



Publications

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IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

October 7, 2011

Table of Contents

- [Van v. Cameron](#)

Van v. Cameron, USDC S.D. California, September 28, 2011

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- District court grants defendants' motion to dismiss plaintiff's second amended complaint with prejudice, finding plaintiff failed to plead sufficient facts to show defendants' movie was substantially similar to protectable elements of plaintiff's copyrighted novel in plot, theme, characters, setting, dialogue, mood, pace or sequence of events.

Plaintiff, author of the copyrighted novel *Sheila the Warrior: The Damned*, sued the author and director of the motion picture *Avatar*, as well as the financier and producer of the movie, alleging copyright infringement, contributory copyright infringement and vicarious copyright infringement, as well as violations of the California Business and Professions Code. The district court dismissed plaintiff's second amended complaint with prejudice, holding no substantial similarity existed, as a matter of law, between the protectable elements of plaintiff's work and the movie. The court found that any alleged similarities stemmed from unprotectable general ideas, and that important differences existed in the works' themes, settings, characters, pace and sequence of events.

Plaintiff alleged she wrote *Sheila* in 2000, published the book in 2003 and copyrighted it in 2004. The plot of the book involves the title character traveling to the planet Tibet to volunteer as a hospital administrator after her husband and children die in a car crash. Once there, Sheila befriends a woman named Claire, falls in love with a human miner and fights off the invasion of the Blood Suckers, an evil alien species. Claire falls in love with one of the Crowpeople, a feathered, flying species descended from the original human settlers of Tibet. In portions of the novel 20 years into the future, Sheila discovers the secret of how humans first reached Tibet and works to get the various tribes on the planet to keep this secret from others who may want to come to Tibet and exploit it for its stores of gold.

Plaintiff alleged that the movie *Avatar* infringed on her copyrighted work. The plot of the



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CASES OF INTEREST

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movie tells the story of Jake, an injured former Marine who travels to the planet Pandora after his twin brother dies in a violent crime. On Pandora, Jake must take his brother's place by occupying the body of an avatar to work for a mining company and his assignment is to infiltrate the native tribe, the Na'vi, defeat them and recover more unobtainium, the planet's precious mineral resource. He first works as a spy for the mining company, then eventually falls in love with a woman in the native tribe, adopts the tribe's ways, and helps them fight the mining company.

To state a case for copyright infringement under the Copyright Act, plaintiff must show both ownership of a valid copyright and copying of original elements of the work. The second prong of the test requires that plaintiff demonstrate that defendants had access to her work and that substantial similarity exists between protected elements of plaintiff's work and elements of defendant's work. Because the expression of ideas and not the ideas themselves are protected by copyright, the alleged similarities must be in plaintiff's particular expression of her ideas. The court may only consider whether the protectable elements, standing alone, are substantially similar. To show substantial similarity, plaintiff must allege articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters and sequence of events.

After comparing these elements in plaintiff's and defendants' works, the district court found, as a matter of law, no substantial similarity in the protectable elements of the works. The court had previously granted defendants' motion to dismiss plaintiff's first amended complaint and found similar deficiencies in her second amended complaint.

With respect to plot, the court found that the alleged similarities – both works involved traveling to another planet with the intent to assimilate, infiltrate and study the new habitat, included characters who have a desire to sleep through the “devastation” of their lives, described how time is lost on the new planet, included persons studying the new planet and protecting those studies, involved a “beautiful planet” with various types of creatures, and included characters who fall in love and characters who learn to fly – were nothing more than standard treatments flowing from abstract ideas not protected by copyright. The court likewise concluded that the alleged similarities in theme stemmed from abstract ideas arising naturally from the idea of humans traveling to a new planet: “Space travel, assimilation, mystery and secrecy do not rise to the level of particular expression of an idea required for a successful copyright claim.” The court also noted important differences in the themes of the two works – *Sheila* centers on love, family and friendship, while *Avatar* focuses on colonialism and environmentalism.

The court also found that plaintiff failed to establish any substantial similarities in



Publications

CASES OF INTEREST

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dialogue or setting between the works. Plaintiff's examples of dialogue lacked similarities in vocabulary and meaning, and only vaguely referenced similar abstract ideas, such as the general idea that a second, remote science facility existed on both planets. The alleged similarities in setting between the two works were also unprotectable general ideas or "scenes a faire": "Comparisons noting beautiful and colorful planets away from earth, multiple-leveled homes in trees, scientific facilities, and ships from earth are not expressions of a particular copyrightable setting. Such settings are scenes a faire and not protected under plaintiff's copyright." The court also noted significant differences in the stories' respective planets. Pandora is almost completely undeveloped, while Tibet is highly developed and includes shopping malls, schools, movie theaters. These differences are substantial because a major plot point in *Avatar* is based on Pandora's unexploited and natural setting. The court also noted that the second amended complaint failed to include any allegations related to substantial similarities in the mood of the two works.

With respect to pace, the court found that the plots of the two works differ significantly in time, rejecting plaintiff's allegation that references to past years of training and studying in *Avatar* established that the work took place over a time period lasting decades, rather than a few months, as claimed by defendants. *Avatar* only briefly mentions and never depicts these previous years, however. In contrast, the story in *Sheila* jumps ahead many years in the future, describing the lives of Sheila's now grown children.

As with the other elements, the court held that any alleged similarities in the characters in the two works failed to rise to the level of particular expression of an idea required for a successful copyright claim because the similarities stemmed from abstract ideas. For example, the characters of Claire and Sully both fall in love with locals on their respective planets, assimilate and undergo transformations. Other alleged similarities in character traits – characters are able to fly, are protective of their planet, have healing powers and are greedy – amounted to no more than general ideas. The court also noted significant differences between all of the characters referenced by plaintiff, including the main characters in both works. In *Sheila*, the main character is a wealthy businesswoman who falls in love with a human man, while the main character in *Avatar*, Jake, is a paraplegic ex-Marine who falls in love with a native woman, a member of an alien species. The court also found that plaintiff's allegations of similarities between the Na'vi in *Avatar* and the "green lady," Leafers, Behemoths and Crowmen in her work was an improper attempt to amalgamate characters to create substantial similarity.

Finally, the court found that plaintiff failed to establish substantial similarity in the sequence of events, noting that the allegations and examples provided by plaintiff



Publications

CASES OF INTEREST

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related more to plot, and that many of the allegedly similar scenes took place in portions of the works that were not analogous. The sequencing in *Sheila* also involved flashbacks and flashforwards in the story, while the story in *Avatar* proceeded chronologically.

Since plaintiff had not alleged sufficient facts to establish the elements of a copyright infringement claim, her claims for contributory infringement and vicarious copyright infringement, as well as her claim for false advertising under the California Business and Professions Code also failed. The court granted defendants' motion to dismiss with prejudice, finding any further grant of leave to amend likely would be futile, in light of plaintiffs' continued failure to plead sufficient facts to support her claims despite the court's previous instructions as to how she should amend her complaint and the fact that she was represented by counsel.

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