged space-traveling tardigrade (he was not), the enlargement of the tardigrade is the only way to render any microscopic creature a viable character in a visual work, and is not protectable. *See, e.g., Ollie v. Domino's Pizza, Inc.*, No. 95 Civ. 10333, 1997 U.S. Dist. LEXIS 12781, at *11-12 (S.D.N.Y. Aug. 22, 1997) (“the humanizing of a domino is an idea not subject to copyright protection”); *Green v. Proctor & Gamble, Inc.*, 709 F. Supp. 418, 421 (S.D.N.Y. 1989) (“the idea of characterizing oral bacteria as humanoid ‘cavity makers’ is hardly protectible”).

Similarly, the basic concept of giving the tardigrade the ability to *travel* in space is an unprotectable idea, and a *scènes à faire* that naturally and necessarily follows from the creation of any fictional tardigrade-based character imbued with actual tardigrades’ well-known ability to *survive* in space. That basic concept also is not owned exclusively by Abdin. Indeed, this Court has routinely held that concepts far more elaborate than this constitute unprotectable ideas and/or unprotectable *scènes à faire*. *See, e.g., Nobile v. Watts*, 747 F. App’x 879, 881 (2d Cir. 2018) (common premise of “a childless couple providentially finding a motherless baby in a boat washed up on an island and deciding to keep the baby,” where “the couple in each has suffered three miscarriages or stillbirths, including one stillbirth right before they find the baby, which allows them to pass off the

found baby as the recent stillborn” and “illicitly conceal[] the dead adult accompanying the baby” constitutes unprotectable ideas or unprotectable *scènes à faire*); *Williams*, 84 F.3d at 589 (*Jurassic Park* not substantially similar to plaintiff’s book series where works “share[d] a setting of a dinosaur zoo or adventure park, with electrified fences, automated tours, dinosaur nurseries, and uniformed workers” and “in both works the characters spend the night in the dinosaur zoo and escape from dangerous dinosaurs by helicopter through the combined wit of the children and adults,” because these were “classic *scènes à faire* that flow from the uncopyrightable concept of a dinosaur zoo”); *see also, e.g., Green*, 750 F. App’x at 58 (“Many of the alleged similarities in the works are unprotectible abstract ideas or *scènes à faire* that do not enjoy copyright protection.”).

Beyond the general public domain attributes of actual tardigrades, the District Court correctly observed that “the similarities end there.” (A.244). Other than the unprotectable use of space-traveling tardigrades, the obvious and extensive differences between the parties’ tardigrades becomes clear upon a review of the parties’ works, and defeat any claim of substantial similarity in the parties’ protectable expression. *See, e.g., Silberstein v. John Does 1-10*, 242 F. App’x 720, 722 (2d Cir. 2007) (no substantial similarity between squirrel like characters called “Sqratt” and “Scrat,” because “[plaintiff’s] Sqratt is a rather crudely drawn two-

dimensional, monochromatic, static character, whereas defendants' *Scrat* is portrayed as existing and moving in three dimensions, and his fur, nose, eyes, mouth, and extremities are rendered in lifelike detail and realistic color and shade"); *Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 241 (2d Cir. 1983) (as to "graphic and three-dimensional works" in particular, "dissimilarities between two works of this sort inevitably lessen the similarity that would otherwise exist between the total perceptions of the two works"). Any contrary result would render *Abdin's* work to be infringing on the multiple works predating his that also featured flying, space-traveling tardigrades. But, of course, no author has a monopoly on the right to create characters based on an actual species or its well-known attributes.

In short, there is *no* actionable similarity based on the common use of a tardigrade in the parties' works.

That Abdin's Tardigrade Contains Copyrightable Expression Is Irrelevant to the Substantial Similarity Determination

Abdin's opening brief attempts to confuse the straightforward substantial similarity inquiry with the proposition that this appeal hinges on whether his tardigrade contains sufficient originality to merit any copyrightable expression at all. (AOB 10-25). That is wrong.

In determining whether a work is copyrightable, the standard is whether a work contains sufficient originality. *See, e.g., Feist Publ'ns, Inc. v. Rura Tel. Serv.*

Co., 499 U.S. 340, 361 (1991) (plaintiff’s work deemed to be “subject to a valid copyright because it contains some ... original material”); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 34 (2d Cir. 1982). “The standard for copyright infringement, by contrast, is whether the defendant’s work is ‘substantially similar’ to the plaintiff’s work.” *Eden Toys*, 697 F.2d at 34.

As was the case in *Eden Toys*, Abdin thus “erroneously mingle[s] the standard for sufficient *originality* and the test for *infringement*.” *Id.* This improper conflation of distinct elements infuses virtually the entirety of Abdin’s opening brief, which repeatedly attacks the incorrect straw-man premise that Abdin’s claims were dismissed “based on a finding of non-copyrightability and/or the lack of originality.” (AOB at 17).¹⁵ To the contrary, the District Court dismissed

¹⁵ See also AOB 7 (“The district court explained that works which use similar concepts prevent the Plaintiff’s work of copyright protection based on lack of originality”); *id.* at 9 (“plaintiff was stripped of any possibility of copyright protection”); *id.* at 10 (“The District Court’s analysis of the plaintiff’s work completely stripped his work of any and all originality essentially denying its copyrightability.”); *id.* at 11 (“the lower Court denies originality of the plaintiff’s game”); *id.* at 12 (“The Court then concluded that conceptual similarities of these two obscure works prevents the Plaintiff’s Tardigrade from being an original work of authorship.”); *id.* at 14 (“Plaintiff’s work contains the requisite original creation, and a modicum of creativity in the work . . .”); *id.* at 16 (“The lower Court’s decision strips plaintiff of originality...”); *id.* at 20 (“Plaintiff’s work was stripped of originality...”); *id.* at 22 (“The lower court applied the more discerning test, based on the lack of originality and in doing so removed any and all protectability in plaintiff’s work.”); *id.* at 25 (“The district court’s analysis erroneously concluded in a finding of non-originality...”); *id.* at 28 (“The analysis used by the district court, would result in most creative endeavors being uncopyrightable . . .”).

Abdin's claims because "*Star Trek: Discovery* and Plaintiff's Videogame are not substantially similar as a matter of law. . . ." (A.238-39).

On this appeal as well, "[t]he central question presented ... is *not* whether [Abdin's work] as a whole [is] entitled to copyright protection. Instead, [the Court is] called upon to determine whether defendants misappropriated the protectible elements of [that work]" upon application of the settled standards for determining substantial similarity. *Peter F. Gaito*, 602 F.3d at 69 (emphasis added). And the "more discerning" ordinary observer test applicable to that determination embodies the precept that "even works which express enough originality to be protected also contain material that is *not* original, and hence that may be freely used by other[s]. . . ." *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 132 (2d Cir. 2003) (emphasis added).

Here, granting that Abdin's tardigrade may be copyrightable, there is *no* substantial similarity between *Discovery's* Ripper character and the protectable expression imbued in Abdin's tardigrade, for the reasons explained above. (*See* Argument § II.A *supra*).

C. None of the Other Character "Similarities" Identified by Abdin Are Actionable

Abdin's contention that his other characters have been infringed is equally meritless. As the District Court properly concluded, "[t]he alleged similarities

between other characters in the two works ... are mostly generalized non-protectable descriptions.” (A.244).

Abdin’s sole argument on this point is that his characters were improperly “dissected into components” (AOB 8), for example, as “Black, Woman, Woman with Red Hair etc.” (*Id.* at 24). But these are Abdin’s *own* terms to describe his characters, based on the nondescript few-sentence vignettes contained in his *Distillation*. (A.24-25 ¶¶ 30(a-e); A.73-76). More importantly, a comparison of the parties’ works themselves shows that any character similarities exist *only* with respect to these stock traits and that any “similarities” can only be described, at the *highest* level of specificity, as “blond white male,” “African-American female,” a redhead, and a “darker complexion” male.

Not surprisingly, the law provides no protection to these types of stock character elements. *See, e.g., Alexander v. Murdoch*, No. 10 Civ. 5613, 2011 U.S. Dist. LEXIS 79503, at *16 (S.D.N.Y. July 14, 2011) (rejecting contention that characters were “substantially similar because each is ‘a stunningly beautiful, fiery, temperamental, Latina mother, with a thick accent, who’s in love with her Caucasian [ex-husband/husband] and always makes him do the right thing, especially where her son is concerned’”), *aff’d*, 502 F. App’x 107, 109 (2d Cir. 2012) (affirming dismissal because, *inter alia*, “specific overlapping character traits reflect superficial and *de minimis* details”); *Walker v. Time Life Films*,

Inc., 784 F.2d 44, 50 (2d Cir. 1986) (no infringement where both works “begin with the murder of a black and a white policeman with a handgun at close range; both depict ... prostitutes ...; [and] both feature as central characters third- or fourth-generation Irish policemen who live in Queens and frequently drink ...”); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121-22 (2d Cir. 1930) (no infringement where both works centered on a “quarrel between a Jewish and an Irish father”); *see also, e.g., Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004) (rhetorically explaining that, “[i]f a drunken old bum were a copyrightable character, so would be a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels, [and] a masked magician”).

In sum, Abdin’s claim of character infringement based on stock “similarities” in race, hair color, sexual orientation and any other superficial attributes is meritless, and provides no support for his claims.

D. There Are No Other Actionable Similarities Between the Parties’ Works

The only other “similarities” identified in the TAC relate to the parties’ respective depictions of uniforms, inclusion of a homosexual relationship, a depiction of a character in floating dots, incorporation of ship-based emitters, and “ethereal” travel. (*See generally* SA.10-14 ¶¶ 27-30; SA.50). Together with the stock character traits Abdin identifies, these are *all* of the purported “similarities”

he is able to identify in the TAC from the voluminous set of materials comprising his Video Compilation (and Distillation) and *Discovery*'s 15-episode first season.

As these claimed “similarities” are not addressed in Abdin’s opening brief (see generally AOB), they are not at issue on this appeal. See, e.g., *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) (“arguments not made in an appellant’s opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief”). Even if they were to be considered, these are the very type of *de minimis* and “random similarities scattered throughout the works” that “cannot support a finding of substantial similarity because it fails to address the underlying issue: whether a lay observer would consider the works as a whole substantially similar to one another.” *Williams*, 84 F.3d at 590 (citation and quotation marks omitted).

Abdin also contends, with little explanation, that the District Court erred because “[n]either fragmented literal similarity, nor comprehensive non-literal similarity were considered” in its comparison of the parties’ works. (AOB 19). But Abdin never argued to the District Court that either of these considerations establish substantial similarity here. (See generally A.205-32 (Abdin opposition brief)). They do not. “[F]ragmented literal similarity” exists only where there is “exact or nearly exact” copying of portions of a plaintiff’s work. *Warner Bros.*, 720 F.2d at 242 (citation omitted). “[C]omprehensive nonliteral similarity” exists

only where there is duplication of “the fundamental essence or structure of a work.” *Id.* at 240 (citation and quotation marks omitted). Here, no element of the *Discovery* series constitutes an “exact or nearly exact” copy of *any* portion of Abdin’s videogame concept, nor does *Discovery* follow the “essence or structure of [Abdin’s] work.” Indeed, as the District Court observed (A.246), the disparate materials constituting Abdin’s work fails to “evince a single coherent plotline” from which a “fundamental essence or structure” could even be discerned.

In the ultimate analysis, Abdin’s claims fail because the total concept and feel of the *Discovery* series is entirely *dissimilar* to Abdin’s videogame concept. When considered in the context of the “works as a whole,” as this Court’s precedents require, it becomes unquestionably clear that the few trivial “similarities” that Abdin identifies are decidedly *insubstantial* when considering the lack of coherence in his work against the richly developed and varied stories running through the approximately 11 hours of Defendants’ allegedly infringing series. *See, e.g., Klauber Bros., Inc. v. Bon-Ton Stores, Inc.*, 557 F. App’x 77, 80 (2d Cir. 2014) (despite “similar elements,” the “accumulation of . . . differences gives [defendant’s work] a substantially different ‘total concept and overall feel’ than [plaintiff’s works]”) (citation omitted); *Warner Bros.*, 720 F.2d at 241 (“dissimilarities between two works of this sort inevitably lessen the similarity that would otherwise exist between the total perceptions of the two works”).

CONCLUSION

For all of the foregoing reasons, Defendants-Appellees respectfully request that the District Court's Order dismissing this action be affirmed in all respects.

Dated: New York, New York
February 14, 2020

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CERTIFICATE OF COMPLIANCE

I, Wook Hwang, a member of Loeb & Loeb LLP, counsel for Defendants-Appellees CBS Broadcasting Inc., CBS Corporation (n/k/a ViacomCBS Inc.), CBS Interactive Inc. and Netflix, Inc., hereby certify that the foregoing brief complies with the requirements of Fed. R. App. P. 32(a)(7) and Local Rule 32.1(a). Excluding the items identified in Fed. R. App. P. 32(f), the foregoing brief contains 7,786 words and 705 lines, including footnotes, according to the word count of the word processing software used to prepare it.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as well as type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen point Times New Roman font.

Dated: New York, New York
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