

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 17-02185-MWF (JCx)

Date: July 11, 2017

Title: Esplanade Productions, Inc. -v.- The Walt Disney Company, et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:
Rita Sanchez

Court Reporter:
Not Reported

Attorneys Present for Plaintiff:
None Present

Attorneys Present for Defendant:
None Present

Proceedings (In Chambers): ORDER RE MOTION TO DISMISS [12]

In this action, Plaintiff Esplanade Productions, Inc. (“Esplanade”), the solely-owned corporation of well-known Hollywood writer, director, and producer Gary L. Goldman, seeks to prove that Disney stole the idea for its hit animated film *Zootopia* from Goldman. In support of its claims, Esplanade alleges that Goldman twice shared a synopsis and treatment for the movie *Looney*, along with his ideas for a larger franchise called “Zootopia,” with Disney agents and executives. The parties now dispute whether Goldman’s materials are sufficiently similar to the Disney film to support an action for copyright infringement. But despite both parties’ urging, the Court cannot engage in a copying analysis on the merits because Esplanade failed either to attach the allegedly infringed materials to the Complaint, or to describe them in sufficient detail to permit the requested analysis. In this action, as in every action, it is the plaintiff’s obligation to allege sufficient facts, if proved true, to permit a jury to rule in the plaintiff’s favor. Esplanade has not met that burden here.

Before the Court is Defendants The Walt Disney Company, Disney Enterprises, Inc., Walt Disney Pictures, ABC, Inc., Buena Vista Home Entertainment, Inc., Disney Consumer Products, Inc., Disney Consumer Products and Interactive Media, Inc., Disney Book Group, LLC, Buena Vista Books, Inc., Disney Interactive Studios, Inc., Disney Store USA, LLC, and Disney Shopping, Inc.’s (collectively, “Disney”) Motion to Dismiss Plaintiff’s Complaint (the “Motion”), filed May 22, 2017. (Docket No. 12). On June 5, 2017, Plaintiff Esplanade Productions, Inc. (“Esplanade”) filed its Opposition. (Docket No. 18). On June 12, 2017, Disney replied. (Docket No. 19).

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The Court has reviewed and considered the papers filed on the Motion, and held a hearing on **June 26, 2017**.

The Motion is **GRANTED** — with leave to amend, of course. The crux of the difficulty here is that Esplanade has chosen not to attach the allegedly infringed materials to the Complaint. The allegations themselves actively obfuscate the details of the infringement. The Complaint describes the alleged similarities at such a high level of generality that it is impossible for the Court to evaluate whether the alleged copying was sufficiently specific to be protectable or merely a series of unprotectable *scènes-à-faire*. The allegations thus fail to state a plausible claim.

Indeed, even if the Court had determined that the Motion should be denied, it would order an immediate production of the *Looney* materials, and then invite a motion for judgment on the pleadings. It seems more efficient just to grant the Motion. As the parties understand, inherent in arguments over substantial similarity is the copyrightability of the material allegedly copied. Whether Goldman likes it or not, Disney has the right to argue that his ideas, clever as they were, constitute mere *scènes-à-faire*, and thus are not subject to copyright protection. If that is all that was infringed, then Hoberman and Disney could openly boast that they copied *Zootopia* from *Looney*, and still Goldman would not prevail. The real question is: When should the parties get to argue this issue? Now? At summary judgment? At trial?

Rule 8 requires that Disney should be able to argue the issue now. Of course Esplanade can respond that the issue is not ripe at this stage because factual disputes prevent the Court from deciding it as a matter of law; but the allegation must at least include sufficient detail for Disney to make the argument if it wishes.

I. BACKGROUND

A. Request for Judicial Notice

Disney asks the Court to take judicial notice of the animated motion picture *Zootopia*, the allegedly infringing work, which Disney attached in DVD form to its

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attorney's declaration. (See Declaration of Craig P. Bloom ("Bloom Decl.") (Docket No. 12-1), Ex. A (the "Film" or "Zootopia") (Docket No. 12-2)). The Film is explicitly referenced in the Complaint, and Esplanade does not dispute the Film's authenticity. Therefore, under the incorporation by reference doctrine the Court properly may take judicial notice of it. Fed. R. Evid. 201; see *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1248 (9th Cir. 2013) (applying incorporation by reference doctrine to allegedly infringing video game).

B. Factual Background

On a motion to dismiss, the Court assumes the facts alleged in the complaint are true and construes any inferences arising from those facts in the light most favorable to the plaintiff. See, e.g., *Schueneman v. Arena Pharm., Inc.*, 840 F.3d 698, 704 (9th Cir. 2016) (restating generally-accepted principle that "[o]rdinarily, when we review a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we accept a plaintiff's allegations as true 'and construe them in the light most favorable' to the plaintiff" (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009))).

The Court thus accepts the following facts as true:

Esplanade is a California corporation formed by Goldman in 1984 to produce motion pictures and as a vehicle for his various projects as a writer, director, and producer. (Complaint ¶ 23 (Docket No. 1)). Goldman has had a long and successful career in film, and worked in one capacity or another on a number of well-known motion pictures, including *Total Recall*, *Basic Instinct*, and *Minority Report*. (*Id.* ¶¶ 24–29).

Starting in 2000, Goldman developed a franchise for motion pictures, television programs, and derivative products that he called "Zootopia." (Compl. ¶ 30). The franchise is "based on an animated cartoon world that metaphorically explores life in America through the fictional setting of a diverse, modern, and civilized society of anthropomorphic animals." (*Id.* ¶ 30). Goldman developed the prospective franchise's

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main characters, and paid an animator/cartoonist to design a set of visual mock-ups of the characters:



(*Id.* ¶ 32).

Goldman wrote a synopsis and treatment of the first segment of the prospective franchise, a live-action film titled *Looney* that he registered with the Writers Guild of America, West, Inc., on August 17, 2000. (Compl. ¶ 33). Neither the synopsis nor the treatment is included in the Complaint, nor is any other holistic description of the plot, characters, dialogue, and so forth. *Looney* appears, however, to be the story of a young man living in a small town who aspires one day to become an animator in the big city. (*Id.* ¶¶ 72–75).

In the early 2000s, a company called Mandeville Films had a first-look production contract with Disney. (Compl. ¶ 36). In 2000, Goldman met with the then-Chief Executive Officer of Mandeville Films, David Hoberman, to pitch the Zootopia proposed franchise. (*Id.* ¶ 37). During the meeting, Goldman shared with Hoberman his character illustrations and his ideas for the themes, plot, and settings for the proposed franchise. (*Id.* ¶ 38). Although Hoberman took copies of the materials after the meeting, and on information and belief gave the materials to Disney, Disney ultimately declined to acquire the rights to the proposed franchise. (*Id.* ¶¶ 38–39).

After further developing the proposed franchise, Goldman tried again in 2009. (Compl. ¶ 40). On February 12, 2009, Goldman met with Brigham Taylor, who at the time was Walt Disney Pictures' Executive Vice President of Production and

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Development, to pitch *Looney*. (*Id.*). During the meeting, Goldman again shared his character illustrations, ideas for the themes, plot, and settings for the broader Zootopia franchise, and the treatment and synopsis of *Looney*. (*Id.* ¶ 42). Taylor took copies of Goldman’s materials and, on information and belief, gave them to others at Disney. (*Id.*). Again, Disney declined to acquire Esplanade’s rights. (*Id.* ¶ 43).

Subsequently, Disney began to develop the animated motion picture that eventually became *Zootopia*. (Compl. ¶ 44). The Film is the story of an idealistic bunny who makes it as a police officer in the big city, only to find herself — and an unlikely partner — tracking down a twisting mystery that leads her from the city’s shady underground up to the political elite. Along the way, the bunny and her partner grapple with the challenges of policing in a diverse metropolis.

Disney completed *Zootopia* on February 11, 2016, and began distributing it on March 4 of that year. (*Id.* ¶¶ 45–46). *Zootopia* grossed more than a billion dollars at the box office, making it the highest-grossing original animated film of all time. (*Id.* ¶ 46). Subsequently, Disney spun off the characters for use at theme parks and in merchandising, as toys, games, books, comics, video games, dolls, clothing, kitchenware, and the like. (*Id.* ¶¶ 48–49).

On February 10, 2017, Esplanade registered the character descriptions and illustrations for the proposed franchise, and the synopsis and treatment of *Looney*, with the United States Copyright Office. (Compl. ¶ 34). Esplanade called the franchise “Zootopia.” (*Id.*).

C. Alleged Similarities

Esplanade alleges that the Film is substantially similar to Goldman’s Zootopia proposed franchise in general, or to *Looney* in particular, or maybe to both — precisely which is unclear from the Complaint. (Compl. ¶ 53). Esplanade alleges that the plots of *Looney* and *Zootopia* are substantially similar because “[b]oth Zootopias play out similar conflicts among the characters, including conflicts about whether one can be what he or she wants to be and whether individuals can change by overcoming

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prejudice not only in society but also within themselves.” (Compl. ¶ 70). Both *Zootopias* include anthropomorphic animals living in diverse, modern metropolises. (*Id.* ¶ 71). But while this is the central conceit of *Zootopia*, it seems only to be the theme of the animated story-within-a-story in *Looney*. That isn’t to say that a valid claim could not be based on only a portion of *Looney*, but only to emphasize that the substance of the alleged copying remains obscured in the Complaint. As best as can be discerned, however, the Complaint compares the characters and themes of *Zootopia* to the animated portion of *Looney* and the plot of *Zootopia* to the live-action portion of *Looney*.

The Complaint further alleges, in a conclusory fashion, other similarities between *Zootopia* and *Looney*, including similarities in the characters, dialogue, setting, mood and pace of the works. (Compl. ¶¶ 54–69, 77–82). Those will be discussed in more detail, *infra*.

II. DISCUSSION

A. Legal Standards

1. Pleading Standard

“Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory.” *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

In ruling on the Motion under Rule 12(b)(6), the Court follows *Bell Atlantic* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). “To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to ‘state a claim for relief that is plausible on

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its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *See id.* at 681 (“It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”); *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014). “Although ‘a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof is improbable,’ plaintiffs must include sufficient ‘factual enhancement’ to cross ‘the line between possibility and plausibility.’” *Eclectic Properties*, 751 F.3d at 995 (quoting *Twombly*, 550 U.S. at 556–57) (internal citations omitted).

The Court must then determine whether, based on the allegations that remain and all reasonable inferences that may be drawn therefrom, the complaint alleges a plausible claim for relief. *See Iqbal*, 556 U.S. at 679; *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). “Determining whether a complaint states a plausible claim for relief is ‘a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.’” *Ebner v. Fresh, Inc.*, No. 13-56644, 2016 WL 5389307, at *2 (9th Cir. Sept. 27, 2016) (as amended) (quoting *Iqbal*, 556 U.S. at 679). Where the facts as pleaded in the complaint indicate that there are two alternative explanations, only one of which would result in liability, “plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs’ allegations plausible.” *Eclectic Properties*, 751 F.3d at 996–97; *see also Somers*, 729 F.3d at 960.

2. Copyright Infringement

“To prevail on [a] copyright infringement claim, [a plaintiff] must demonstrate (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010) (citation and internal quotation marks omitted). Ownership is not disputed for

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purposes of this Motion. Accordingly, the Court focuses on whether Esplanade has adequately alleged copying in the Complaint.

A plaintiff may establish copying through direct or circumstantial evidence. *See Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987) (“Because direct evidence of copying is rarely available, a plaintiff may establish copying by circumstantial evidence . . .”). Circumstantial evidence of copying may include “(1) defendant’s access to the copyrighted work prior to creation of defendant’s work and (2) substantial similarity of both general ideas and expression between the copyrighted work and the defendant’s work.” *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987). Again, Disney does not dispute access for purposes of this Motion, and so the Court assumes without deciding that Disney had access to Esplanade’s work. “Under the ‘inverse ratio’ rule, if a defendant had access to a copyrighted work, the plaintiff may show infringement based on a lesser degree of similarity between the copyrighted work and the allegedly infringing work.” *Benay v. Warner Bros. Entm’t*, 607 F.3d 620, 625 (9th Cir. 2010). Therefore, Esplanade’s burden is somewhat lesser under the facts as alleged in the Complaint.

“The substantial-similarity test contains an extrinsic and intrinsic component.” *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006). A finding of substantial similarity under the extrinsic component is a necessary prerequisite to considering the intrinsic component, which is expressly reserved for the jury. *See Shaw v. Lindheim*, 919 F.2d 1353, 1360–61 (9th Cir. 1990). A failure to satisfy the extrinsic component on a motion to dismiss thus requires judgment for the defendant as a matter of law. *See Funky Films*, 462 F.3d at 1077.

In *Funky Films*, the Ninth Circuit explained the components of the extrinsic component of the test:

Extrinsic analysis is objective in nature. It depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed. The extrinsic test focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence

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of events in the two works. In applying the extrinsic test, this court compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters.

462 F.3d at 1077 (quotation marks and citations omitted). As the Ninth Circuit has emphasized, the Court “must take care to inquire only whether ‘the *protectable elements, standing alone*, are substantially similar” and thus must “filter out and disregard the non-protectable elements” when considering substantial similarity. *Cavalier v. Random House*, 297 F.3d 815, 822 (9th Cir. 2002) (quoting *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996)) (emphasis in original).

B. Analysis

This action presents the unusual question of whether a plaintiff can plead substantial similarity between two works without either party actually attaching the allegedly infringed work for the Court’s review. No case law directly addresses this question in the context of film (whether motion pictures or television). But whether or not it is *possible* to allege copyright infringement without attaching the relevant works, Esplanade has failed to do so here. The Complaint fails to allege the “the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events” of *Looney* in sufficient detail to ascertain whether it (defined as the live action component, or the animated story-within-a-story, or both) is substantially similar to *Zootopia*. The details of the plot, dialogue, setting, and so on, are pled at such a high level of generality that arguably they consist only of non-protectable concepts and themes — *i.e.*, *scènes-à-faire*. Phrased another way, the Complaint is filled with conclusory allegations that are not factually specific enough to support Esplanade’s claims. Excising those elements leaves little in the Complaint to indicate that *Zootopia* infringed Esplanade’s copyright.

1. Plot

Paragraph 71 of the Complaint, which purports to describe the similarities between the animated story arc within *Looney* and the plot of *Zootopia*, is perhaps

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more accurately described as a list of themes, none of which is specific enough to be protectable. The Complaint alleges that

[b]oth Zootopias involve a small, cute, furry female animal, who is an outsider to “Zootopia.” [Whether this use of “Zootopia” refers to a city, the animal society, or something else entirely is unclear.] She is dismissed by the other more dominant animals because of her species, and she strives to overcome that societal prejudice. She is brave, determined, resourceful, and helpful to others in trouble, particularly by using her small size. She becomes friends with an abrasive predator who lives in Zootopia. [Again, it is unclear how “Zootopia” is being used in this context.] The predator is also subject to prejudice as he is reviled for his species. He is determined not to seek the approval of those who disdain him and derives pleasure from pulling pranks. The two contrasting protagonists team up and contend with prejudice and preconceived notions of the elite, including a power structure headed by those whose species were dominant in a state of nature. She is an enthusiastic optimist while he is a cynical pessimist, and the stories play out that conflict, *e.g.*, whether one can evolve, define oneself, and become what he or she wants to be. Each plot develops in the context of a scheme by a third character, a small prey animal, to upend the power structure, but the scheme goes too far and fails.

(Compl. ¶ 71).

What the paragraph describes is a buddy movie starring talking animals, possibly set in a place called “Zootopia.” The paragraph spends more time describing the generic characteristics of the protagonists (*e.g.*, “[s]he is brave, determined, resourceful, and helpful to others in trouble, particularly by using her small size”) and the themes (the works explore “a power structure headed by those whose species were dominant in a state of nature” and “whether one can evolve, define oneself, and become what he or she wants to be”), than any true plot points. From this description, it is impossible to determine what the plot of the animated portion of *Looney* even is.

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Perhaps the most specific and detailed allegation is that the two protagonists present an odd pair — one a predator, the other prey, one optimistic, the other a cynical pessimist. But this is a cliché of the buddy cop genre. *See, e.g., Men in Black* (Columbia Pictures 1997) (streetwise, charming youngster is paired with a stodgy old coot); *Rush Hour* (New Line Cinema 1998) (straight-laced Hong Kong detective is paired with wisecracking, reckless LAPD detective); *The Heat* (20th Century Fox 2013) (straight-laced FBI agent is paired with an unconventional Boston cop). “[C]haracters which naturally flow from a ‘basic plot idea’ are ‘scenes-a-faire’ not protected by copyright.” *Campbell v. Walt Disney Co.*, 718 F. Supp. 2d 1108, 1115 (N.D. Cal. 2010). Excising all of the non-protectable elements and conclusory allegations from paragraph 71 leaves any potential jury with insufficient facts to conclude anything about whether *Zootopia* is substantially similar to *Looney*.

The more extended discussion of the plot similarities between the live-action portion of *Looney* and *Zootopia* does not fare any better. Again, it is impossible to get more than the most general sense of *Looney*’s plot from the Complaint, because the story arc itself is never separately pled. Instead, the Complaint leaves it for the Court to infer the details of the plot from a list of purported similarities. (*See* Compl. ¶¶ 72–76). Not only does this leave the details of *Looney*’s plot obscure, the alleged similarities bear only a passing resemblance to the plot of *Zootopia*.

For example, the Complaint argues that the two works are similar because both “begin with young, uncool heroes who live in small towns with their parents” both of whom are “bullied by a bigger, stronger, mean kid” and both of whom “work to achieve a career dream that their parents specifically discourage.” (*Id.* ¶ 72). Not only is this description too vague to support a claim of substantial similarity, but it is different in key respects from the plot of *Zootopia*. There, the female bunny protagonist, Judy Hopps — in contrast with *Looney*’s human male protagonist — is popular and brave, with a plum part in the school play and several friends who she loyally protects from the local bully. Although Judy certainly acts single-mindedly in pursuing her dream of becoming a police officer in the big city, her parents are not

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“specifically discouraging,” but are in fact relatively supportive of their daughter’s goals, despite their tendency to worry on her behalf.

The Complaint further alleges that the two plots are similar because, upon arriving in the big city, “the heroes come up against strong, powerful, and entrenched bosses who want to maintain control over the heroes.” (Compl. ¶ 73). But there is no indication that Judy’s boss, Chief Bogo, is particularly “entrenched” nor does he seem to want to “maintain control” over Judy; rather, he is much more concerned with driving her off the police force altogether, by assigning her menial tasks.

The Complaint then describes the following narrative arc supposedly shared by the two works:

The heroes have partners who help them achieve success. But success goes to the heroes’ heads and they publicly offend others and alienate their partners, exhibiting their own prejudices. This triggers a job crisis, resulting in the heroes losing their dream jobs and hard-won statuses. And the crisis results in their having to leave unfinished an important but problematic project.

(Compl. ¶ 73).

In *Zootopia*, Judy partners with a fox named Nick, who helps her find a missing otter; and, in the process, the two uncover what appears to be a scheme by the mayor to cover up an epidemic of predators going “savage.” During a press conference afterwards, Judy inadvertently implies that predators are naturally inclined to turn savage, offending and alienating Nick. But Judy does not “lose” her dream job, she voluntarily resigns at the height of her success. And there is no indication that Judy leaves “an important but problematic project” unfinished. When Judy resigns, so far as she knows, she has solved the mystery of why animals go savage. It is not until later that Judy realizes that mystery had more to it than initially met the eye.

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Whether the foregoing description of *Zootopia* accurately describe *Looney*'s plot is unclear from the Complaint. It seems not — although the sections discussing plot say nothing about whether *Looney*'s protagonist, too, fights his way onto the police force, only to uncover an apparent scheme by the Mayor to cover up wrongdoing by persons of his social group, it seems unlikely in a movie about a small-town animator making his way in the big city. But the allegations are just not specific enough to say for sure.

Finally, the strained comparison regarding the climax of the films requiring their characters to “solve a problem with the madness of out-of-control *Zootopia* characters in an asylum” (Compl. ¶ 75) misstates the sequence of events in *Zootopia*. In *Zootopia*, it is the trip to the asylum that leads to the discovery of the missing predators and, eventually, Judy's disastrous press conference. The climactic scene in which Judy and Nick together outwit the antagonist seemingly takes place in some sort of natural history museum. And again, the allegations in the Complaint make it impossible to know whether *Looney*'s protagonist uncovers a similar scheme.

The vague allegations regarding the plot of *Looney* fail to establish the factual support necessary to plead a proper claim of copyright infringement. No jury could conclude, from the strained comparisons outlined above, that the two works have substantially similar plots.

2. Characters

The Complaint also alleges that the *Zootopia* characters' traits, designs, and artwork were copied from *Looney*. Esplanade does provide the original artwork, and thus, taken alone, this portion of the Complaint would survive a Rule 8 analysis. But Esplanade does not claim that only the artwork was stolen; it claims the work as a whole was copied. Therefore, this section is insufficient on its own to show copying between the works. And even if it were, as described below, the *Looney* artwork is not substantially similar to the artwork in *Zootopia*.

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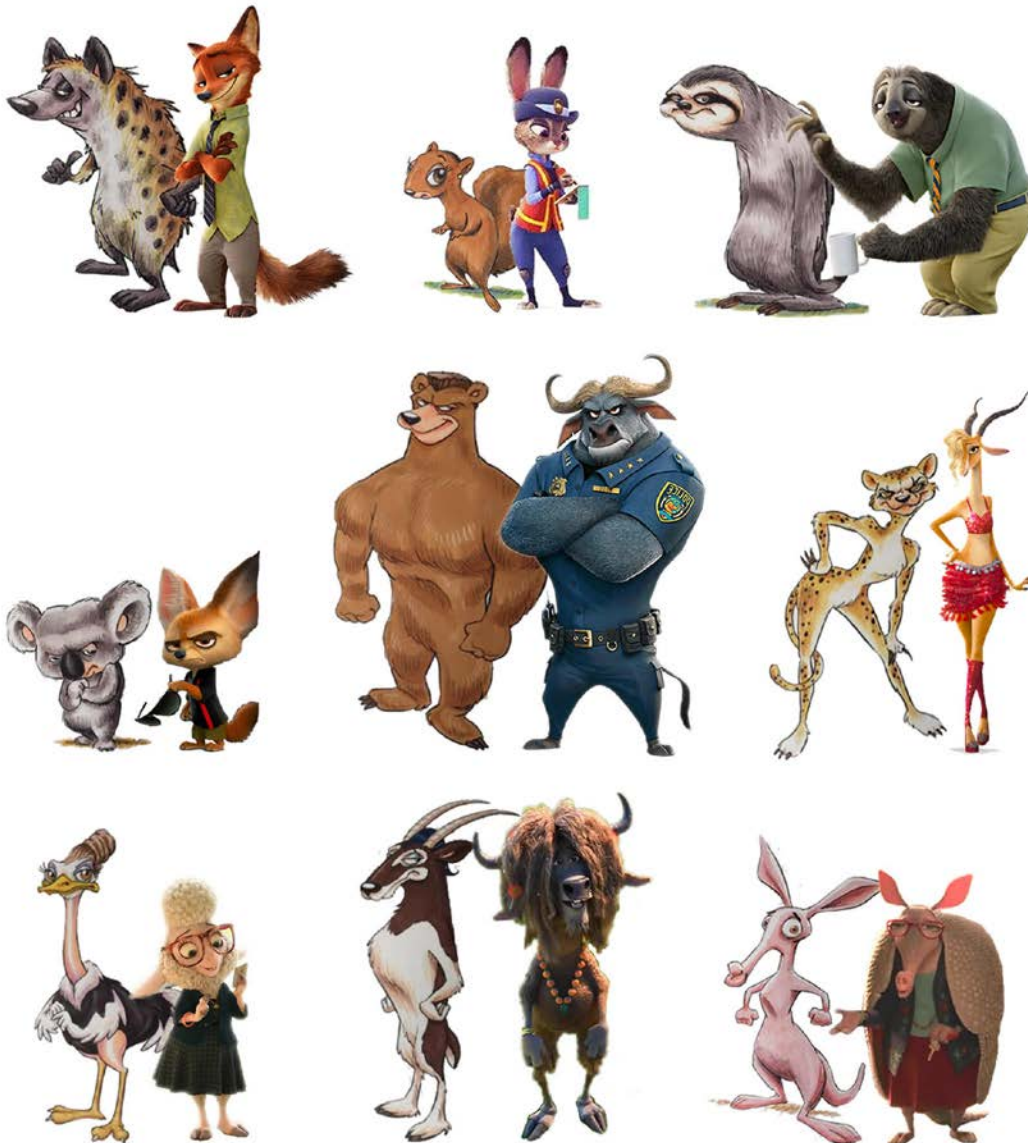
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The Complaint includes the following chart comparing the character designs and artwork from *Looney* (the characters on the left in each pair) with those from *Zootopia* (the characters on the right in each pair):

Comparison of the Characters in the Goldman Zootopia (L) and Disney Zootopia (R)



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The differences between the character designs outnumber the similarities. Most obviously, almost none of the above pairings actually include the same animals. A hyena is not a fox (and in reality is a much larger animal than a fox) and a grizzly bear is not a water buffalo. Additionally, the *Looney* characters are unclothed while the *Zootopia* characters are all elaborately costumed. And the animation style itself is very different between the two sets of characters: whereas the Disney characters are typically cute and appealing, the *Looney* characters evoke a darker, seedier aesthetic. The *Zootopia* characters appear generally clean, healthy, and well-built for their respective body types; by contrast, the *Looney* characters have generally slovenly physiques, poor posture, and circles under their eyes. Picking just one example, while Nick, the fox from *Zootopia*, sports smooth fur, a straight back, and a full bushy tail, *Looney*'s hyena slouches sheepishly, emphasizing his protruding, paunchy belly and disheveled fur; his scrawny, rather stunted tail is all but hidden. The two character designs bear little resemblance to one another.

Indeed, most similarities between the characters boil down to the fact that both ensembles consist of anthropomorphic animals whose attributes flow to some extent from their physical form. That is, small animals are cute and feminine, traditional trickster animals appear sly, and large animals are strong. The Complaint alleges that “the characters illustrated [in both works] are not true-life depictions of real animals, nor are they generic or inherent in nature; rather, they are original creative expressions of animals of different species from different habitats in different parts of the world and constitute a selection and arrangement of expression.” (Compl. ¶ 79). This allegation is a generic observation, a *scène-à-faire* flowing from the very idea of anthropomorphizing animals. Indeed, this statement could be true of any number of animated, talking-animal films created over the years, from *Robin Hood* (Walt Disney Pictures 1973) to *Finding Nemo* (Walt Disney Pictures 2003). It likely is not protectable. See *Mandeville-Anthony v. Walt Disney Co.*, No. CV 11-2137-VBF (JEMx), 2012 WL 4017785, at *3 (C.D. Cal. July 28, 2012) (“[T]he *idea* of animated, anthropomorphic car characters is unprotectable” as is “[t]he idea that some of the respective car characters share attributes that flow from their make and country of origin” because there is “no property interest in stereotyped characters.”) (emphasis

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in original) (quoting *Midas Prod., Inc. v. Baer*, 437 F. Supp. 1388, 1390 (C.D. Cal. 1977)).

Nor does the Complaint plead any details that would permit a comparison between the personalities and traits of the two sets of characters. To be deemed protectable in the Ninth Circuit, characters must meet a three-part test, including a requirement that they be “especially distinctive.” *See DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015) (requiring characters to (1) have “physical as well as conceptual qualities,” (2) be “sufficiently delineated,” and (3) be “especially distinctive” in order to receive copyright protection, and on application of the test, finding the Batmobile to be a protected character); *see also Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (finding Mickey Mouse to be a protected character); *Metro–Goldwyn–Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1295–96 (C.D. Cal. 1995) (finding James Bond to be a protected character). The allegations in the Complaint are too general to meet any component of this test. For example, in ostensibly comparing Judy with a composite of two *Looney* characters, the Complaint describes only Judy. (Compl. ¶ 66). The paragraph says nothing about how Judy’s character is similar to “Mimi” or “Hugo,” and it is not even clear from the Complaint who these characters are, or what role they play in *Looney*. The same is true of the attempt to compare Nick with “Roscoe” and “Monty” (*id.* ¶ 67), the attempt to compare Ms. Bellwether with “Ms. Quilty” and “Fuzz” (*id.* ¶ 68), and so on.

3. Dialogue, Mood, Setting, etc.

The remaining similarities claimed in the Complaint are equally unsupported by any facts alleged therein. The Complaint argues that the “mood” of the two works is substantially similar because both “are written for adults and children, with comic, social, and emotional aspects” and “involve humor with an undercurrent of pathos and light moments juxtaposed with dark moments.” (Compl. ¶ 77). This generic description encompasses nearly every animated movie Disney has ever made.

Nor does the dialogue identified in the Complaint support an inference of copying. A successful claim of dialogue infringement requires “extended similarity of

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dialogue” between the two works. *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1450 (9th Cir. 1988); *see also Bernal v. Paradigm Talent and Literary Agency*, 788 F. Supp. 2d 1043, 1071 (C.D. Cal. 2010) (rejecting claim of substantial similarity where there was only sporadic similarity of dialogue). Moreover, “ordinary, common expressions . . . are not copyrightable.” *Bernal*, 788 F. Supp. 2d at 1072.

Here, the Complaint identifies only two instances of similar dialogue, which is insufficient to show any extended dialogic similarity between *Zootopia*, which has a 110-minute running time, and *Looney*, which proposed running time is unknown. (Compl. ¶¶ 60–61); *see Braham v. Sony/ATV Music Publ’g*, No. CV 15-8422 MWF (GJSx), 2015 WL 7074571, at *5 (C.D. Cal. Nov. 10, 2015) (concluding that the repetition of the phrases “Haters gonna hate” and “Players gonna play” between two songs was, in itself, insufficient to create a plausible case of copyright infringement); *Gallagher v. Lions Gate Entm’t Inc.*, No. CV 15-2739-ODW (Ex), 2015 WL 12481504, at *10 (C.D. Cal. Sept. 11, 2015) (“A mere three sentences taken from a 302-page book compared to three sentences from a 90-minute motion picture falls far short of the ‘extended similarity’ required for a finding of substantial similarity for dialogue.”). Moreover, both sets of dialogue identified as similar are the sorts of “ordinary, common expressions” that courts have rejected as non-copyrightable. (*See, e.g.*, Compl. ¶ 61 (comparing the remark, “He has no hope that he can change or improve; or that anyone else can change or improve” from *Looney* with the remark, “Everyone comes to *Zootopia* thinking they can be anything they want. Well, you can’t. You can only be what you are” from *Zootopia*)).

The Complaint alleges that the settings of *Zootopia* and *Looney* are similar. Although, as has been discussed above, it is difficult to tell where *Looney* is set, the Complaint indicates that *Looney* plays out in a live-action suburb and its adjacent city. (Compl. ¶ 3). Absent more, Esplanade has failed to allege a substantial similarity to *Zootopia*, which takes place primarily in an entirely fictional, computer-animated city called “*Zootopia*” that is divided into several temperature-controlled, unique zones to accommodate the anthropomorphic animals who live there. *See, e.g.*, *Gallagher*, 2015 WL 12481504, at *10 (concluding that “the setting for half of *Cabin*’s scenes and an

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integral aspect of the plot [is not] merely a minor difference”); *Benay*, 607 F.3d at 628 (holding that settings were not similar partly because “[t]he Film includes extended scenes in a samurai village” and “[n]o such village appears in the Screenplay.”).

It is true that, as the Complaint alleges, the title of *Zootopia* and the title of the *Looney* franchise are the same, at least as described in the 2017 copyright. (Compl. ¶ 85). The Complaint alleges that “‘Zootopia’ is more than just a name: it expresses theme, setting, and character, and it relates to plot.” (*Id.* ¶ 80). While this may be so, a shared title alone is insufficient to rescue the Complaint from its many other deficiencies.

4. *Metcalf* and the Totality of the Elements

At the hearing, counsel for Esplanade argued that even if none of the individual elements discussed above is sufficiently specific to be protectable, taken together the allegations are sufficient to raise an inference of copying under *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002). In that case, the Ninth Circuit considered whether two works, including the television series *City of Angels*, were sufficiently similar under the extrinsic test to survive summary judgment. *Id.* at 1072. The Ninth Circuit concluded that, although the similarities between the works were not individually protectable, when considered as a whole the overall selection and sequence of generic elements was substantially similar. *Id.* at 1074–75. Esplanade relies on this case for the principle that “[t]he particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element.” *Id.* at 1074.

As currently drafted, however, the allegations in the Complaint are too vague to determine whether any particular sequence of generic elements in *Looney* is protectable. That is, the Complaint never clearly sets out *any* sequence of events from beginning to end, and thus the Court is unable to evaluate whether the alleged generic similarities between *Looney* and *Zootopia* “go[] beyond the necessities of [defendants’ work’s] theme and belie[] any claim of literary accident” *Id.* at 1074 (quoting *Shaw*, 919 F.2d at 1363).

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5. In Sum

It was within Esplanade’s power to attach the *Looney* treatment, synopsis, and/or screenplay to the Complaint so that a clear, direct comparison between it and *Zootopia* could have been made. As the masters of their complaint, plaintiffs should allege the facts that best support their case. See *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1132 (C.D. Cal. 2007) (granting motion to dismiss copyright claim even though court considered only 8 of 150 allegedly infringing television episodes, because those 8 episodes were the only ones the plaintiffs attached to the complaint). Here, the failure to include, at the least, any clear summary of the *Looney* plot, dialogue, themes, and so on indicates, on some level, that Esplanade believed including those details would have been detrimental to its claims. To decide in Esplanade’s favor and allow the action to proceed based on deliberate obfuscation would run afoul of what the Ninth Circuit considers to be “a critical policy interest in ‘preventing plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based.’” *Id.* (quoting *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998)); *c.f. id.* (rejecting a scenario where “future plaintiffs alleging copyright infringement in ongoing works (i.e., book series or television series), could evade dismissal simply by alleging infringement from common elements by citing only a handful of specific examples in the” complaint as implicitly rejected by the Ninth Circuit’s decision in *Funky Films*).

The Motion is thus **GRANTED** as to Esplanade’s copyright claim.

Esplanade may cure the deficiencies outlined above either by providing a clear and detailed description of the allegedly infringed works, or by attaching them to the Complaint — at which point the Court will again consider whether the works are substantially similar to *Zootopia*. Accordingly, Esplanade shall be afforded *leave to amend*. See *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1086 (9th Cir. 2014) (“A complaint should not be dismissed without leave to amend unless amendment would be futile.”).

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C. State Law Claims

Because the Motion is granted with leave to amend, the Court will not rule on the state law claims at this time. However, the Court is not inclined to exercise supplemental jurisdiction over Esplanade’s remaining state law claims should a First Amended Complaint be filed and dismissed. *See* 28 U.S.C. § 1367(c) (“The district court[] may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction.”); *Satey v. JPMorgan Chase & Co.*, 521 F.3d 1087, 1091 (9th Cir. 2008) (“[A] federal district court with power to hear state law claims has discretion to keep, or decline to keep, them under the conditions set out in § 1367(c)”) (quoting *Acri v. Varian Assoc., Inc.*, 114 F.3d 999, 1000 (9th Cir.1997) (en banc)).

III. CONCLUSION

For the foregoing reasons, the Motion is **GRANTED**. The First Amended Complaint, if any, shall be filed on or before **July 24, 2017**.

IT IS SO ORDERED.