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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TERENCE DUNN,

Plaintiff and Appellant,

v.

DREAMWORKS ANIMATION SKG,
INC.,

Defendant and Respondent.

B236200

(Los Angeles County
Super. Ct. No. BC438833)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Joanne B. O'Donnell, Judge. Affirmed.

The Macellaro Firm and Theresa J. Macellaro for Plaintiff and Appellant.

Loeb & Loeb, Jonathan Zavin, David Grossman and Eric Schwartz for Defendant
and Respondent.

Plaintiff Terence Dunn appeals from a judgment entered after a jury found in favor of defendant DreamWorks Animation SKG, Inc. (DreamWorks) on Dunn's cause of action for breach of implied-in-fact-contract. Dunn's complaint alleges DreamWorks used his ideas in the animated motion picture Kung Fu Panda, without compensating him or giving him any credit. On appeal, Dunn contends the trial court erred (1) in refusing to instruct the jury with his specially prepared jury instructions regarding the test for determining use of an idea, and (2) in answering the jury's question regarding what constitutes use of an idea. We affirm.

BACKGROUND

The following background facts are taken from evidence presented at trial.

DreamWorks released the animated film Kung Fu Panda in June 2008. The film tells the story of Po, a lazy panda bear who loves to eat. Po is surprised to learn that he is the chosen one who will become the Dragon Warrior, a kung fu master destined to defend his peaceful Chinese village from an evil snow leopard named Tai Lung. Master Oogway, a wise old tortoise, announces that Po is the Dragon Warrior. Po trains hard and learns kung fu from five animal masters, a tiger, a monkey, a crane, a snake and a praying mantis (the Furious Five). Po rises to the occasion, becomes the Dragon Warrior, and defeats Tai Lung.¹

Dunn Creates Zen-Bear

Dunn is a Chinese-American man who is trained in martial arts, including Sil Lum Five Animal Style of Kung Fu.² In the 1980's, Dunn began making and selling instructional tai chi videos.

¹ The jury watched the film Kung Fu Panda after the parties gave their opening statements.

² According to Dunn, he was the seventh person in the world to be certified as an instructor in this particular style of Kung Fu.

In the early 1990's, Dunn created an animated character he called "Zen-Bear." He hired an illustrator "to design [his] concept of a martial arts panda bear." He put his designs on T-shirts and began selling them along with his tai chi videos. In or about 1996, Dunn began working on animating his Zen-Bear images, using choreography from a tai chi routine.

Also in 1996, Dunn registered with the Writers Guild of America a nine-page outline for an animated television series concept called "The Adventures of Zen-Bear." The outline describes Zen-Bear as a master of tai chi, an expert in cooking and "a master of the five excellences—painting, poetry, Chinese calligraphy, Chinese medicine, and martial arts." The outline describes Zen-Bear's background as follows:

When Zen-Bear was a cub living in China, his parents and sister were captured by poachers. Zen-Bear was alone and lost until human monks took him into their monastery. While living at the monastery, Zen-Bear learned tai chi, cooking and other skills. Zen-Bear "quite inadvertently won a poetry contest and was thereby chosen to be the abbot's successor," the "next patriarch of the monastery." Senior monks became jealous of Zen-Bear, so the abbot told Zen-Bear he must leave the monastery "and move far away, waiting seven years before coming back and claiming his rightful position" Zen-Bear traveled to America in search of his parents and sister, because a clue led him in that direction. Children (siblings) found Zen-Bear on a beach in California and took Zen-Bear home with them.

Over the years, Dunn continued to write about Zen-Bear's adventures in various story outlines and scripts containing the same basic plot as his 1996 outline, with additional details. Dunn registered some of these documents with the Writers Guild of America. In Dunn's written stories, after Zen-Bear's family was kidnapped by poachers, Zen-Bear met a snake, a crane, a tiger and a leopard who were sent by the Dragon spirit to teach Zen-Bear survival skills. For example, Zen Bear learned to leap like a leopard, balance like a crane and roar like a tiger. Zen-Bear also learned both tai chi and kung fu from the human monks at the monastery. In Dunn's stories, Zen-Bear was a panda who was "marked for spiritual greatness."

Dunn's Pitch to DreamWorks

According to Dunn, he pitched a movie idea to DreamWorks's executive Lance Young on November 20, 2001. Dunn's girlfriend (at the time) had a holiday party at her home and she introduced Dunn to Young.³ This was the first time Dunn had pitched his Zen-Bear idea as a film. He had previously pitched it to another studio as a television series.

At trial, Dunn described the four-to-five-minute pitch he made to Young as follows: "I told him about—just the basic essential ideas of my Zen-Bear project, that it's about a spiritually marked panda bear, who is first orphaned and then learns kung fu from five animal friends of the forest, who adopt him. He rises to become a martial hero in the classical Chinese sense and saves his whole environment or milieu from animal aggressors, and he defends in the process a peaceful village that's included in the whole valley. I call it Plum Blossom Valley. I don't think I gave him the name of the location in the pitch, but that's what I used in my work. Also, that his entire destiny and exploits as a martial arts field [sic] is foretold by a character called turquoise tortoise, a sage tortoise." At the time Dunn made the pitch, he did not have a written synopsis of the pitch. Young expressed interest, gave Dunn his business card and cell phone number, and told Dunn to call him after Thanksgiving.

Dunn testified at trial about a telephone conversation he had with Young on December 19, 2001: "During this conversation, I disclosed more of the details of my proposal for Zen-Bear, the Kung Fu Panda. He asked me to elaborate more about the story and the characters. I told him a little bit more about the characteristics of my central panda character. I recall I described more details about the five animal masters who are friends. Also, I briefly disclosed that my antagonistic animals were a pack of hyenas, a horde of rats, a clan of yellow monkeys, all led by a giant praying mantis."

³ The only evidence of Dunn's pitch is Dunn's trial testimony. Young testified he did not remember meeting Dunn or receiving a pitch at the party. Dunn's former girlfriend did not testify at trial.

Dunn continued to work on the story outline for his television series, “The Adventures of Zen-Bear.” In January 2002, he registered two additional documents with the Writers Guild of America. The basic plot of his story remained the same. In these versions, Dunn references “Five-Animal Kung-Fu (Tiger, leopard, snake, crane, dragon).” Zen-Bear learns skills from these five animals to help him find and rescue his family. He becomes a master of kung fu, in addition to tai chi.

According to Dunn, he had a phone conversation with Young on April 5, 2002, during which Young told him that DreamWorks already had “a martial arts panda project.” Dunn told Young he expected to be compensated and receive “a “created by” credit” if DreamWorks used his ideas. Dunn also expressed interest in being a writer on the project. Young said maybe DreamWorks would make Dunn a producer or associate producer on the project.

On April 12, 2002, Dunn contacted Young by phone again to discuss the project. Dunn testified at trial that Young told him: “You know, Terry, I’m not going to bring you in here to have you pitch this project. We have the best artists in the world here, and by the time they get through with your idea, you won’t recognize it anyway.” When Dunn protested, Young transferred Dunn to Michael Lachance, another employee in DreamWorks’s development department. In urging Lachance to involve Dunn in the project, Dunn told Lachance he had “contacts with the best martial artists on screen” and, with their help, he could choreograph “the best kung fu that’s ever been seen.”

Dunn’s communications with DreamWorks ceased on April 15, 2002, after one additional call with Lachance.

DreamWorks’s Development of Kung Fu Panda

In January 2000, about two years before Dunn pitched his idea to Young, Jeffrey Katzenberg, the founder and Chief Executive Officer of DreamWorks, suggested during a

roundtable meeting that DreamWorks “take a look at pandas as a possible subject for a movie.”⁴ DreamWorks assigned Lachance to oversee the project.

In March 2000, Lachance drafted outlines for a story called, “The Secret Life of Pandas.” The outlines were based on a story by James Thurber called, “The Secret Life of Walter Mitty.” The hero of Lachance’s story is Ming-Ming, “a panda living in northern China, [who] is an average panda with an overactive imagination.” Lachance’s outline states: “Ming-Ming’s mental escapades show him as fearless and brave, but in real life, he’s just another scared panda. When some adversary threatens the forest where he and his family live, Ming-Ming must become the hero of his dreams, but fighting the forces of evil takes a lot more courage when they’re not figments of his imagination.”

Lachance asked Raphe Beck, a writer at DreamWorks, to work on potential storylines for the panda project. In July and August 2000, Beck wrote story outlines for the panda project based on William Shakespeare’s play “The Taming of the Shrew.”

At trial, Lachance testified he asked Beck to draft a story outline, or “take,” about “pandas set in China in the martial art genre, where the panda performed kung fu.” In September 2000, more than a year before Dunn pitched his idea to Young, Beck drafted and submitted to Lachance a take entitled “Enter the Pandas.” In Beck’s story, a group of “peace-loving” pandas are threatened by “an aggressive snow leopard, and his henchmen.” A “fast-talking, kung fu bamboo rat” agrees to train the pandas in kung fu. With the rat’s help, the pandas are able to defeat the snow leopards and “regain their territory.”

Beck left DreamWorks and Lachance continued to work on the panda project. In late 2000 or early 2001, Lachance put the panda project on hold because he was working on other movies.

In October 2001, Lachance resumed work on the panda project. He began reviewing research DreamWorks employees had pulled together on pandas, their

⁴ During his testimony, Katzenberg refreshed his recollection of what he said at the roundtable meeting with a memorandum memorializing what occurred at the meeting.

environment, China, kung fu films, etc. In November 2001, Lachance discussed with Katzenberg Lachance's idea for an animated film called "Kung Fu Panda." Katzenberg liked the idea.

Lachance drafted a story outline entitled "Kung Fu Panda," dated November 27, 2001, one week after Dunn claims he pitched his ideas to Young at the holiday party. The concept as stated in the story outline is, "A parody of Hong Kong martial arts films like *Crouching Tiger, Hidden Dragon*, and the movies of Bruce Lee, Jackie Chan, and John Woo." (Italics omitted.) The summary of the story, as stated in the outline, is: "After an attack that leaves his community in rubble, an idealistic panda seeks out a kung fu master who will teach him how to defend his village. On the hard journey to the master's mountain retreat, the panda encounters [animal] friends and foes that forge him into a fighter." (Italics omitted.) The animals who attack the pandas' village are snow leopards. In the end, the panda hero defeats the snow leopards and saves his village.

At trial, Lachance testified that Young did not provide him with any of the elements for this story outline. Before drafting the outline, Lachance had never heard Young mention Dunn.

In early 2002, DreamWorks executive Chris Kuser contacted third party writers Ethan Reiff and Cy Voris. Kuser knew Reiff and Voris had recently written the screenplay for a movie involving kung fu. Kuser asked them if they wanted to prepare a full-length pitch for a story about a panda who learns kung fu to defend his village from snow leopards. They did.

Reiff and Voris attended three pitch meetings in April and May 2002, which DreamWorks audio recorded in the ordinary course. The transcripts from these three meetings were received in evidence and provided to the jury. The audiotape from the third and final pitch meeting was played for the jury in its entirety.

Evidence presented at trial demonstrated: Reiff and Voris named the hero panda, "Po," and the villain snow leopard, "Tai Lung." It was their idea to have Po be a clumsy, "slacker," but also "the chosen one." Reiff and Voris came up with the idea for the

“Furious Five,” the five animal kung fu masters who each practice an animal style of kung fu. They also created the character “Oogway,” the wise old tortoise.

DreamWorks released the film Kung Fu Panda in June 2008.

Procedural History

In June 2010, Dunn filed this action, asserting one cause of action against DreamWorks for breach of implied-in-fact contract. The complaint alleges DreamWorks agreed it would not use Dunn’s ideas without compensating him and giving him credit. The complaint further alleges: “In releasing the film to the public, . . . without compensating Dunn or giving him any credit, [DreamWorks] breached the Contract.

The matter went to trial on July 8, 2011.

Jury instructions

Dunn proposed several special jury instructions, three of which are at issue on appeal. Special Instruction No. 6, which the trial court used to instruct the jury, provides: “For Plaintiff to recover for Breach of Implied Contract in this case, he must prove that the movie Kung Fu Panda is substantially similar to the movie pitched to DreamWorks. Substantial similarity is determined by making a comparison of the two works based on the opinion of the average individual.”

Dunn’s proposed Special Instruction No. 7, which the trial court declined to use to instruct the jury, provides: “Substantial Similarity may be found in a combination of ideas or in the form in which ideas are embodied. It may be found if you believe the movie is ‘based upon’ Plaintiff’s pitch, or any material element of his pitch, or if you find that Plaintiff’s pitch was the inspiration for the movie. Even if the similar material is quantitatively small, if it is qualitatively important you may properly find substantial similarity.”

Dunn’s proposed Special Instruction No. 8, which the trial court also declined to use, provides: “Differences between the movie and the pitch do not necessarily mean they are not substantially similar. You may find that differences between the movie and Plaintiff’s pitch were deliberately contrived to disguise the fact that Plaintiff’s ideas were being used.”

During the conference on jury instructions, the trial court indicated it would instruct the jury with Dunn’s Special Instruction No. 6 entitled “Substantial Similarity Must be Found” (quoted above) because both sides agreed on it. The court stated it would not use Dunn’s proposed Special Instruction No. 7 entitled “Substantial Similarity – Defined” (quoted above) because DreamWorks opposed it and the court decided the instruction “sounds like argument.” The court also declined to use Dunn’s proposed Special Instruction No. 8 entitled “Substantial Similarity – Differences” (quoted above) because it “seems like argument.” Dunn’s counsel argued unsuccessfully for the court to give these two instructions.

Later in the conference, the trial court questioned whether there was a “need for” Dunn’s Special Instruction No. 6. Although DreamWorks had not objected to the instruction, DreamWorks’s counsel stated he did not “think there’s a need for” the instruction. Dunn’s counsel also agreed the instruction could be left out, given the court’s refusal to give Dunn’s other special jury instructions regarding substantial similarity (Nos. 7 & 8).

Immediately thereafter, the trial court reversed its position and decided to instruct the jury with Dunn’s Special Instruction No. 6, stating: “I think ‘similarity’ is something the jury is going to be looking at, whether they are instructed to or not, and it might help them to know what they should be looking for, so I’ll give it.”

After further discussion about other jury instructions and the special verdict form, Dunn’s counsel stated Dunn was withdrawing his request for Special Instruction No. 6. DreamWorks’s counsel urged the trial court to use Dunn’s instruction. The court sided with DreamWorks and read Dunn’s Special Instruction No. 6 to the jury.

Jury questions and special verdict

On July 20, 2011, the case went the jury. The following day, the jury asked some questions. First, the jury asked if it could hear the audio tapes of Voris and Reiff’s first two pitch meetings at DreamWorks as well as Dunn’s testimony “regarding the content of the ideas he expressed to DreamWorks.” The court ordered that the audio tapes be played for the jury and the requested testimony be read to the jury.

Second, the jury asked: “If an idea is expressed by Dunn to DreamWorks, incorporated in an intermediate work, and abandoned before the movie is made, does this constitute use in question 2?” The jury was referring to question number 2 on the special verdict form, which reads: “Did DreamWorks actually use Plaintiff’s idea in ‘Kung Fu Panda?’”⁵

DreamWorks’s counsel urged the trial court to answer this question “no,” arguing “use” for purposes of question number 2 on the special verdict form means DreamWorks used Dunn’s idea in the film Kung Fu Panda. Dunn’s counsel argued a “no” answer is not correct because if DreamWorks “changed [Dunn’s idea] or left things out or added things to it [that] does not mean that [DreamWorks] didn’t use the idea.” Dunn’s counsel added: “[T]he fact that things did not appear in the final iteration is not necessarily proof that [DreamWorks] did not use [Dunn’s idea].” The trial court informed the jury the answer to its question is “no.”

On July 25, 2011, the jury returned a special verdict. The jury found (by a vote of 11 to 1) that Dunn and DreamWorks entered into an implied-in-fact contract pursuant to which DreamWorks agreed to pay for Dunn’s idea if DreamWorks used it. The jury also found (by a vote of 9 to 3) that DreamWorks did not actually use Dunn’s idea.⁶

DISCUSSION

Dunn’s Proposed Special Jury Instruction No. 8

Dunn contends the trial court committed reversible error in refusing to instruct the jury with his proposed Special Instruction No. 8 entitled “Substantial Similarity – Differences,” which, as set forth above, provides: “Differences between the movie and the pitch do not necessarily mean they are not substantially similar. You may find that

⁵ Question number 1 on the special verdict form reads: “Did Terrence Dunn and DreamWorks enter into an implied-in-fact contract pursuant to which DreamWorks agreed to pay for Plaintiff’s idea if DreamWorks used it?”

⁶ The jury did not answer the third and fourth questions on the special verdict form regarding damages and DreamWorks’s independent creation defense.

differences between the movie and Plaintiff's pitch were deliberately contrived to disguise the fact that Plaintiff's ideas were being used."

"A party has a right to jury instructions on his or her theory of the case, if they are reasonable and supported by the pleadings and the evidence, or any inference which may properly be drawn from the evidence. [Citations.] This right is designed to ensure the jury has 'a full and complete understanding of the law applicable to the facts' of the case before it. [Citations.]" (*Sesler v. Ghumman* (1990) 219 Cal.App.3d 218, 223.)

"Instructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.] [Citation.]" (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217.)

"In deciding whether the trial court erred in refusing a requested instruction, the evidence must be viewed in the light most favorable to the party seeking it. [Citations.]" (*Sesler, supra*, 219 Cal.App.3d at p. 223.) "The propriety of jury instructions is a question of law that we review de novo." (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.)

In this idea submission case, Dunn alleges DreamWorks breached an implied-in-fact contract when it used his ideas in the film Kung Fu Panda without compensating him or giving him any credit. To establish a breach of implied-in-fact contract, a plaintiff must prove (1) he clearly conditioned his offer to disclose his idea to the defendant upon defendant's obligation to pay for the idea if defendant used it; (2) knowing of this condition before plaintiff disclosed the idea, defendant voluntarily accepted disclosure of the idea; and (3) believing the idea was valuable, defendant used it. (*Desny v. Wilder* (1956) 46 Cal.2d 715, 738-739; *Mann v. Columbia Pictures, Inc.* (1982) 128 Cal.App.3d 628, 646.)

Where there is no direct evidence of defendant's use of plaintiff's idea, plaintiff may raise an inference of use by "[a] showing of access and similarity." (*Teich v. General Mills, Inc.* (1959) 170 Cal.App.2d 791, 797.) "The standard for determining similarity is 'the common knowledge of the average reader, observer, spectator or listener.' [Citation.]" (*Id.* at p. 798.) "For purposes of comparison therefore the works must be viewed as a whole 'without dissection and without expert or elaborate analysis.' [Citations.]" (*Klekas v. EMI Films, Inc.* (1984) 150 Cal.App.3d 1102, 1111-1112.)

The parties have agreed Dunn was required to show "substantial similarity" between his pitch and the film *Kung Fu Panda*. (*Sutton v. Walt Disney Productions* (1953) 118 Cal.App.2d 598, 603.) As the trial court instructed the jury in this case, using Dunn's Special Instruction No. 6: "For Plaintiff to recover for Breach of Implied Contract in this case, he must prove that the movie *Kung Fu Panda* is substantially similar to the movie he pitched to DreamWorks. Substantial similarity is determined by making a comparison of the two works based on the opinion of the average individual."

There is no bright line test for determining whether two works are substantially similar. The fact finder compares the two works and, using its "common knowledge," decides whether substantial similarity exists. (*Klekas v. EMIL Films, Inc., supra*, 150 Cal.App.3d at p. 1111.) The trial court in this case properly instructed the jury on the applicable standard.

The trial court did not err in declining to instruct the jury with Dunn's proposed Special Instruction No. 8: "Differences between the movie and the pitch do not necessarily mean they are not substantially similar. You may find that differences between the movie and Plaintiff's pitch were deliberately contrived to disguise the fact that Plaintiff's ideas were being used." The first sentence unnecessarily highlights an obvious point—Dunn need not prove his pitch was identical to the film *Kung Fu Panda* in order to establish his cause of action. The phrase "substantially similar," as used in the instruction given to the jury, clearly indicates differences between the movie and the pitch do not necessarily preclude a judgment in Dunn's favor.

The second sentence of this proposed instruction “amount[s] to an argument to the jury in the guise of a statement of law,” and the trial court properly refused to include it in its instructions to the jury. (*Major v. Western Home Ins. Co.*, *supra*, 169 Cal.App.4th at p. 1217.) With this second sentence of the proposed jury instruction, Dunn is improperly highlighting his view of the evidence—that any differences between his pitch and the film Kung Fu Panda are the result of DreamWorks changing his pitch to disguise its use of Dunn’s ideas.

Dunn cites an appellate opinion which includes similar language to that included in the second sentence of Special Instruction No. 8, *Fink v. Goodson-Todman Enterprises, Ltd.* (1970) 9 Cal.App.3d 996. In deciding the allegations in the complaint concerning similarity between plaintiff’s proposed television program and defendant’s television series were sufficient to allow the case to proceed past the demurrer stage, the court stated, “Actually the variations [between the two works] are such as might be *deliberately contrived to disguise piracy*, although the western setting may well be considered as derived from plaintiff’s own observations in his presentation.” (*Id.* at pp. 1011-1012, italics added.) By using this language while considering an appeal from an order of dismissal sustaining a demurrer, however, the court in that case was not setting forth general principles of law or requisite jury instructions on substantial similarity. Instead, the court was discussing its interpretation of the allegations in the complaint supporting its decision.

As DreamWorks points out: “The fact that a jury instruction is copied from an appellate opinion unfortunately is no guarantee that it is not argumentative, negatory or prolix. The danger of translating appellate rhetoric into jury instructions has received frequent judicial recognition.” (*Bell v. Seatrains Lines, Inc.* (1974) 40 Cal.App.3d 16, 27, fn. and citations omitted.)

While it may be a correct statement of law that a defendant who unlawfully uses a plaintiff’s idea “cannot avoid his liability by making changes or omissions from or additions to the original plot” (*Barsha v. Metro-Goldwyn-Mayer* (1939) 32 Cal.App.2d 556, 562), Dunn’s proposed instruction was unnecessary. As discussed above, the jury

was properly instructed that it needed to determine whether Dunn’s pitch and the film King Fu Panda were substantially similar. No reasonable jury would interpret “substantially similar” to mean identical. Accordingly, the jury did not need to be instructed that two works could be substantially similar despite changes, omissions or additions.

Answer to Jury’s Question Regarding Use of Idea

Dunn contends the trial court committed reversible error in responding to the jury’s question regarding use of an idea. As set forth above, the jury asked: “If an idea is expressed by Dunn to DreamWorks, incorporated in an intermediate work, and abandoned before the movie is made, does this constitute use in question 2?” The jury was referring to question number 2 on the special verdict form, which reads: “Did DreamWorks actually use Plaintiff’s idea in ‘Kung Fu Panda?’” After hearing argument, the court responded to the jury’s question, “no.”

Dunn argues the jury’s question should have prompted the trial court to give additional jury instructions on substantial similarity, such as his proposed Special Instruction Nos. 7 and 8 quoted above. Dunn also wanted the trial court to answer the question, “yes.”

The trial court did not err. As discussed above, the court properly instructed the jury to compare Dunn’s pitch with the film Kung Fu Panda to determine if the two are substantially similar. Dunn could not recover on his cause of action unless he proved his pitch and the film are substantially similar. If the jury were to find DreamWorks abandoned Dunn’s idea before it made the film, the jury would necessarily find Dunn’s pitch and the film were not substantially similar.⁷ The correct answer to the question is “no.”

Dunn’s proposed Special Instruction No. 8 regarding differences, discussed in the preceding section of this opinion, would not have been an appropriate response to the

⁷ Abandon means to give up or “to cease to assert an interest, right, or title to esp. with the intent of never again resuming or reasserting it.” (Webster’s 3d New Internat. Dict. (1976) p. 2.)

jury's question. The jury asked about abandonment of Dunn's idea, not differences between Dunn's idea and the film. The question does not indicate the jury was seeking clarification on the substantial similarity standard.

Dunn's proposed Special Instruction No. 7 provides: "Substantial similarity may be found in a combination of ideas or in the form in which ideas are embodied. It may be found if you believe the movie is 'based upon' Plaintiff's pitch, or any material element of his pitch, or if you find that Plaintiff's pitch was the inspiration for the movie. Even if the similar material is quantitatively small, if it is qualitatively important you may properly find substantial similarity."

The trial court did not err in declining to give this instruction. If the film Kung Fu Panda was based on Dunn's pitch or Dunn's pitch was the inspiration for the film, then Dunn's idea could not have been abandoned before DreamWorks made the film.

In any event, the instruction was not necessary to the jury's determination of substantial similarity. As set forth above, "The standard for determining similarity is 'the common knowledge of the average reader, observer, spectator or listener.' [Citation.]" (*Teich v. General Mills, Inc.*, *supra*, 170 Cal.App.2d at p. 798.) "For purposes of comparison therefore the works must be viewed as a whole 'without dissection and without expert or elaborate analysis.' [Citations.]" (*Klekas v. EMI Films, Inc.*, *supra*, 150 Cal.App.3d at pp. 1111-1112.) Dunn's argument about how the jury should evaluate substantial similarity, even if based on language from case law, does not make a required or even appropriate jury instruction.

Dunn asserts there was no evidence presented at trial that DreamWorks "abandoned" an idea expressed by Dunn. He argues the jury must have been confused on the issues and required additional instructions. Dunn interprets the jury's question to mean "the jury thought that *changes* to Dunn's pitch, or *differences* between Dunn's pitch and the movie, meant that DreamWorks 'abandoned' Dunn's idea." As discussed above, we disagree with Dunn's interpretation of the jury's question based on the plain meaning of the word "abandon."

The trial court properly answered the jury's question and properly instructed the jury on substantial similarity. The court was not required to further instruct the jury on how to determine substantial similarity.

DISPOSITION

The judgment is affirmed. DreamWorks is entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.