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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

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 :
 ANAS OSAMA IBRAHIM ABDIN, :
 Plaintiff, :
 :
 -against- :
 :
 CBS BROADCASTING, INC., et al., :
 Defendants. :
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18 Civ. 7543 (LGS)

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

Plaintiff Anas Osama Ibrahim Abdin filed the Third Amended Complaint (“TAC”) on January 15, 2019, against CBS Broadcasting, Inc. and/or CBS Corp. and/or CBS Interactive Netflix, Inc. The TAC alleges that Defendants violated the Copyright Act, 17 U.S.C. § 101 *et seq.*, by copying Plaintiff’s concept for an unreleased science fiction videogame *Tardigrades* in their *Star Trek: Discovery* television series (the “Television Series”).¹ Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants move to dismiss the TAC on the ground that *Star Trek: Discovery* is not substantially similar to Plaintiff’s videogame as a matter of law. As discussed below, Defendants’ motion is granted.

I. BACKGROUND

The facts below are drawn from the TAC and its exhibits, which include all available images and video and audio footage of the Videogame, and other evidence integral to the Complaint, which includes all fifteen episodes of the Television Series’ first season. The facts are construed in the light most favorable to Plaintiff as the non-moving party. *See Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016).

¹ In his Opposition to the Motion to Dismiss, Plaintiff withdrew the accounting cause of action and withdrew CBS All Access as a Defendant.

A. Plaintiff's Concept for the Videogame *Tardigrades*

Between May 2014 and September 2017, Plaintiff published draft designs, videos, and descriptions of the videogame on his personal website, YouTube, and other popular websites. Plaintiff has compiled these materials in a video file with the filename "Exhibit K-H" (the "Video Compilation"), comprising approximately thirty minutes of twenty-three separate YouTube videos, followed by static blog posts from two websites. None of the contents of the Video Compilation is alleged to be registered for copyright. On June 28, 2018, Plaintiff registered for copyright a distillation of the game concept, which was first published July 12, 2017 (the "Distillation"). Plaintiff claims, and it is assumed for purposes of this motion, that the Video Compilation and Distillation are the protected work that Defendants allegedly infringed. The videogame itself has not yet been released. Nevertheless, for ease of reference, Plaintiff's allegedly protected work hereafter is collectively referred to as the "Videogame."

The Videogame follows Carter, a blonde male botanist who lives on a space station, Marsi 3, which orbits the planet Jupiter. Other characters are Aziz, a technician with a dark complexion who is gay, Kat, a blonde engineer, Yolanda, a black woman who is the space station's communications engineer, and Natasha, a red-haired woman whom Plaintiff describes as a "bad girl." The game is set around the year 20,000 B.C., when civilization is about to discover galactic travel, and "the deserts of south Egypt and Ethiopia are green and full of advanced technology."

Carter communicates with others and explores the space station, the outer space, and planet terrains to solve puzzles. The player decides Carter's mood as he completes tasks, which may alter the Videogame's storyline. The storyline "has a plot twist and deals with slavery,

secrecy, espionage and other issues.” One video suggests that the game involves an alien race that knows the origins of the universe. Another suggests that Carter has superpowers.

In early 2015, Plaintiff changed the Videogame’s title from *Epoch* to *Tardigrades*² and introduced tardigrades to the game series, as reflected in about the last ten minutes of the Video Compilation. These ten minutes contain two video snippets depicting Plaintiff’s tardigrade. The first is the closing sequence to each of the videos showing a small tardigrade fading into the background and lasting approximately one second. The second is a thirteen-second sequence in a single video that shows a massive, deep blue tardigrade, standing upright, that grabs Carter from behind with its eight limbs and envelopes Carter within itself before crawling off into space. The same sequence appears on two pages of the Distillation. In the blog post announcing the name change, Plaintiff describes tardigrades as “indestructible.” He states that “[d]espite their little size,” tardigrades can “survive temperatures from just above absolute zero up to above the boiling point of water,” can “survive extreme conditions of radiation and the vacuum of space” and can “go without food or water for more than 10 years.” The blog post asks, “Who else can travel in space like tardigrades?” Although unexplained, it can be surmised that Carter, enveloped within the tardigrade, is also protected from the conditions of space. Despite the allegation in the TAC, the Videogame does not suggest that Plaintiff’s tardigrade is capable of “instantaneous” space travel.

² According to the Merriam-Webster Dictionary, a tardigrade is “any of a phylum (Tardigrada) of microscopic invertebrates with four pairs of stout legs that live usually in water or damp moss — called also water bear.” *Tardigrade*, MERRIAM-WEBSTER DICTIONARY (Sept. 3, 2019), available at <https://www.merriam-webster.com/dictionary/tardigrade>.

A June 2015 blog post announced a change to the Videogame's logo, describing it as "a combination of the water bear [a colloquial name for the tardigrade] posing as the ancient Egyptian scarab holding a crook and a flail, accessorized with two wings."

B. Defendant's Television Series *Star Trek: Discovery*

The Television Series first aired on September 24, 2017, and follows the same themes as earlier *Star Trek* television shows and movies.³ The protagonist is Michael Burnham, a Vulcan-raised, human, black woman who fights for the United Federation of Planets (the "Federation") on a spaceship in a war against the alien Klingons. Other characters are Captain Philippa Georgiou, an Asian woman who shares a close bond with Burnham; Captain Gabriel Lorca, a white man with a hawkish disposition; Silvia Tilly, an anxious young woman with red hair; Paul Stamets, a blonde, white man who is an "astromycologist" (someone who studies space-based fungi) and is gay; and Hugh Culber, a doctor with a dark complexion who is Stamets' partner.

A storyline early in the first season involves an advanced technology called the "Displacement Activated Spore Hub (DASH) Drive." The DASH Drive connects to a "mycelial network" that spans the galaxy and allows a spacecraft to travel instantaneously to any location. The DASH Drive, however, does not work until Burnham, Stamets and Tilly find an alien tardigrade and learn that its "unique genetic makeup allows it to navigate through the [mycelial] network because of its symbiotic relationship with the mycelium spores."

³ There have been many *Star Trek* television series and movies since the first *Star Trek* television series aired from 1966-68. See *Paramount Pictures Corp. v. Carol Pub. Group*, 11 F. Supp. 2d 329, 331-32 (S.D.N.Y. 1998) (providing background on *Star Trek*). *Star Trek* is set in a distant future where space travel is common and humans and aliens regularly communicate. The United Federation of Planets (the "Federation") includes, among others, humans from the planet Earth and aliens -- known for their preference for rationality over emotion -- from the planet Vulcan. The Federation has a history of conflict with the Klingons, an alien species known for its aggression. The Federation includes a fleet of spacecraft that travel the galaxy ("Star Fleet").

The alien tardigrade is named Ripper and is a polar bear-sized “cousin” of the microscopic earth tardigrade. Although the alien tardigrade is often lit in electric blue light, it is not blue; it is greenish brownish with four pairs of clawed limbs and body armor segments with tentacles. The alien tardigrade is at first violent, but Burnham discovers that it is normally docile. Burnham also learns that the alien tardigrade feels pain when Captain Lorca uses it to travel instantaneously through space. Rather than harm the creature, Stamets chooses to inject himself with the alien tardigrade’s DNA so that he -- instead of the entrapped tardigrade -- can connect to the DASH Drive. Michael and Tilly ultimately release the alien tardigrade into space, and the creature flies away through the subspace mycelial spore network. Episodes four and five are the only episodes of the fifteen-episode series in which Ripper (the only tardigrade-like creature in the series) makes more than a fleeting appearance.

The show interweaves storylines about the Klingon War and intergalactic travel with storylines about the personal struggles of its lead characters. Burnham carries guilt over her prior acts of mutiny and dual identity as a human-born on Vulcan. Tilly feels anxiety as a young member of the space crew. Stamets struggles to balance his professional ambitions with his personal relationship with Culber. The Television Series also follows the story of a Klingon, named Voq, whom other Klingons disrespect because of the “color of [his] skin.

II. STANDARD

On a motion to dismiss, a court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in favor of the non-moving party. *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016). To withstand dismissal, a pleading “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is

plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Where the disputed works are attached to or incorporated by reference in the complaint, a district court can “consider the similarity between those works in connection with a motion to dismiss, because the court has before it all that is necessary in order to make such an evaluation.” *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010). In a copyright infringement action, “the works themselves supersede and control contrary descriptions of them, including any contrary allegations, conclusions or descriptions of the works contained in the pleadings.” *Id.* at 64 (internal citations and quotation marks omitted); *accord Hirsch v. Complex Media, Inc.*, No. 18 Civ. 5488, 2018 WL 6985227, at *2 (S.D.N.Y. Dec. 10, 2018). “In order to establish a claim of copyright infringement, a plaintiff with a valid copyright must demonstrate that: (1) the defendant has actually copied the plaintiff’s work; and (2) the copying is illegal because a substantial similarity exists between the defendant’s work and the protectable elements of plaintiff’s.” *Gaito*, 602 F.3d at 63 (citation and internal quotation marks omitted); *accord Gardner v Merlo*, No. 19 Civ. 6701, 2019 WL 3936965, at *2 (S.D.N.Y. Aug. 19, 2019). On a motion to dismiss, a district court may assume that actual copying by defendants occurred and proceed to the question of substantial similarity. *Gaito*, 602 F.3d at 63; *accord Carrell v Origami Owl, LLC*, No. 18 Civ. 694, 2019 WL 1330941, at *2 (S.D.N.Y. Mar. 25, 2019).

III. DISCUSSION

Defendants’ motion to dismiss is granted because *Star Trek: Discovery* and Plaintiff’s Videogame are not substantially similar as a matter of law in concept, characters, settings and

“overall feel.” *Gaito*, 602 F.3d at 63, 66. In particular, the tardigrade in *Star Trek: Discovery* is not substantially similar to Plaintiff’s tardigrade in concept, attributes and overall feel.

A. “Substantial Similarity” Applicable Law

The Copyright Act gives owners of a copyright “exclusive rights,” 17 U.S.C. § 106, to protect “original works of authorship,” 17 U.S.C. § 102(a). Not all elements of a work are entitled to copyright protection. “[C]opyright does not protect an idea, only the expression of an idea.” *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996) (citations and internal quotation marks omitted); accord *Brown v. Time Warner, Inc.*, 287 F. Supp. 3d 380, 384 (S.D.N.Y. 2017). Similarly, scènes-à-faire or “elements of a work that are indispensable, or at least standard, in the treatment of a given topic—like cowboys, bank robbers, and shootouts in stories of the American West—get no protection.” *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102 (2d Cir. 2014) (internal quotation marks omitted). Also, as the TAC concedes, facts, including scientific facts, are not protected because they “do not owe their origin to an act of authorship.” *New York Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 114 (2d Cir. 2007); *Perry v. Mary Ann Liebert, Inc.*, 765 F. App’x 470, 472 (2d Cir. 2019) (noting that the “protectable elements” of Plaintiffs work are “the arrangement of the diagrams, the shapes, and the colors, not the actual scientific information being conveyed”).

“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.” *Gaito*, 602 F.3d at 66 (quoting *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2001) (alteration in original, internal quotation marks omitted)). A “more discerning” test applies when a plaintiff’s work contains both protectable and unprotectable elements. *Gaito*, 601 F.3d at 66; accord *LEGO A/S v. Best-Lock Constr. Toys*,

Inc., No. 11 Civ. 01586, 2019 WL 3387330, at *16 (D. Conn. July 25, 2019). Courts are not to consider the protectable elements of the two works in isolation. *Boisson v. Banian*, 273 F.3d 262, 272 (2d Cir. 2001). “Such a scattershot approach cannot support a finding of substantial similarity because it fails to address the underlying issue: whether a lay observer would consider the works as a whole substantially similar to one another.” *Williams*, 84 F.3d at 590; *accord LEGO A/S*, 2019 WL 3387330, at *16.

In applying either test, the task is to compare holistically the works’ “total concept and overall feel . . . as instructed by our good eyes and common sense.” *Gaito*, 602 F.3d at 66 (internal citations and quotation marks omitted). To aid the Court in its determination of substantial similarity, the Court must examine similarities in “total concept and feel, theme, characters, plot, sequence, pace, and setting.” *Williams*, 84 F.3d at 588; *accord Green v. Harbach*, No. 17 Civ. 6984, 2018 WL 3350329, at *1 (S.D.N.Y. July 9, 2018), *aff’d*, 750 Fed. App’x 57 (2d Cir. 2019).

B. Concept and Plot

The Television Series has a clear and fully constructed concept that develops across fifteen episodes and builds upon over five generations of Star Trek content. The Federation’s intergalactic missions and Klingon antagonism to the Federation has been a part of Star Trek since the first season of *The Original Series*.⁴ The Television Series also has characters with personal story arcs and who build relationships with others -- Tilly, for example, builds confidence and a friendship with Stamets as the first season progresses. In contrast, the Videogame’s concept is unclear, as only discrete and unconnected videos and images of the

⁴ See Memory Alpha “Errand of Mercy (episode)” available at [https://memory-alpha.fandom.com/wiki/Errand_of_Mercy_\(episode\)](https://memory-alpha.fandom.com/wiki/Errand_of_Mercy_(episode)).

game are available. The Video Compilation describes the game as being in an early stage of production.

Both the Videogame and Television Series employ concepts that are associated in popular culture with the tardigrade and not original to Plaintiff's work. The Videogame is set in space, at a time where space travel is common, and supernatural forces are present. The game's purpose is to guide Carter and others so that "they might be able to witness their civilization shifting into a higher type." The Television Series is also set in space, at a time when space travel is common. Through the first season, the U.S.S. Discovery's goal is to protect the Federation and defeat the Klingon opposition in the war. As is common in Star Trek productions, many of the main characters in the Television Series also seek to explore and better understand the universe. Supernatural forces, war games, and space exploration are all scènes-à-faire in science fiction dramatizations about space and not protectable. *Zalewski*, 754 F.3d at 102.

Both the Videogame and the Television Series include a large tardigrade that can fly through space and interacts with the characters. These concepts are not original to the Videogame. Since at least 2007, Tardigrades have been identified as the first known animal to survive unprotected in outer space.⁵ A 2010 children's fantasy novel titled *The Search for*

⁵ See K. Ingemar Jönsson et al., *Tardigrades survive exposure to space in low Earth orbit*, 18 CURRENT BIOLOGY 17 (Sept. 9, 2008) (available at <https://www.sciencedirect.com/science/article/pii/S0960982208008051>); <http://tardigradesinspace.blogspot.com/> (discussing TARDIS program and linking to relevant articles from 2007-2009). Judicial notice may be taken of the publication of information, not necessarily for the truth of the matter asserted. See *New London Assocs., LLC v. Kinetic Soc. LLC*, 384 F. Supp. 3d 392, 406 (S.D.N.Y. 2019) ("A court may also take judicial notice of 'relevant matters of public record'") (quoting *Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012)).

WondLa includes a “gargantuan” tardigrade that interacts with the characters and can fly. A YouTube video from May 7, 2015, *Captain Tardigrade*, depicts a humanoid tardigrade that flies in a spaceship, and calls tardigrades “virtually indestructible.” Episodes from March and April 2014 of the non-fiction television series *Cosmos: A Spacetime Odyssey* feature discussions of tardigrades’ unique ability to survive in space. These conceptual similarities of tardigrades flying in space are thus non-copyrightable elements of the Videogame and cannot constitute the basis for a copyright infringement. *See Zalewski*, 754 F.3d at 102 (“A fundamental rule of copyright law is that it protects only original works of authorship, those aspects of the work that originate with the author himself”) (internal quotation marks omitted).

The tardigrade in both the Video Compilation and the Television Series assists humans with space flight, but in completely different ways. The Video Compilation’s thirteen-second clip of the tardigrade shows the tardigrade enveloping Carter in something like a bear hug before floating off into space. In the Television Series, Stamets gains the tardigrade’s power to travel through the mycelial network by injecting himself with the tardigrade’s DNA. The injection gives Stamets supernatural powers, but also causes him serious physical harm. These clips are small pieces of each work and do not alone represent each work’s concept and plot. *Boisson*, 273 F.3d at 272. But more importantly, there is no similarity between how the Videogame tardigrade envelops Carter and how Stamets injects himself with tardigrade DNA. *Williams*, 84 F.3d at 590.

The plots of both works are similar solely to the extent that the characters go on adventures in space, and some of the adventures involve alien tardigrades. This common storyline of adventuring through space and discovering aliens is a *scènes-à-faire* common to works that involve space travel. Just as “cowboys, bank robbers, and shootouts in stories of the

American West . . . get no protection,” alien contact in fictional stories about space adventures gets no protection. *Zalewski*, 754 F.3d at 101. Moreover, the Television Series’ plot also involves subjects that are not part of the Videogame: the war between the Federation and Klingons, and the personal struggles of individual characters that involve redemption, growth, and fitting in as an outsider.

C. Characters

“In determining whether characters are similar, a court looks at the ‘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].” *Sheldon Abend Revocable Tr. v. Spielberg*, 748 F. Supp. 2d 200, 208 (S.D.N.Y. 2010) (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986).

The tardigrade in the Videogame and the Television Series share many of the same characteristics as the real-life microscopic tardigrade. All three have eight short legs that run in pairs along a rounded body, all three have an O-shaped mouth in the center of the “face” and all three are capable of surviving in space without protection. These are non-protectable facts about the tardigrade and cannot provide the basis for copyright infringement. *See Zalewski*, 754 F.3d at 102.

Actual Tardigrade

Plaintiff’s Tardigrade

Defendants’ Tardigrade



Beyond the unprotectable physical attributes of actual tardigrades, the differences between Plaintiff's and Defendants' tardigrades defeat any finding of substantial similarity. The Videogame tardigrade is large and deep blue. The logo directly links the tardigrade to a scarab beetle, a figure in ancient Egyptian culture associated with immortality, transformation and protection. The tardigrade's power to envelope Carter and thereby transform and protect him in space suggests that it is a powerful creature that characters in the Videogame venerate.

The Television Series tardigrade is also a large space traveler, but the similarities end there. Although this tardigrade is lit with a blue light, it is brownish greenish. More importantly, the tardigrade in the Television Series does not capture the "total concept and feel" of the Videogame's tardigrade. *Nobile v. Watts*, 289 F. Supp. 3d 527, 536 (S.D.N.Y. 2017). This tardigrade is a creature kept on the U.S.S. Discovery against its will that the human characters name and initially seek to exploit for personal gain, and then -- upon learning that it feels pain -- protect and liberate. It has no god-like attributes and is not venerated, but instead is treated almost like a pet: to be protected and not harmed, but not deified. Where the Videogame tardigrade is best associated with the spiritual symbolism of the scarab beetle, the Television Series tardigrade is best associated with a beloved, but poorly behaved, pet dog. "The bar for substantial similarity in a character is set quite high," and the similarity between the two tardigrades falls short of this standard. *Spielberg*, 748 F. Supp.2d at 208.

The alleged similarities between other characters in the two works also fails to support a claim, as they are mostly generalized non-protectable descriptions. Yolanda and Burnham are both black woman, Natasha and Tilly both have red hair, Aziz and Culber are both gay and have black hair and facial hair, Stamets and Carter are blond men who work in a field of biology. Courts have denied claims of substantial similarity when comparing characters who are far more

similar than these. *See e.g., Cabell v. Sony Pictures Entm't, Inc.*, 714 F. Supp.2d 452, 454 (S.D.N.Y. 2010), *aff'd*, 425 F. App'x 42 (2d Cir. 2011) (summary order) (granting summary judgment to a defendant where main characters were both military-trained hairstylists who fight crime and wild hairdryers as weapons); *DiTocco v. Rioradan*, 496 F. App'x 126, 128 (2d Cir. 2012) (summary order) (affirming a 12(b)(6) dismissal where “[b]oth sets of books chronicle the adventures of a young male protagonist named after the Greek hero Perseus” set in modern times); *Hogan v. DC Comics*, 48 F. Supp.2d 298, 311-12 (S.D.N.Y. 1999) (granting summary judgment where the main characters in both works were named Nicholas Gaunt and were born half vampire).

The settings of the Videogame and Television Series are similar, but the similarity is not actionable. The Videogame is set in a space craft orbiting a planet that has the capacity to house large crew. The main set for the Television Series is also a spaceship -- the U.S.S. Discovery -- that has the capacity to house a large crew. The characters in both works leave these main settings to explore outer space and planets. However, these similarities are scènes-à-faire for science fiction set in outer space. *See Zalewski*, 754 F.3d at 102 (“A fundamental rule of copyright law is that it protects only original works of authorship, those aspects of the work that originate with the author himself”) (internal quotation marks omitted).

D. Overall Feel

The difference between the two works is also notable at the macro level. The Television Series is not substantially similar to the Videogame after holistically comparing the works’ “overall feel . . . as instructed by . . . good eyes and common sense.” *Gaito*, 602 F.3d at 66 (citations and internal quotation marks omitted).

The Television Series builds on over five decades of Star Trek movies and television shows to represent Star Fleet adventures in a new era. Characters use similar terminology and technology and wear similar badges. Overarching themes from prior renditions, such as multiculturalism, the importance of loyalty and the struggle to balance reason and emotion, are prevalent here. And the Television Series consistently alludes to characters and events from prior Star Trek shows -- for example, there is a reoccurring reference in the show to the “U.S.S. Defiant,” a spaceship from the Star Trek television show, *Deep Space Nine*, and one episode references the popular Vulcan character Spock. The conflict at the very center of the Television Series -- the war between the Federation and Klingons -- makes little sense without background knowledge about the Star Trek universe.

The Videogame lacks this overall feel. The disparate videos and images do not easily evince a single coherent plotline. Nevertheless, there is no suggestion that this story follows a war between dueling world orders or that the characters engage with the themes prevalent in Star Trek. It is at least clear that the Videogame follows Carter, who solves mysteries to uncover information about the universe and fellow characters. And the story also seems to “deal[] with slavery, secrecy[and] espionage.” This is not enough to conclude that the overall feel of the Videogame is substantially similar to that of the Television Series.

E. Other Purported Similarities

The Complaint includes a list of eleven purported similarities between the two works. Most of these are discussed above. The remaining similarities are disparate and not essential to the overall feel or understanding of the Television Series. The Videogame features Egyptian cultural influences and supernaturalism. Episode one of the Television Series includes Egyptian iconography on one of the space ships, but nothing further. In the Videogame, Carter is

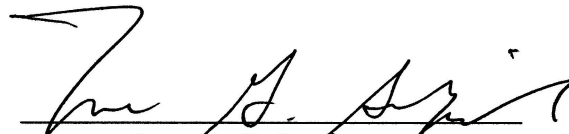
sometimes immersed in glowing blue light, and at least once walks through an “astro-plain” environment. *Stamets* also is sometimes immersed in a glowing blue light, and *Burnham* once walks through an “astro-plain.” In both works, the characters’ uniforms delineate status and rank and their space suits have a large head piece. These similarities do not change the calculus; they do not provide a sufficient basis to find substantial similarity between the works’ “total concept and feel.” *Gaito*, 603 F.3d at 67.

IV. CONCLUSION

For the foregoing reasons, Defendants’ motion to dismiss is GRANTED.

The Clerk of Court is respectfully directed to close all outstanding motions and terminate the case.

Dated: September 20, 2019
New York, New York



LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE