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Dune Entertainment LP  
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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
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12 ELIJAH SCHKEIBAN, an individual,  
13 Plaintiff,

14 v.

15 JAMES CAMERON, an individual;  
LIGHTSTORM ENTERTAINMENT,  
16 INC., a California corporation;  
TWENTIETH CENTURY FOX FILM  
17 CORPORATION, a Delaware  
corporation; DUNE  
18 ENTERTAINMENT LP, a Delaware  
limited partnership,

19 Defendants.  
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CASE NO. CV 12-0636-R (MANx)  
Honorable Manuel L. Real

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS THE SECOND AMENDED  
COMPLAINT UNDER FED. R. CIV.  
P. 12(B)(6) AND GRANTING  
DEFENDANTS' REQUEST FOR  
JUDICIAL NOTICE AND  
GRANTING PLAINTIFF'S  
REQUEST FOR JUDICIAL NOTICE**

Time: 10 a.m.  
Date: September 17, 2012  
Ctrm.: 8

1 TO THE DISTRICT COURT, ALL PARTIES AND THEIR ATTORNEYS  
2 OF RECORD:

3 On September 17, 2012, the motion of Defendants James Cameron,  
4 Lightstorm Entertainment, Inc., Twentieth Century Fox Film Corp. and Dune  
5 Entertainment LP (collectively, “Defendants”) to dismiss the Second Amended  
6 Complaint in its entirety pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
7 Procedure came on regularly for hearing, in Courtroom 8 of this Court, the  
8 Honorable Judge Manuel L. Real, presiding. After full consideration of the  
9 moving, opposition, and reply papers, and good cause appearing therefor, for the  
10 reasons set forth below, the Court GRANTS the motion to dismiss with prejudice.  
11 The Court also GRANTS the requests for judicial notice filed by Defendants and  
12 Plaintiff, respectively.

13 This is Plaintiff’s third attempt to state a claim for copyright infringement.  
14 To demonstrate copyright infringement, a plaintiff must show “(1) ownership of a  
15 valid copyright, and (2) copying of consistent elements of that work that are  
16 original.” *Feist Publications, Inc. v. Rural Telephone Services Company*, 499 U.S.  
17 340, 361 (1991). Copying may be established by demonstrating that (1) defendant  
18 had access to the work, and (2) that the works at issue are substantially similar to  
19 their protected elements. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th  
20 Cir. 2002).

21 Plaintiff’s first two complaints failed to plead access. Access is defined as a  
22 “‘reasonable opportunity’ or ‘reasonable possibility’ of viewing the plaintiff’s  
23 work.” *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir.) (internal  
24 citation omitted). Again, the facts concerning how Mr. Zane delivered the script to  
25 Mr. Cameron and why Mr. Cameron would read anything from Mr. Zane are  
26 vague. Regardless, the works at issue are not substantially similar, which is a  
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1 defect that cannot be cured by an amended complaint. *Campbell v. The Walt Disney*  
2 *Co.*, 718 F. Supp. 2d 1108, 1116 (N.D. Cal. 2010).

3 The Ninth Circuit applies a two-part test, the extrinsic test and the intrinsic  
4 test, to compare the similarities of ideas and expressions in the two works. *Kouf v.*  
5 *Walt Disney Pictures and Television*, 16 F.3d 1042, 1045 (9th Cir. 1994). On a  
6 motion to dismiss only the extrinsic test is important. *Zella v. The E.W. Scripps*  
7 *Co.*, 529 F. Supp. 2d 1124, 1128-29 (C.D. Cal. 2007). The extrinsic test is an  
8 objective test based on specific expressive elements. The test focuses on  
9 articulable similarities between the plot, themes, dialogue, mood, setting, pace,  
10 characters, and sequence of events in two works. *Funky Films, Inc. v. Time*  
11 *Warner Entm't, Inc.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

12 Here, the two works at issue, *Avatar* and *Bats and Butterflies*, have  
13 substantially different plots and sequences of events. In *Avatar*, Jake, the  
14 paraplegic ex-Marine, takes six years to travel to the moon Pandora, and in a  
15 genetically engineered avatar body learns the customs of the indigenous tribe.  
16 During his journey, he falls in love with a member of the tribe and eventually  
17 chooses to support the tribe against his employer, a corporation engaged in strip  
18 mining. In contrast, *Bats and Butterflies* tells the story of Joshua, a 13-year old  
19 school boy, who is bullied by school mates. He is instantly and magically  
20 transported to a distant planet invaded by bats and butterflies. There, Joshua helps  
21 the butterflies defeat the bats and helps a caterpillar princess mature into a queen  
22 butterfly.

23 Plaintiff argues the plots are similar because both involve ideas of alien  
24 lands and deaths of family members and battles between groups with competing  
25 interests. However, the extrinsic test looks beyond the vague abstracted ideas of a  
26 general plot idea and instead focusses on the objective details of the works. *Berkic*  
27 *v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985).

1 Here, even though the two works overlap, a closer inspection reveals very  
2 different stories, and Plaintiff's compilations of random similarities scattered  
3 throughout the works are insufficient *scenes a faire*. See *Shaw v. Lindheim*, 919 F.  
4 2d 1353, 1356 (9th Cir. 1990); *Cavalier*, 297 F.3d at 822. The characters and  
5 dialogue are dissimilar as a matter of law. For example, the similarities that  
6 plaintiff highlights between a bullied teenager and a paraplegic war veteran are  
7 mere general themes or plot ideas. Likewise, apart from general themes, the  
8 dialogue comparisons are similar in random ways at best.

9 The themes and expressions of themes are also not substantially similar.  
10 While *Avatar* directly conveys themes of racism, genocide, imperialism and  
11 environmentalism, *Bats and Butterflies* conveys these themes symbolically, if at  
12 all. Further, the general similarities between these themes, such as saving the  
13 world or battles between good and evil are not subject to copyright. *Stromback v.*  
14 *New Line Cinema*, 384 F.3d 283, 297 (6th Cir. 2004).

15 Finally, the mood, setting, and pace of the works, are not substantially  
16 similar. *Bats and Butterflies* is a children's story with a simple protagonist who  
17 stands for good and consistently fights against evil. In contrast, *Avatar* is a more  
18 complex story about a conflicted protagonist who struggles to choose between, on  
19 the one hand, his allegiance to the military and desire for money, and on the other,  
20 his growing affection for the opposition and his romantic love interest. The  
21 majority of battle scenes in *Avatar* take place roughly two-thirds of the way  
22 through the movie. But *Bats and Butterflies* quickly jumps into action. *Avatar* is a  
23 three-hour-plus movie that includes many more story lines than *Bats and*  
24 *Butterflies*, which is a relatively short story with fewer twists and turns. *Avatar*  
25 takes place over a period of months, whereas the version of *Bats and Butterflies*  
26 that the defendant allegedly obtained, takes place in days.

27 For these reasons defendant's motion to dismiss is granted with prejudice.

1 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

2 1. That Defendants' motion to dismiss for failure to state a claim be, and  
3 hereby is, GRANTED with prejudice; and

4 2. That the requests for judicial notice filed by Defendants and Plaintiff,  
5 respectively, hereby are GRANTED.

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DATED: Oct. 4, 2012

By:   
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Hon. Manuel L. Real District Judge