

# 19-3160-CV

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## United States Court of Appeals *for the* Second Circuit

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ANAS OSAMA IBRAHIM ABDIN,

*Plaintiff-Appellant,*

– v. –

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

*Defendants-Appellees.*

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

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### **BRIEF FOR PLAINTIFF-APPELLANT**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE  
JURISDICTION**

This is a copyright infringement action initiated pursuant to 17 U.S.C. § 101 et seq. The United States District Court for the Southern District of New York had subject matter jurisdiction pursuant to 28 U.S.C. § 1338. Following the District Court’s Decision and Order Entered September 20, 2019 granting defendant’s motion pursuant to F.R.C.P 12(b)(6). The plaintiff filed his notice of appeal on September 30, 2019, within the statutory time period permitted for filing. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The Second Circuit Court of Appeals reviews “*de novo* a district court’s dismissal of a complaint pursuant to Rule 12(b)(6).”

**ISSUES PRESENTED**

1. Whether two previous obscure works, “The Search for WondLa” and “Captain Tardigrade” with purported conceptual similarities can be relied upon to conclude a finding of non-copyrightability. Does such a conclusion impart a novelty standard on the plaintiff?

2. Whether the District Court erred by actually applying the “more discerning” standard instead of the “ordinary observer” standard to compare plaintiff’s drawings because they are representations of a microscopic organism existing in nature.
3. Whether the District Court correctly concluded non-copyrightability of Plaintiff’s elements of original expression, by comparing characters generic descriptions disregarding the characters’ original visual art expressions.
4. Whether the District Court erred by excessively dissecting Plaintiff’s work into individual basis elements.
5. Based upon the District Court’s conclusion that no similar elements existed between the two works, Mr. Abdin seeks de novo review of the District Court’s ruling that the two works lack substantial similarity, and that in the instant case substantial similarity is a **matter for the jury**.

## **FACTUAL BACKGROUND**

Between May of 2014 and July of 2017. Plaintiff, an indie developer<sup>1</sup> completed and published several forum articles, artwork, and audio/video characters and creatures which formulated the basis of his science fiction script for

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<sup>1</sup> Independent video game development, or indie game development, is the video game development process of creating indie games; these are video games, commonly created by individuals or small teams of video game developers and usually without significant financial support of a video game publisher or other outside source.

an upcoming video game/storyboard. Plaintiff's Tardigrade creature is inspired by science, a real life microscopic tardigrade, as a whole, plaintiff's work is creative and clearly meets the standard for copyright protection. Plaintiff alleges access to his work via the Steam gaming platform<sup>2</sup>, Twitter, YouTube and Reddit, which yielded approximately 13.2 million views. The Discovery series season 1 writers had access to plaintiff's work prior to the production and airing of Discovery in 2017. The writers had access in particular with the Steam gaming platform, of which members of the writing team are members.

The Steam gaming platform voted to allow the indy game on its website in November 2015. The defendants announced the possibility of a new show Star Trek "Discovery" which went into development in October 2016 with the hiring of Brian Fuller. The defendants use of plaintiff's material was essential to the Star Trek Discovery's entire first season, including its derivative works created therein. As stated by the CBS owned, official Star Trek website, "the spore drive technology of

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<sup>2</sup> Independent developers can put up their game concepts (including screenshots, preview videos, and early builds) on the Steam website upon which community users can vote for these titles. Once titles have received the required number of votes, Steam will determine if the title is appropriate for the service, and then start working with the developer to bring the game/software to the Steam digital marketplace. Once this stage is reached, the game is considered "Greenlit." <https://steamcommunity.com/games/593110/announcements/detail/558846854614253751>. In 2015 there were approximately 14 million Steam members polled regarding plaintiff's game. "Now, five years since Greenlight started, we've seen over 90 Million votes cast on submissions in Greenlight. Nearly 10 Million players have participated in voting in Steam Greenlight, but over 63 million gamers have played a game that came to Steam via Greenlight." <https://steamcommunity.com/games/593110/announcements/detail/12659223215141825>.



the U.S.S. Discovery is surprising in itself ...but the spore drive is more than merely a plot device — it is, in essence, a character itself, symbolized by the Tardigrade.<sup>3</sup>

Upon information obtained from the limited discovery, three of the Star Trek Discovery head writers and creators are Steam members, and were purportedly polled in the greenlight process. The indy game's characters, the Tardigrade and various crew members are substantially, if not striking similar, to the defendants'. Plaintiff asserts that the defendants misappropriated his work by copying various portions of that work, and creating a derivative based on the work.

## I. Procedural History

A. Plaintiff initiated this action in or about August 2018 for copyright infringement.

The parties agreed to amendment of the original complaint, culminating in the Third Amended Complaint. At the January 8, 2019 conference plaintiff was granted leave to file a third amended complaint, and physical exhibits. Additionally, plaintiff was granted limited discovery based on the defendant's access to plaintiff's work. (cite record) After the filing of the third amended complaint, defendant filed a motion pursuant to 12(b)(6). Subsequently, the District Court rendered a decision

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<sup>3</sup> <https://www.startrek.com/article/dscundefineds-top-8-most-surprising-moments>

and order dated September 20, 2019 (A-233). Said Order is the subject of the instant appeal.

B. Limited Discovery

On January 8, 2019, at a pretrial conference, the District Court granted a limited discovery to the Plaintiff to be completed on March 19, 2019. The court granted limited discovery based on potential access to plaintiff's work. Plaintiff argued that defendant's writers had access to his work via the Steam gaming platform and/or voted for Plaintiff's game in the Steam Greenlight process. (A-22). After defendant failed to comply with discovery, the District Court granted a motion to compel. (A-11)

On the discovery due date, CBS produced a fraction of the information requested by the Plaintiff's subpoena to produce documents: a list of individuals who were creators and/or writers relating of the Tardigrade creature episodes, no other discovery was forthcoming. It was revealed however, that to the best of defendant's knowledge at least four people did in fact have access via the Steam gaming platform. With such limited discovery Steam was able to verify voting for/or against plaintiff's game. Again, with the limited information Steam produced no results regarding voting however, the broader issue of access remains unresolved. Finally, defendant made a 12(b)(6) motion to dismiss based on substantial similarity.

### C. Defendant's Motions To Dismiss

Defendant's erroneously argued that:

- Plaintiff's copyright claims fail as a matter of law because there is no substantially similarity to protectable elements of Plaintiff's works.
- CBS contends that the similarities stem from the comparison of the parties' works are features that exist in real-life tardigrades. CBS contends that the Plaintiff's visual art representing a real life creature can not be original and are not protectable.
- CBS urged the Court to extract non protectable features from their analysis and utilize the **more discerning** test.
- CBS then contends the remaining similarities between the parties' works are that both tardigrades are enlarged from their microscopic size and able to travel unprotected in space. They believe these concepts that flow naturally and predictably from the real life space-resistant Tardigrade in a space-based fictional work, equate to **scenes a faire**, which have no copyright protection.
- Additionally, CBS argues that predating works with similar use and application of the Tardigrade creature prevent the Plaintiff's work from being considered original.

- Lastly, CBS argues any other similarities Plaintiff identified or that exist are random, scattershot and trivial similarities that cannot establish substantial similarity.

#### D. The District Court Decision

On September 20, 2019, the district court issued a written opinion granting CBS's motion to dismiss on the basis of no substantial similarity as a matter of law.

The District Court decided that the concept of large Tardigrade that can fly through space and interacts with the characters **lacks originality**. In using the more discerning test the district court dissected the works based on a lack of originality, and gave short shrift to the overall concept and feel of plaintiff's work. **The work was not viewed as a whole.**

The district court explained that works which use similar concepts prevent the Plaintiff's work of copyright protection based on **lack of originality**. Such works are listed as: a children's fantasy novel titled The Search for WondLa details a large Tardigrade that interacts with the characters; YouTube video, Captain Tardigrade which includes a humanoid with the head of a Tardigrade which flies in a spaceship; and a television series Cosmos: A Spacetime Odyssey which presents the **tardigrades' ability to survive in space.**

The District Court further held that the juxtaposition of the Plaintiff's Tardigrade enveloping a human and the Defendant's human injecting himself with

Tardigrade DNA result in no similarity on how the Tardigrade assists a human with space flight.

The district court relied on *Sheldon Abend Revocable Tr. v. Spielberg*, 748 F. Supp. 2d 200, 208 (2010). Which defines the test for character similarity “totality of [the characters’] attributes and traits[’] as well as the extent to which the defendants’ characters capture the ‘total concept and feel’ of figures in [the plaintiff’s work].”; The district court’s analysis failed to follow the Sheldon test. The Plaintiff’s characters were dissected into components and each component analyzed separately. Such analysis is not the standard in this Circuit and contrary to Sheldon.

The District Court compares the Plaintiff’s and Defendant’s Tardigrade to a real life tardigrade. It concluded in error that the physical attributes of the Tardigrade are to be considered non-protectable facts, therefore a finding of no substantial similarity

The District Court in comparing the color of Plaintiff and Defendant’s tardigrade, the court dismissed the copying of the color of plaintiff’s work. The district court distinguishes Defendant’s presentation of a blue Tardigrade as only being a lighting effect, thus determining no similarity in error.

The district court considered the main characters, and concluded in error that they are characters with generalized non-protectable descriptions without any analysis of the Plaintiff's original visual depictions of such characters.

Lastly, the District Court determined the overall feel of the works after extracting all original elements which it determined to be non protectible; erroneously concluded no similarity.

The district court rejected plaintiff's arguments that: originality does not mean that the work for which copyright protection is sought must be either novel or unique; copyrighted work only requires an original creation; a subject which is found in nature can be creatively expressed in the artists own rendering, and therefore the ordinary observer test applies; and courts should not merely dissect the works at issue into separate components and compare only those elements which are in themselves copyrightable.

#### ARGUMENT SUMMATION

Plaintiff asserts the District Court employed the wrong analysis in determining substantial similarity resulting in a finding of lack of originality. Once originality is subtracted from the equation, plaintiff was stripped of any possibility of copyright protection. The more discerning test should not have been employed in this matter. Plaintiff asserts that the ordinary observer test should have been

employed. The Court employed techniques which have been long disavowed by the second circuit, by excessively dissecting plaintiff's work. "in comparing designs for copyright infringement, we are required to dissect them into their separate components, and compare only those elements which are in themselves copyrightable. As the district court noted, if we took this argument to its logical conclusion, we might have to decide that "there can be no originality in a painting because all colors of paint have been used somewhere in the past." (Emphasis Added.) Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1003 (1995). The similarity of plaintiff's work "its expression of an idea or fact, not on the similarity of the facts, ideas or concepts" Rogers v. Koons 960 F. 2d 301, 307 (1992). Fragmented literal similarity, and comprehensive non-literal similarity, were also not considered by the court based on a finding on non-copyrightability. The total concept and feel analysis failed to consider that copyright protects not what is depicted, but rather how it is depicted.

## ARGUMENT

### ANAS ABDIN'S CREATIONS DEMONSTRATES ORIGINALITY

The District Court's analysis of the plaintiff's work completely stripped his work of any and all originality essentially denying its copyrightability. The Court applied a scientific fact analysis to the plaintiff's work. We ask this Court to review

the District Court's Decision and Order, De novo. While factual information has been treated within this Circuit as being in the public domain. The District Court's analysis failed to consider that the plaintiff took factual information, and created material that is new, unique and original. That material was then admittedly copied for purposes of appellees' motion to dismiss. The lower Court's decision amounted to "wholesale usurpation" of the plaintiff's work, see A.A. Hoehling v. Universal City Studios, Inc. 618 F. 2d 972, 974 (1980). As this Court stated in Scholz Design, Inc. V. Sard Custom Homes, LLC, 691 F.3d 182, 186 (2012) "It is black-letter law that courts accept as protected by copyright any work which by the most generous standard may arguably be said to evince creativity. It would be a dangerous undertaking for persons trained only to the law to constitute themselves the final judges of the worth of pictorial illustrations."

In the instant matter the plaintiff has both pictorial, graphic and video which clearly demonstrate the creative energy which sparked his development of the game. While plaintiff does not have the revered position of Star Trek's fifty years of development, the Plaintiff is nonetheless entitled to create and develop characters, plots and themes, that deserve copyright protection. By way of example the lower Court denies originality of the plaintiff's game based upon the fact that Tardigrades, are capable of surviving in space (A-242).



The Court then compares two obscure references, a children's book and four youtube videos in support of its decision. (A-239.) The first reference is called The Search for Wondla. The second, is called Captain Tardigrade. Respectfully, plaintiff asserts that both comparisons fail. The fact that the district court's examples can survive in space or interact with humans are inconsequential to the plaintiff's copyrightability. The Court then concluded that conceptual similarities of these two obscure works prevents the Plaintiff's Tardigrade from being an original work of authorship. The mere existence of prior works do not affect plaintiff's originality.

"Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 110 (2001). Novelty defined by 35 U.S.C. 102 is "known or used by others... before the...applicant". The Wondla creature, Otto which has the appearance of an elephant sized pill bug, crawls on the ground. Wondla looks nothing like the plaintiff's character, nor does it have the attributes of the plaintiff's character.

Captain Tardigrade is humanoid with only the head resembling a Tardigrade and looks nothing like plaintiff's character. Captain Tardigrade uses a spaceship to travel in space, unlike plaintiff's Tardigrade which travels in space of its own

accord, and helps humans also travel through space by enveloping them. The District Court stated that it is a fact that Tardigrades can survive in space (A-242 n. 5); which can be distinguished from the ability to travel or journey through the void of space. The rationale quoted by the district court, is based on an article by the Scientific American. Said rationale was mistakenly applied in the instant matter. The Article simply discussed the ability of a microscopic Tardigrade to survive without water, in the vacuum of space.

Plaintiff's character embellishes on those characteristics. plaintiff's Tardigrade is large. In fact, plaintiff's creature can envelop a human being. Plaintiff's Tardigrade is blue, actual Tardigrades are not. Real life tardigrades are near-microscopic phylum with a natural habitat of an aquatic environment whom are colored: white, colourless, transparent, yellow, orange, pink, red or green. Plaintiff's Tardigrade has the ability to travel in space independently without the aid of a spaceship.. Plaintiff's Tardigrade has unique adventures with humans, such as assisting movement through space. Plaintiff's work is based on pure imagination. The District Court's comparison affirms, the creativity of plaintiff's work in that none of the uses of the Tardigrade are alike. Each creator placed their own spin on the creature.

Plaintiff's work contains the requisite original creation, and a modicum of creativity in the work, see generally, Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 \* | 111 S. Ct. 1282 \*\* | 113 L. Ed. 2d 358 \*\*\* | 1991 U.S. LEXIS 1856 | ; Mattel V. Goldberger Doll Manufacturing Company, 365 F.3d 133 \*; 2004 U.S. App. LEXIS 7377 \*\*; 70 U.S.P.Q.2D (BNA) 1469 \*\*\*; Copy. L. Rep. (CCH) P28,803. the plaintiff used his imagination to create the graphics, plot, theme, characters, and story line of his work.:

“The Copyright Act protects original and minimally creative selection of preexisting, unprotected materials (such as facts) for inclusion in a work, as well as original and creative arrangement of those materials. Citing Eckes v. Card Prices Update, 736 F.2d 859, 863 (1984) ("Selectivity in including otherwise non-protected information can be protected expression."); 1 Nimmer, supra, § 3.04[B][2], at 3-31 ("If originally combined, a selection or arrangement of underlying materials that are themselves unoriginal may support copyright protection.")” Matthew Bender and Co. V. West Publishing Co. 158 F. 3d 674, 682 (1998).

The plaintiff chose to enlarge a Tardigrade to a size that can envelop a human being. Plaintiff chose to create the Tardigrade not as a microscopic organism. The giant Tardigrade is Blue in color and interfaces with human beings. The Tardigrade

interacts with humans and guides them in space travel. Plaintiff took the original characteristics of the Tardigrade and expanded on them, giving the creature attributes far superior to the microscopic Tardigrade. The defendant, further does not dispute the work was independently created by the Plaintiff; and therefore said creation was not due to copying others.

The District Courts' examples of *The Search for Wondla*, and *Captain Tardigrade* which is also inspired by natural facts, fails in that both of those examples have their own creative spark, which differs from plaintiff'. Those various uses of the Tardigrade show creation and expression by each creator. It also demonstrates that creative use of the Tardigrade does not have to be exactly the same as plaintiff's portrayal.

As stated In *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1075 \*; (1992) U.S. App. LEXIS 16694 \*\*; 23 U.S.P.Q.2D (BNA) 1593 \*\*\*; Copy. L. Rep. (CCH) P26,96, "An original *expression* of facts is copyrightable, even where the facts themselves are not, *Nimmer on Copyright*, § 2.11[B] at 2-159. Thus, a sufficiently creative sequence will merit copyright protection. [Citing], *Feist*, 111 S. Ct. at 1289-90; *Victor Lalli Enterprises, Inc. v. Big Red Apple, Inc.*, 936 F.2d 671, 673 (2d Cir. 1991); *Wainwright Sec. Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), cert. den. 434 U.S. 1014, 54 L. Ed. 2d 759, 98 S. Ct. 730 (1978)." "The

Copyright Act protects original and **minimally creative selections of preexisting, unprotected materials (such as facts) for inclusion in a work, as well as original and creative arrangement of those materials.** See Eckes v. Card Prices Update, 736 F.2d 859, 863 (1984) ("Selectivity in including otherwise non-protected information can be protected expression."); 1 Nimmer, *supra*, § 3.04[B][2], at 3-31 ("If originally combined, a selection or arrangement of underlying materials that are themselves unoriginal may support copyright protection.")

The lower Court's decision strips plaintiff of originality in contradiction of case law in this Circuit "The test of originality is concededly one with a low threshold in that "all that is needed . . . is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'...Originality means that the work owes its creation to the author and this in turn means that the work must not consist of actual copying" Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (1951). "Originality has been described as "founded in the creative powers of the mind . . . the fruits of intellectual labor," In re Trade-Mark Cases, 100 U.S. 82, 94, 25 L. Ed. 550, 1879 Dec. Comm'r Pat. 619 (1879). Originality has also been held to be evidencing "intellectual production, . . . thought, and conception," Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60, 4 S. Ct. 279, 28 L. Ed. 349, 1884 Dec. Comm'r Pat. 186 (1884)".

Therefore, in applying the logic and case law herein, use of facts, in an original and creative manner does not purge the work of copyrightability. The Lower Court held that the physical appearance of the Plaintiff's Tardigrade creature are non-protectable facts, since the real-life microscopic Tardigrade have eight short legs, rounded body and an O-shaped mouth. Plaintiff's arrangement and positioning of the Tardigrade creature is unlike anything in nature.

The district court ignored Plaintiff's creative visual art, the interpretation of the real life tardigrade, and its expression. "Hence, in looking at these two works of art to determine whether they are substantially similar, focus must be on the similarity of the expression of an idea or fact, not on the similarity of the facts, ideas or concepts themselves." Rogers v. Koons, 960 F.2d 301, 307 (2010).

SUBSTANTIAL SIMILARITY EXISTS BETWEEN  
PLAINTIFF'S AND DEFENDANT'S TWO WORKS

"The substantial similarity inquiry asks whether the works at issue are, as the name implies, substantially similar. The question posed is whether the defendant appropriated a material amount of the plaintiff's original expression", see Arnstein v. Porter, 154 F.2d 464, 468 (1946). The District Court answered negatively in the instant matter, based on a finding of non-copyrightability and/or the lack of originality. The District Court disallowed plaintiff's creative use of a natural

creature in creating his video game, which in turn led to an excessive level of abstraction and a distortion of the total concept and feel.

The test in this Circuit pivots on several primary issues. 1. **A valid copyright,** and 2. **copying of constituent elements of the work that are original.** Actionable copying can be inferred from a defendant's access to the copyrighted work and substantial similarity between the copyrighted work and the alleged infringement, see generally, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991)); Adams v. Warner Brothers Pictures, 289 Fed. Appx. 456 \*; 2008 U.S. App. LEXIS 17495 \*\*; Copy. L. Rep. (CCH) P29,621.

**The first point was not argued in appellees motion.** The next issues of concern are 3. actual copying by the defendant and 4. Misappropriation, Hamil Am. Inc. v. GFL, 193 F.3d 92, 99 (1999). In the instant action, Appellee admits to copying for purposes of its motion to dismiss. Fortuitously, plaintiff provided the lower Court with evidence of access to plaintiff's work and evidence of the ordinary observers' confusion in the marketplace. (A-63,68) (A-97,99). The fact that copying was admitted, and evidence of access was presented the issue of probative similarity should weigh in favor of the plaintiff. Before the issue of substantial similarity is reached, two additional tests have been identified in this Circuit.. **Exact "copying of a portion of a work amounts to 'fragmented literal similarity,'** in contrast to

'comprehensive non-literal similarity,' which refers to an alleged copy that is qualitatively but not exactly similar to a copyrighted work." Ringgold, 126 F.3d at 75 (noting also that the Second Circuit has "endorsed th[is] taxonomy" (citing) *Twin Peaks Prods.*, 996 F.2d 1366, 1372 n.1 (1993); see also *Broadus*, 2001 U.S. Dist. LEXIS 12894, 2001 WL 984714, at \*3 ("Fragmented literal similarity exists where . . . parts of the pre-existing work are copied . . . note for note . . . , [t]he similarity, although literal, is not comprehensive" (internal citations and quotation marks omitted)). Put slightly differently, "[f]ragmented literal similarity exists where the defendant copies a portion of the plaintiff's work exactly or nearly exactly, without appropriating the work's overall essence or structure." (Citations Omitted).

Neither fragmented literal similarity, nor comprehensive non-literal similarity were considered in the Lower Court decision. Plaintiff asserts that appellee copied portions of his work (A-69), (see also pg. 28 herein.). Plaintiff's lower court argument asserted that the qualitative copying of his work occurred in the episodes involving the tardigrade, and that the episodes that followed were derivatively based on the tardigrade. Plaintiff never argues that the copying of his work filtered into Star Trek's historical works.

Based upon a finding of non-copyrightability, the lower court did not review plaintiff's works with an eye toward fragmented or comprehensive similarity.



Plaintiff's work was stripped of originality which led to a cascade of events culminating in the appellee's motion being granted.

Substantial similarity in the instant matter can be found in a comparison of the works. Specifically argued below are the substantial similarities between the expression of the tardigrade. The District Court decided that a fact cannot be used creatively and sustain copyrightability. The evidence presented by the appellee,(ie; Wondla/Captain Tardigrade) contradicts this finding. The District Court uses that same evidence as proof of its conclusion of no substantial similarity.

In examining, Wondla and Captain Tardigrade, we find two very different uses of the Tardigrade or Tardigrade like creature. Appellee, on the other hand chose to utilize the Tardigrade in the same manner as the plaintiffs expression. Plaintiff's exhibit 2 of the Third Amended Complaint gives a clear picture of the substantial similarity of the works. (A-41, 42 & 43.) The plaintiff additionally provided a comparison of the characters, their likeness and similarity of their function on the crew. (A-70) In Nobile v. Watts, 747 Fed. Appx. 879, 880 (2018), it was held:

"The standard test for substantial similarity between two items is whether an ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal as the same." Id. at 66 (quoting Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2001)). But, where the original

work is composed partly of unprotectible content, we apply the "more discerning observer test," under which "substantial similarity must exist between the defendant's allegedly infringing design and [\*\*3] the *protectible* elements in the plaintiff's design." citing, Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 130 (2003) (internal quotation marks omitted).”

In the instant matter, the District Court overlooked the ordinary observer test, and the evidence presented by plaintiff on marketplace ordinary observers, the so called “common man”. That court applied the more discerning test, in error based on the scientific fact that a Tardigrade can survive in space and is a natural creature. The fact that a Tardigrade is derived from nature and can survive in space, does not prevent the creation of a Tardigrade which posses other attributes. The more discerning test should not breakdown the plaintiff’s work in to a counterintuitive exercise.

“We do not believe that we are required by the "more discerning ordinary observer test" to undertake so mechanical and counterintuitive an exercise as Lollytogs suggests. Lollytogs' argument rests on one case, Folio Impressions, 937 F.2d 759 (1991), and we believe that Lollytogs has accorded this case too broad a reading. Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1002 (1995).

Plaintiff's Tardigrade is wholly original. The district court's dissection was erroneously based on the non-copyrightability of plaintiff's Tardigrade and the various other characters.

Plaintiffs' works, especially the tardigrade, was not simply use of a scientific fact. Nor, were the other attributes of the work, *scènes-a-faire*. The works were an original expression clearly distinguishable from a natural microscopic Tardigrade in all respects. Plaintiff's characters are not common to every space adventure as proven by the evidence presented in plaintiff's Third Amended Complaint. (A-69). Plaintiff's creature can move through space, not just survive. It can assist humans in moving through space. It is not microscopic, and capable of enveloping a human. None of these attributes are given to a natural tardigrade. 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.

Additionally, the idea/expression dichotomy was not examined due to the fact that copyrightability was denied by the lower court. "[i]n a copyright action . . . the similarity between the two works must concern the expression of ideas, not the ideas themselves." Gaito Architecture, 602 F.3d at 67 (2010)... also unprotectable are *scènes à faire*, which we have described as "sequences of events which necessarily follow from a common theme," Reyher v. Children's Television Workshop, 533 F.2d

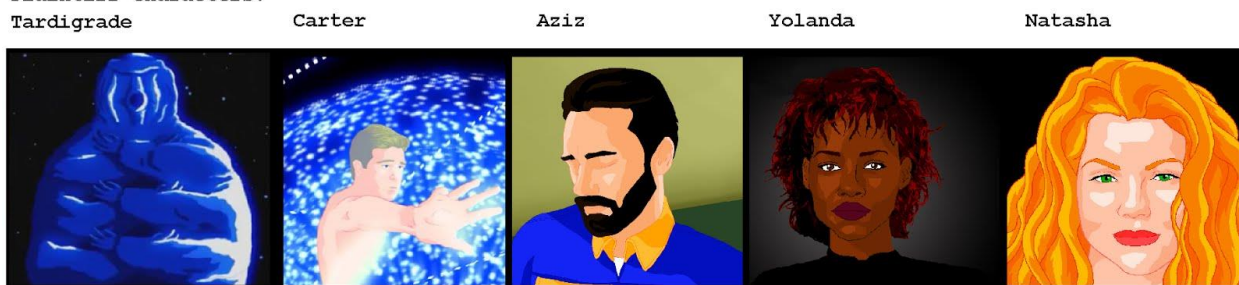
87, 91 (2d Cir. 1976), and "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic," Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (1980)" see also Nobile Id.

Plaintiff asserts that the expression of the Tardigrade and its ability to move through space, assist humans in moving through space, and its interactions with humans is unique. The similarities as shown demonstrate that the expression of the idea is substantially similar, if not striking similar. (A-70). "Scenes a faire..., they are not copyrightable except to the extent they are given unique (Emphasis Added) -- and therefore protectible -- expression in an original creation." Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (1986). In the present matter, the scenes a faire doctrine would render unprotectible only those elements of the product descriptions that are unprotectible for lack of originality or due to the merger doctrine." MyWebGrocer, LLC v. Hometown Info, Inc., 375 F.3d 190, 194 (2004).

In further examining the court's analysis for substantial similarity of the characters and scenes of plaintiff's work, creativity or copyrightability was also abstracted. The district court did not conduct an analysis for the protectable elements of the visual arts created and used in plaintiff's game. The district court dissected and only considered various parts of the characters such as race, and gender. The dissection highlighted the difference, and not the similarities. Plaintiff

argues that such a dissection causes the character comparisons to lose originality, “the law requires the lay observer to focus on similarities rather than differences when evaluating a work.” Williams v. Crichton, 84 F. 3d 581, 590 (1996). The similarities were discussed as Black, Woman, Woman with Red Hair etc. No further analysis of other characteristics was made. (A-38) for comparisons provided to the lower court.

Plaintiff characters:



Defendant characters:



The stripped originality led the court away from substantial similarity and to the more discerning test, which in turn led to excessive dissecting of the plaintiff’s work. In Alexander v. Murdoch 2011 U.S. Dist. LEXIS 79503, aff. Alexander v. Murdoch, 502 Fed Appx. 107 2012 U.S. App, LEXIS 23334 (2012) it was held:

“Under either the ordinary or more discerning observer standard, "a court is not to dissect the works at issue into separate components and compare only the copyrightable elements." Id. at 654 (citing Allen v. Scholastic 739 F. Supp 2d 642). In the end, the more discerning analysis is "principally guided by comparing the contested [work's] total concept and overall feel with that of the allegedly infringed work, as instructed by [a viewer's] good eyes and common sense." (citing) Peter F. Gaito Architecture, 602 F.3d at 66. (2010)” See also, Lapine v. Seinfeld, 375 F. App'x 81, 82 (2010).” Additionally, “total concept and feel we generally have taken care to identify precisely the particular aesthetic decisions -- original to the plaintiff and copied by the defendant -- that might be thought to make the designs similar in the aggregate.” Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 134 (2003). The district court’s analysis erroneously concluded in a finding of non-originality, and did not consider the plaintiff’s work in the aggregate or as a whole. ”Whether we employ the traditional "ordinary observer" test or the Folio Impressions "more discerning" inquiry -- we examine the works' "total concept and feel." Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1003 (1995).

THE DISTRICT COURT'S ANALYSIS OF THE TOTAL CONCEPT AND FEEL  
FAILED TO ADDRESS THE CORRECT ISSUES

The requirement that a court address the total concept and feel in a copyright infringement case, is delineated by this Circuit's decision in Tufenkian, Id. This Court found several fortuitous points relevant to the instant matter. First, the idea of inexact copying was explained.

“Our circuit first employed the "total feel" nomenclature in a case involving children's books. *See Reyher v. Children's Television Workshop*, 533 F.2d 87, 91-92 (1976). Reyher characterized this Court's previous treatment of inexact copying of books, movies, and plays as concerned with the "the 'pattern' of the work[, i.e.,] the sequence of events and the development of the interplay of characters." Id. at 91 (quoting Zechariah Chafee, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 513-14 (1945)).”

The court further emphasized “In Reyher, "total feel" functioned as a shorthand way of explaining that -- while a children's story whose sequence of events is not protected might nonetheless be infringed by other forms of inexact copying... Essentially, the total-concept-and-feel locution functions as a reminder that, while the infringement analysis must *begin* by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original, [the] infringement analysis is not *simply* a matter of ascertaining similarity between components

viewed in isolation.” Plaintiff asserts that the district court’s analysis was made based on isolation, and not the overall total concept and feel.

The Reyher court then defines the analysis: “For the defendant may infringe on the plaintiff’s work not only through literal copying of a portion of it, but also by parroting properties that are apparent only when numerous aesthetic decisions embodied in the plaintiff’s work of art -- the excerpting, modifying, and arranging of public domain compositions, if any, together with the development and representation of wholly new motifs and the use of texture and color, etc. -- are considered in relation to one another. The court, confronted with an allegedly infringing work, must analyze the two works closely to figure out in what respects, if any, they are similar, and then determine whether these similarities are due to protected aesthetic expressions original to the allegedly infringed work.”

The lower court disregarded so much of plaintiff’s work that not only its originality was destroyed, the total concept and feel of the work was also extinguished. “Total concept and feel’ should not be viewed as a *sine qua non* for infringement - similarity that is otherwise actionable cannot be rendered defensible simply because of a different ‘concept and feel.’” Reyher, citing 3 Nimmer on Copyright § 13.03[A][1][c]. Plaintiff argues that his selection coordination and arrangement of the characters, and their characteristics were copied by the appellee.



The court should have considered the total concept and feel of the characters as a whole, not in isolation. That comparison should necessarily focus on whether plaintiff's selection coordination and arrangement is being used by the defendant, see Feist, supra 499 U.S.at 349-51, see also, Reyher id. In Mcdonald v. West this court stated that "Courts must compare "the 'total concept and feel' of the contested works" rather than "dissect the works at issue into separate components and compare only the copyrightable elements. It has been established in this Circuit that "[the] infringement analysis is not *simply* a matter of ascertaining similarity between components viewed in isolation." (Citations Omitted). Rather, we must also look to how public domain [or factual] components are selected, coordinated, excerpted, modified, and arranged. *Id.*; (Citations Omitted)."

## CONCLUSION

In the instant action the district court failed to totally examine setting, pace, plot development, focus, and characters. There was also failure to review the aggregate of the plaintiff's work. "total concept and overall feel was not conducted with originality at the forefront. Plaintiff's work is original and fully deserving of copyrightability. The analysis used by the district court, would result in most creative endeavors being uncopyrightable and contrary to 17 U.S.C. § 102. The district

court's decision failed to consider fragmented literal similarity, nor comprehensive non-literal similarity.

The court, reviewed and compared the plaintiff's work with Star Trek over a fifty year period, ignoring, the issues revolving around the use of the tardigrade, and the characters in plaintiff's work. Plaintiff supplied this Court with physical digital copies of the two works [A-70 (comparison) & A-69 Summary of Star Trek Season 1]. Plaintiff also supplied the court with a digital summation of the Star Trek Discovery season 1. It is season 1 where the infringement occurs. Plaintiff provided the summation for the Court's ease of review of the substantial similarity issue.

Dated: January 10, 2020

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## CERTIFICATE OF COMPLIANCE

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