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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

STEVE K. WILSON BRIGGS, Plaintiff-Appellant,

v.

SONY PICTURES ENTERTAINMENT, INC.; TRISTAR PICTURES,
INC.; MEDIA RIGHTS CAPITAL; QED INTERNATIONAL;

NEILL BLOMKAMP, Defendants-Appellees.

No. 14-17175

D.C. No. 4:13-cv-04679-PJH

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California

Phyllis J. Hamilton, Chief Judge, Presiding

[FILED MAR 1 2018]

Submitted February 28, 2018

Before: Thomas, Chief Judge, Trott and Silverman, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes that this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Steve K. Wilson Briggs appeals pro se from the district court's summary judgment in his copyright action. We have jurisdiction under 28 U.S.C. § 1291. We review *de novo*, *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002), and we affirm.

The district court properly granted summary judgment on Briggs's copyright infringement claim because Briggs failed to raise a genuine dispute of material fact as to whether defendants accessed his screenplay *Butterfly Driver*, or whether Briggs's screenplay and defendants' film *Elysium* are either strikingly or substantially similar. See *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 846 (9th Cir. 2012) (setting forth ways a plaintiff may prove access); *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987) ("Absent evidence of access, a 'striking similarity' between the works may give rise to a permissible inference of copying."); see also *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 624-25 (9th Cir. 2010) (setting forth the extrinsic test to assess substantial similarity between specific expressive elements of copyrighted works at issue, such as plot, sequence of events, theme, dialogue, mood, setting, pace, and characters).

We reject Briggs's unsupported contention that the district court applied the wrong standard for deciding whether the defendant has accessed the plaintiff's work. *L.A. Printex* did not overrule *Art Attacks Ink, LLC v. MGA Entertainment, Inc.*, 581 F.3d 1138 (9th Cir. 2009), or *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000), by not expressly reiterating that speculation or conjecture fails to establish a reasonable probability of access. See *L.A. Printex*, 676 F.3d at 846 ("To prove access, a plaintiff must show a reasonable possibility, not merely a bare possibility, that an alleged infringer had the chance to view the protected work.") (quoting *Art Attacks Ink*, 581 F.3d at 1143); see also *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) ("[M]ere allegation and speculation do not create a factual dispute for purposes of summary judgment."). This court in *Loomis v. Cornish* reaffirmed that access can be proved with circumstantial evidence either by a chain of events linking the plaintiff's work and the defendant's access, or by showing that the plaintiff's work has been widely disseminated. See *Loomis v. Cornish*, 836 F.3d 991, 995 (9th Cir. 2016). Summary judgment was proper because Briggs's speculations about access did not raise a triable dispute.

The district court did not abuse its discretion by denying Briggs's motion to amend his complaint after the deadline set forth in the pretrial scheduling order because Briggs failed to show "good cause." See *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-09 (9th Cir. 1992) (setting forth standard of review and the "good cause" requirement to modify a scheduling order).

The district court did not abuse its discretion by granting Briggs a shorter discovery continuance than he had requested. See *Martel v. Cnty. of Los Angeles*, 56 F.3d 993, 995 (9th Cir. 1995) (en banc) ("[A] district court's decision to deny a continuance sought for the purposes of obtaining discovery will be disturbed only upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant.") (citation and internal quotation marks omitted).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEVE WILSON BRIGGS,

Plaintiff,

V.

NEILL BLOMKAMP, et al.,

Defendants.

No. C 13-4679 PJH

**ORDER RE MOTIONS FOR
SUMMARY JUDGMENT**

The parties' motions for summary judgment came on for hearing before this court on September 3, 2014. Plaintiff Steve Wilson Briggs appeared in propria persona, and defendants Neill Blomkamp, Sony Pictures Entertainment, Inc., Tristar Pictures, Inc., Media Rights Capital II, L.P., and QED International LLC appeared by their counsel Michael J. Kump and Gregory P. Korn. Having reviewed the papers and other materials submitted by the parties, and having carefully considered their arguments and the relevant legal

authority, the court hereby GRANTS defendants' motion and DENIES plaintiff's motion.

BACKGROUND

A. Procedural and Factual Background

The following facts are as alleged in the first amended complaint ("FAC"). Plaintiff asserts that he completed a first draft of a screenplay entitled "Uberopolis: City of Light" in May 2005, and that he emailed copies of the screenplay to family and friends. On December 16, 2005, he registered a revised version of "Uberopolis: City of Light" with the Writers Guild of America (West).

In January 2006, plaintiff began attempting to market his screenplay. During approximately the next two years, he sent dozens of query letters and emails to literary agents and film companies. He also posted short synopses on screenwriter websites, and entered screenwriting and scriptwriting competitions.

In January 2007, plaintiff again revised his screenplay, and renamed it "Butterfly Driver." He claims that in February 2007, he posted the entire "Butterfly Driver" screenplay on triggerstreet.com, a filmmaker-screenwriter website designed to link filmmakers and screenwriters with industry professionals, by allowing members to post screenplays, short films, and short stories to get feedback from peers and professionals. Plaintiff asserts that at that time, the triggerstreet.com website had approximately 50,000 active members.

Plaintiff alleges that between February 2007 and August 2007, he posted "Butterfly Driver" on triggerstreet.com approximately four times, making script revisions each time. In December 2007, plaintiff stopped marketing the "Butterfly Driver" screenplay, as he had decided to film it himself some day. From 2008 to 2012, he worked on other film projects.

On May 27, 2013, plaintiff went to a movie theater, where he watched a trailer for a film called "Elysium," featuring a plot, characters, and settings that appeared to plaintiff to have been misappropriated from "Butterfly Driver." Later that evening, plaintiff read an entry on Wikipedia about the film "Elysium." He claims that this reading confirmed his view that the story structure of "Elysium" closely conformed to his "Butterfly Driver" screenplay.

Plaintiff alleges that on June 13, 2013, he located a version of the screenplay for "Elysium" online, and downloaded it. He claims that the text of the script conformed to the portion of the dialogue he had observed when he watched the trailer on May 27, 2013. After an attorney recommended that he register his copyright for "Butterfly Driver," he obtained a copyright registration from the U.S. Copyright Office on June 21, 2013.

Defendants released "Elysium" in August 2013, and plaintiff viewed the film for the first time on August 10, 2013. Upon viewing the film, he concluded that the "Elysium" film and screenplay infringed his copyright in "Butterfly Driver," as a whole and with regard to features such as plot, characters, settings, and themes. He speculates that defendant Neill Blomkamp ("Blomkamp") accessed the "Butterfly Driver" screenplay on triggerstreet.com, and used it as the basis for his own screenplay for "Elysium."

Plaintiff filed the present action on October 8, 2013, asserting one cause of action for copyright infringement. Each side now seeks summary judgment.

B. Synopsis of "Butterfly Driver"

The protagonist of plaintiff's screenplay "Butterfly Driver" is Arlo Grainer. The year is 2120. Arlo is a "legend" on Earth because of his prior military service and subsequent defiance of the "Global State" (or "State"). Arlo lives in a "Zone" outside the State's jurisdiction, working as a "hover-jet" pilot flying supplies between Zones. Living in the same building, but in a separate apartment, are Arlo's estranged wife (Rianna) and his two children (John Carl and Franny).

Arlo's antagonist, Drexler, is President of the State and the owner of "Uberopolis," a "satellite city" that orbits Earth. Uberopolis is three miles in diameter, and is enclosed in a transparent, spherical shield, with a "flora-sphere" and an "aqua-sphere" beneath the city floor. It is an ultra-modern city, with casinos, golf courses, high-rise apartments, and offices. At the time of the story, half of Uberopolis (also called "Sky Town") is developed; the other half (separated by a wall) is still under development.

At work in the warehouse from which he flies supplies, Arlo receives a distress signal from a fellow pilot, Roddy, and races on a "sky-cycle" to Roddy's location to find that he has been shot and is near death. Roddy tells Arlo that he was ambushed by bounty

hunters, who "set us up to find the butterfly – Tamara." He says they will be seeking out Arlo and his family next. Arlo flies home to collect his children and estranged wife, and send them to New York, away from the Zone.

Knowing that to reenter the State, his family will need a hundred thousand dollars to begin the "repatriation" process, Arlo accepts an offer from the warehouse operator, Dylan, to make a dangerous "butterfly run" to transport Tamara Gwynn to Los Angeles on a skycycle. Tamara is heading to Los Angeles for a trial in a civil suit against the State concerning her rights to the "A-cell" – a small glass cylinder that produces electricity from "anti-matter" water. She tells Arlo that use of the A-cell can potentially save more than 100 million people every year, who would otherwise die from "fuel pollution."

Arlo sends the real A-cell to a different Zone to hide it; Tamara travels with a decoy. On the flight, they are ambushed by police in "sky-cars" and crash into the streets of Los Angeles. They separate, and Arlo is apprehended. Television news reports falsely claim that Arlo kidnapped and killed Tamara. Jerry Mathiessen, a federal agent who once attended flight school with Arlo, is sent to investigate. The State Secretary persuades Jerry to take the case by promising to pay for medical assistance for Jerry's son.

Arlo is criminally charged and transported to a "work program" on Uberopolis until his trial date. Four months later, he is given a "ticket" to return to Earth for his trial. While waiting for the shuttle transport, he meets a fellow prisoner, David Levine, also set to return for trial. They discuss the fact that the citizen-commute shuttles take five hours to travel from Uberopolis to Earth and back, while the inmate return shuttles take only two hours. As they are being loaded onto the shuttle along with other prisoners, they notice that there are no pilots, and conclude that Uberopolis has been killing prisoners by dumping them into space during the shuttle flights. They escape into an "airlock" to avoid suffering the same fate. They pilot the shuttle back to Earth and part ways.

Arlo locates his family in Rianna's mother's Manhattan apartment, and discovers that daughter Franny is on a respirator, near death, and in need of the drug "Drexlerin." Arlo races to a warehouse that normally stocks the drug, but supplies on Earth are temporarily exhausted because production of Drexlerin has been discontinued in anticipation of the release of its replacement, "Drexlerin 2." At the warehouse, Arlo meets brother and sister Louis and Benni. They

provide Arlo with more respectable clothing, and help him obtain a fake ID and passport that will enable him to covertly travel by shuttle to Uberopolis to find Drexlerin. As Arlo is arranging for his transport on the shuttle, he also recovers the A-cell, which he had arranged to be sent to a friend for safekeeping. Benni gives Arlo a yellow butterfly "dreamcatcher" for luck.

Jerry manages to track Arlo down, but Arlo disarms Jerry and forces him into the trunk of a sky-car. Arlo tells Jerry he must find Drexlerin for Franny, and proceeds to Uberopolis. Upon arrival, Arlo obtains a police uniform and proceeds to the hospital warehouse to search for the Drexlerin. He discovers that the warehouse is empty, and as he is leaving the hospital, the security guards recognize him and give pursuit. He steals an unattended police "sky-ranger," and then contacts Drexler. After he tells Drexler he has the genuine A-cell, Drexler agrees to a meeting.

Based on the investigation he has been conducting, Jerry has figured out that Arlo and Drexler are acquainted from their past during wartime. After he is released from the trunk of the sky-car, Jerry follows Arlo to Uberopolis and orders a technician in the "Drexler Media" building to track Arlo's movements with surveillance cameras located throughout the satellite. Jerry forces the tech to broadcast the video from the surveillance cameras to television stations.

With the surveillance cameras tracking and broadcasting his movements, Arlo crashes the police sky-ranger through the glass windows of Drexler's 57th floor conference room. He persuades Drexler to dismiss the security guards by threatening to break the glass A-cell and release the anti-matter, which will result in a massive explosion.

Arlo and Drexler converse. Not knowing that the conversation is being televised, Drexler confesses to a number of crimes, including dumping prisoners into space and killing Zone residents and prisoners for transplant organs, and also to being an imposter. Drexler is actually "Midland," a soldier previously known to Arlo. Midland murdered the real Drexler, adopted his identity, and inherited Drexler's fortune.

Drexler tells Arlo that Drexlerin is produced on Earth, but was "warehoused" on Uberopolis "to keep it safe from pirates until our bunkers were ready" – and that the last shipments were returned to Earth the previous day. However, he has a few doses of Drexlerin in

his possession, and offers to exchange them for the A-cell. He also offers to have Arlo "escorted" to give his daughter the Drexlerin, after which he will be returned to prison.

Arlo initially hesitates, telling Drexler that Tamara didn't want him to have the A-cell. Drexler responds that "Tamara would have destroyed the energy industry and our economy for her cause." Drexler's plan is to phase the A-cell technology in over a thirty-year period, in order to protect the existing energy industry and the "quality of life," notwithstanding that billions of people will die in the interim.

They begin to exchange the A-cell for the Drexlerin. Drexler opens his briefcase and removes the Drexlerin. Arlo slowly extends the A-cell to Drexler, and takes the Drexlerin from him. He then sees in a mirror reflection that Drexler is reaching for a gun with his other hand. As Drexler's fingers come within an inch of the A-cell, Arlo tosses it out the broken window. Drexler scrambles out the window after the A-cell, gun in hand, followed by Arlo.

As Drexler is about to grab the A-cell, Arlo seizes Drexler's ankle, and flings Drexler toward the city floor. However, Arlo's throw is not hard enough to hurt Drexler, because of the reduced gravity on Uberopolis. Arlo then seizes the A-cell, just before his own "gravity garments" pull him down.

A lengthy fight and chase scene follows, involving Arlo, Drexler, Jerry, and the police, culminating in Drexler bearing down on Arlo on a sky-ranger and shooting him in the leg. Arlo dives into a harbor to escape Drexler and encounters a dolphin named Spike (whom he had previously met while waiting for transport with fellow prisoner David Levine) and is guided to an escape hatch.

Drexler finds Arlo on a shuttle. Just as Arlo is gaining the upper hand, he suffers a debilitating "ice pick" headache caused by a longstanding chronic affliction. Drexler shoots Arlo and is on the verge of killing him when Jerry arrives and discharges his stun-gun into Drexler's back, knocking him unconscious. Arlo and Jerry pilot the shuttle off Uberopolis. They are immediately targeted by a missile launched from Uberopolis.

Arlo drifts out of consciousness (from his bullet wound) and has a dreamlike vision of a pale child with a respirator holding a yellow flower, and of Benni's dream catcher in the eyes of Spike the

dolphin. Arlo awakes and orders Jerry to turn back toward Uberopolis.

The missile follows, and just before the shuttle collides with Uberopolis, Arlo launches an evacuation pod. The shuttle and missile continue forward and destroy Uberopolis.

Arlo and Franny survive. They attend the funeral of Jerry's son, Matty, who died from a respiratory illness. Rianna asks Arlo to "repatriate" into the State with his family, but he declines, and returns to his job as a hover-jet pilot.

C. Synopsis of "Elysium"

Defendants' film "Elysium" opens with images of Earth in total squalor. The year is 2154, and the extremely wealthy have abandoned the planet to live on a luxurious space station called "Elysium." Elysium is exclusive to its wealthy citizens, who have access to futuristic devices called "med bays," which cure all diseases and injuries, and can even halt aging. The less fortunate remaining on Earth are poor. They live in rundown apartments and have inadequate medical care, and are policed by a brutal robotic police force.

The film's protagonist, Max, grows up as a child in a convent where he befriends a young girl, Frey. As a child, Max steals under the delusion that he can buy his way onto Elysium. He continues stealing as an adult and has an extensive criminal history. On parole, Max lives in Los Angeles and works at a company called Armadyne building the robots that police Earth. Walking toward a bus headed to work, Max is confronted and battered by robot police officers. He proceeds to a hospital and is surprised when he is treated by Frey, now a nurse.

The film cuts to a mass of people trying to board shuttles bound for Elysium. An ID is burned onto the wrist of everyone who boards the shuttle. The shuttles take off. As they approach Elysium, the space station's Defense Secretary, Delacourt, gives an order to a covert agent on Earth, Kruger, to destroy the shuttles. Kruger destroys two of the shuttles with shoulder-fired rockets. The third shuttle lands on Elysium, and the "illegal aliens" on board flee robot police forces. One young girl enters a residence and is able to use a med bay because the ID on her wrist fools the device into believing she is a citizen of Elysium. Patel, the President of Elysium, reprimands Delacourt and dismisses Kruger.

Back on Earth, Max is accidentally shut in a chamber while working at Armadyne, and is exposed to a heavy dose of radiation. In a flashback scene, a nun hands the child Max a locket with a photo of Earth to remind him that Earth looks as beautiful from there as Elysium "looks beautiful from here." Max awakes and is told by an Armadyne robot that he will die in five days from the radiation exposure.

Max finds Spider, a smuggler who runs the illegal shuttles to Elysium. In exchange for a promise of a shuttle ride to Elysium where he might be able to access a med bay to cure his fatal condition, Max accepts a dangerous mission: he must kidnap Armadyne's chief officer, John Carlyle, and download valuable data from Carlyle's brain into his own using a futuristic device. An exoskeleton is installed onto Max's body and head to give him super-human strength.

Meanwhile, Delacourt has persuaded Carlyle, who also designed Elysium, to prepare a "reboot sequence" that will allow her to wrest the presidency of Elysium from the current President, Patel, with whom she has political differences. Carlyle uploads the software program into his brain, and leaves Earth on a private shuttle. However, Max and his fellow rebels intercept the shuttle, capture Carlyle, and plug Carlyle's brain into Max's. Max's brain seizes when the download starts because of a defense mechanism that Carlyle encoded into the reboot sequence.

Delacourt learns of the kidnapping and orders Kruger to intercede but to avoid harming Max (because Max holds the reboot sequence in his brain). Max evades Kruger and his men, who arrive in an airship and kill everyone else. Severely injured, Max finds Frey, who takes him to her home. He tells Frey that he must travel to Elysium to save his life. Frey begs Max to take her daughter Matilda, who is dying of leukemia, with him. He refuses, in order to protect them, and leaves.

Max returns to Spider's hideout to get a shuttle to Elysium, but the air traffic system has been frozen by the authorities on Elysium. Spider plugs a computer into Max's brain and is astonished to see that Max now possesses a reboot sequence that would "override the whole system" and "open the borders," thus making everyone a citizen of Elysium. Max is interested only in saving his own life and refuses to help Spider. He leaves and voluntarily surrenders to Kruger. Max threatens that he will blow up Kruger's ship with a

grenade unless he is taken to a med bay on Elysium, but as he boards the ship, he discovers that Kruger has found and kidnapped Frey and Matilda.

A fight erupts en route to Elysium. Max drops the grenade. It detonates, destroying Kruger's face and crashing the ship on Elysium. Frey and Matilda flee to a house in hopes of using a med bay, but it does not work because Matilda is not a citizen. All three are captured.

Delacourt confronts Kruger for crashing a ship onto Elysium. Kruger, whose mangled face has been regenerated by a med bay, decides that he will use the reboot sequence to make himself the president of Elysium, and he stabs and kills Delacourt. Max, Frey, and Matilda are being held separately in a control center on Elysium.

Max escapes and sees on a video screen that Spider and his men have landed on Elysium. He contacts Spider to set up a rendezvous, and also rescues Frey and Matilda and tells them to head to a med bay. Max and Spider race to download the reboot sequence as Kruger chases them. Max suffers a seizure which allows Kruger to catch up, but he is able to kill Kruger.

Max and Spider make it to a control room. Max understands that he will die the moment the reboot sequence is extracted from his brain. Max studies his locket with the picture of Earth while staring at the actual planet out a large window. He pushes a button to start the download and dies instantly. When the download completes, Elysium's computer systems recognize everyone on Earth as citizens of Elysium. Matilda's leukemia is cured by a med bay, and an armada of shuttles equipped with med bays is dispatched toward Earth.

DISCUSSION

A. Legal Standards

1. Motions for Summary Judgment

A party may move for summary judgment on a "claim or defense" or "part of . . . a claim or defense." Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Material facts are those that might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 324-25. If the moving party meets its initial burden, the opposing party must then set out specific facts showing a genuine issue for trial in order to defeat the motion. *Anderson*, 477 U.S. at 250; see also Fed. R. Civ. P.56(c).

When deciding a summary judgment motion, a court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor. *Anderson*, 477 U.S. at 255; *Hunt v. City of Los Angeles*, 638 F.3d 703, 709 (9th Cir. 2011).

2. Copyright infringement

To prevail on a claim of copyright infringement, a plaintiff must demonstrate ownership of a valid copyright, and infringement – the copying of protected elements of the work. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Absent evidence of direct copying, the plaintiff must demonstrate both that the defendant had "access" to the plaintiff's work and that the two works are substantially similar. *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1076 (9th Cir. 2006).

In evaluating whether two works are substantially similar, the Ninth Circuit employs an "extrinsic test" and an "intrinsic test." See *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010); *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003). The extrinsic test is "an objective comparison of specific expressive elements[.]" while the intrinsic test is a subjective comparison that focuses on "whether the ordinary, reasonable

audience' would find the works substantially similar in the 'total concept and feel of the works.'" Benay, 607 F.3d at 624 (quoting *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)). Only the extrinsic test is applied at the summary judgment stage. *Funky Films*, 462 F.3d at 1077. The intrinsic test is left to the trier of fact. *Id.*

The extrinsic test "focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works." Benay, 607 F.3d at 624 (quoting *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994)). The court must take care to inquire only whether the protectable elements, standing alone, are substantially similar. *Id.* (citing *Cavalier*, 297 F.3d at 822); see also *Rice*, 330 F.3d at 1174 (courts "must distinguish between the protectable and unprotectable material because a party claiming infringement may place 'no reliance upon any similarity in expression resulting from unprotectable elements.'" (citation omitted). In other words, courts "filter out and disregard the non-protectable elements in making [a] substantial similarity determination." *Funky Films*, 462 F.3d at 1077 (quoting *Cavalier*, 297 F.3d at 822).

B. The Parties' Motions for Summary Judgment

Plaintiff has attached a copy of the June 21, 2013 Certificate of Registration from the Copyright Office to the FAC. A copyright registration is "prima facie evidence of the validity of the copyright and the facts stated in the certificate" if the work is registered before or within five years of when it is first published. 17 U.S.C. § 410(c); see also *Entertainment Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997). Defendants do not challenge plaintiff's ownership of a valid copyright in a work entitled "Butterfly Driver" (formerly "City of Light: Uberopolis").

Thus, plaintiff's burden on summary judgment is to show that there are no triable issues with regard to the second element of the claim of copyright infringement – the copying of protected elements of his original work – such that summary judgment must be granted as a matter of law. *Celotex*, 477 U.S. at 323; *Soremekun*, 509 F.3d at 984. Specifically, plaintiff must provide direct evidence of copying, or circumstantial evidence "through a combination of access to the copyrighted work and substantial similarity between the copyrighted work and the accused product." *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

For their part, defendants' burden on summary judgment is to point out an absence of evidence to support the "copying" element of plaintiff's claim; and, if they are successful, the burden then shifts to plaintiff to set out specific facts showing a genuine issue for trial in order to defeat the motion. Anderson, 477 U.S. at 250; Fed. R. Civ. P. 56(c).

1. Access

Defendants contend that plaintiff has no evidence of access. Direct access is shown if there is proof that the defendant actually viewed, read, or heard the work at issue. *Lucky Break Wishbone Corp. v. Sears, Roebuck & Co.*, 528 F.Supp. 2d 1106, 1122 (W.D. Wash. 2007), *aff'd*, 373 Fed. Appx. 752 (9th Cir. 2010). Here, plaintiff has provided no direct evidence that defendants ever saw the "Butterfly Driver" screenplay.

Access may also be demonstrated by circumstantial evidence, which requires a showing that the defendants had a "reasonable opportunity" or a "reasonable possibility" of viewing plaintiff's work prior to the creation of the infringing work. See *Three Boys Music*, 212 F.3d at 482 (access may be shown by a chain of events connecting plaintiff's work and the defendant's opportunity to view/hear/copy the work, such as dealings through a third party that had access to the plaintiff's work and with whom both the plaintiff and the defendant were dealing; or by the plaintiff's work being widely disseminated). Reasonable access requires more than a "bare possibility," and "may not be inferred through mere speculation or conjecture." *Id.* (citations and quotations omitted); see also *Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1143-44 (9th Cir. 2009).

Both in his own motion and in his opposition to defendants' motion, plaintiff relies on the allegations in the FAC. There, he asserts that he posted the "Butterfly Driver" script on a website operated by triggerstreet.com in February 2007, and that triggerstreet.com was "the only place" he ever posted a complete script of "Butterfly Driver." FAC ¶¶ 18-22. At the time, triggerstreet.com allowed members to post screenplays and short films to get feedback from peers and professionals – and gave them "a small hope of being noticed by a Hollywood insider." FAC ¶ 231.

Based on this, plaintiff asserts that triggerstreet.com "is where the [d]efendants had access to [p]laintiff's script." FAC ¶ 23. He claims that he posted four versions of "Butterfly Driver" on

triggerstreet.com between February and August 2007, and that after he posted one of the versions in late July 2007, "[a] young director (whose name escapes the [p]laintiff) . . . praised the script through the [website's] message board." FAC ¶ 26. Plaintiff alleges that this director "MAY have been [d]efendant, Neill Blomkamp[.]" although he also asserts that "Blomkamp, or any associate, may have accessed the work, without a word." FAC ¶ 26 (emphasis in original). He does not believe that the founders of triggerstreet.com "were complicit in the access of his work or the infringement[.]" but . . . is certain that one or more of the [d]efendants, or an acquaintance, accessed the [p]laintiff's work on triggerstreet.com." FAC ¶ 226.

In plaintiff's view, Blomkamp, who is credited with writing "Elysium," is "most likely the infringer" because (a) triggerstreet.com is a website for short filmmakers and screenwriters; (b) in 2007 Blomkamp was exclusively a short filmmaker, who was based in Los Angeles (home of Trigger Street); (c) Blomkamp was "perhaps the most social media savvy short filmmaker in the world – and living in the screenwriting hub of the world;" and (d) plaintiff was a screenwriter. See FAC ¶¶ 227, 232, 233.

Defendants contend, however, that plaintiff alleges no facts in the FAC to support his claim that Blomkamp found the "Butterfly Driver" screenplay on triggerstreet.com. They argue further that plaintiff has no evidence that any defendant, including Blomkamp, had a reasonable opportunity or any reasonable possibility of viewing "Butterfly Driver," and that plaintiff is simply speculating when he alleges in the FAC (and argues in these motions) that Blomkamp accessed his screenplay on triggerstreet.com.

Defendants also assert that such a contention is rebutted by Blomkamp's uncontroverted declaration filed in support of defendants' motion. In his declaration, Blomkamp states that before this lawsuit was filed, he had never heard of the website triggerstreet.com; that he has never visited the website; and that he did not obtain a copy of plaintiff's screenplay on that site or anywhere else, and was not given a copy by anyone. Declaration of Neill Blomkamp ("Blomkamp Decl.") ¶¶ 7-8.

Blomkamp briefly explains the genesis of "Elysium" as follows. He states that he was raised in Johannesburg, South Africa, where he lived for 18 years before moving to Vancouver. As a teenager he began pursuing 3D animation and design, which he continued studying in film school. Blomkamp Decl. ¶ 2. He made several short

films between 2004 and 2007, with storylines involving extraterrestrials and robotic workers. His first feature film was "District 9," which tells the story of extraterrestrials who are marooned in South Africa when their spacecraft becomes disabled, and are confined to camp outside of Johannesburg, and which explores themes of racism and segregation, and has a main character who transforms into an alien after coming in contact with an extraterrestrial substance. Blomkamp Decl. ¶¶ 3-4. He asserts that he created "Elysium" as he creates all his works, proceeding from visual concepts (in this case, utopian space stations and a robotic police force) and incorporating themes of racial and class segregation (building on his earlier works). Blomkamp Decl. ¶¶ 5-6.

As noted above, to establish infringement, a plaintiff that has a valid copyright registration must provide evidence of both access and copying. Here, plaintiff has no evidence that Blomkamp or any defendant had access to his "Butterfly Driver" screenplay. Plaintiff contends that he "dedicated over a page of the FAC (page 4 line 11 to page 5 line 13) to alleging facts supporting the plausibility of Blomkamp accessing his screenplay on triggerstreet.com." However, allegations in a complaint are not evidence that can be used to support or oppose summary judgment. See *Celotex*, 477 U.S. at 324; see also *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Moreover, the allegations in the FAC are entirely speculative as they relate to Blomkamp's access to the screenplay. Plaintiff has failed to provide any evidence supporting his assertion that defendants had access to his screenplay.

In his own motion, plaintiff argues that access can be established under the "chain of events" theory. He reiterates that he posted his screenplay on triggerstreet.com; that triggerstreet.com was based in Los Angeles; that the majority of triggerstreet.com members were "short filmmakers and screenwriters;" and that Blomkamp was a short film-maker who was "media-savvy" and who was based in Los Angeles (the "screenwriting hub of the world").

Even assuming for the sake of argument that these factual assertions are judicially noticeable and/or supported by evidence, together they do no more than suggest a bare possibility of access, which is insufficient to sustain a copyright infringement claim. Plaintiff has not provided evidence of a chain of events sufficient to establish a reasonable possibility of access. See *Jason v. Fonda*, 698 F.2d 966, 967 (9th Cir. 1982); see also *Art Attacks*, 581 F.3d at 1144.

He also asserts that his screenplay was so widely disseminated that it is reasonably possible that Blomkamp had access to his work. He claims that he emailed the screenplay to his family and friends, and that he posted drafts of the screenplay on triggerstreet.com. However, even were this claim supported by evidence, it does not show wide dissemination sufficient to support an inference that defendants had access to his work, or to raise a triable issue as to access. He also contends that over a 23-month period he sent queries to agents seeking representation, posted short synopses of the storyline on screenwriter websites, and entered screenwriting competitions. Again, these communications and Internet postings do not constitute evidence of wide dissemination of the screenplay.

2. Infringement

Had plaintiff provided some evidence of access (even circumstantial), he could potentially show infringement by demonstrating that the two works are "substantially similar." Because plaintiff lacks any evidence of access, however, he can establish copyright infringement only by showing "striking similarity." See *Three Boys Music*, 212 F.3d at 485 ("in the absence of any proof of access, a copyright plaintiff can still make out a case of infringement by showing that the [works] were 'strikingly similar'") (citations omitted); see also *Pringle v. Adams*, 556 Fed. Appx. 586, 587 (9th Cir. Feb. 21, 2014); *Seals-McClellan v. Dreamworks, Inc.*, 120 Fed. Appx. 3, 4 (9th Cir. 2004) (citing *Baxter v. MCA, Inc.*, 812 F.2d 421, 424 n.2 (9th Cir. 1987)).

Striking similarity is a high bar. "At base, 'striking similarity' simply means that, in human experience, it is virtually impossible that the two works could have been independently created." 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.02[B] (2005), quoted in *Stewart v. Wachowski*, 574 F.Supp. 2d 1074, 1103 (C.D. Cal. 2005); see also *Bernal v. Paradigm Talent and Literary Agency*, 788 F.Supp. 2d 1043, 1052 (C.D. Cal. 2010). That is, "[t]o show a striking similarity between works, a plaintiff must produce evidence that the accused work could not possibly have been the result of independent creation." *Seals-McClellan*, 120 Fed. Appx. at 4 (emphasis in original) (citation omitted).

Defendants contend that the protectable elements of the two works share no similarity in expression – let alone "striking similarity." Protectable expression includes "the specific details of an author's rendering of ideas." *Funky Films*, 462 F.3d at 1077 (citation and quotation omitted). What is not protectable are "basic plot ideas for

stories" or other generic concepts. *Id.*; see also *Van v. Cameron*, 566 Fed. Appx. 615, 616 (9th Cir. 2014).

Plaintiff asserts that "Elysium" infringes numerous elements of his "Butterfly Driver" screenplay, including "plot, characters, settings, conflicts, themes, catalyst, crisis, climax, inciting incident, his hero's 'character affliction,' and 'keepsake necklace' and more." Defendants argue that neither the plot/sequence of events, nor the settings, nor the dialogue, nor the characters, nor the themes, nor the mood/pace in the two works are similar. In addition, defendants assert that the parties' works share nothing more than "stock" or "cliché" ideas. In opposition and in support of his own motion, plaintiff argues that all the elements alleged in the FAC are similar. When evaluating literary works for similarity, courts compare the works' plot, themes,

First, plaintiff contends that in both "Butterfly Driver" and "Elysium," there is a hero who must get to the satellite world for medicine or medical care. This is an abstract idea that is not expressed similarly in the screenplay and the film. In the screenplay, Arlo is on a mission to save his daughter Franny, and travels to Uberopolis after he discovers that supplies of Drexlerin on Earth are exhausted. In the film, Max is dying of a fatal dose of radiation, and must travel to Elysium because that is the only place that there is any possibility of receiving the necessary medical treatment to counter the radiation poisoning. He travels there to save himself, not a child.

1 Plaintiff compares the "Butterfly Driver" screenplay to the apparently unauthorized (and unauthenticated) version of the "Elysium" screenplay he downloaded. The proper comparison is between the "Butterfly Driver" screenplay and the film "Elysium." See *Quirk v. Sony Pictures Entm't, Inc.*, 2013 WL 1345075 at *6 (N.D. Cal. Apr. 2, 2013) (in a case where the plaintiff alleged that the defendant's film infringed his novel, the "only relevant question[was] . . . whether the final movie as filmed, edited, and released" contained matter substantially similar to protectable elements of the plaintiff's novel); see also *See v. Durang*, 711 F.2d 141, 142 (9th Cir.1983).

In addition, plaintiff claims he downloaded the "Elysium" screenplay on June 13, 2013, a week before he obtained his copyright registration. However, he had seen a trailer for the film "Elysium" on May 27, 2013. While the actual film was not released in the theaters until October 9, 2013, plaintiff cannot maintain an action for copyright infringement based on an undated version of an "Elysium" screenplay that he downloaded prior to his copyright registration.

2 In addition, a number of what plaintiff characterizes as "plot features" appear to the court to instead be features of setting, theme, or character. Accordingly, the court has endeavored to place any analysis of those features

under the appropriate heading. dialogue, mood, setting, pace, characters, and sequence of events. See Berkic, 761 F.2d at 1292. Here, while there may be some superficial similarities between the two works, a close examination of the screenplay and the film reveals many significant differences and few real similarities among the protectable elements.¹ Plot/sequence of events Plaintiff asserts that defendants copied numerous "plot features" of the "Butterfly Driver" screenplay. Generally, the "plot features" identified by plaintiff are similar only at a very abstract level. Indeed, many of these features reflect generic themes that are not expressly similar in the two works.

Second, plaintiff asserts that the hero in the "Butterfly Driver" screenplay is poor, witnesses the death of his best friend, and needs I.D. and transport to a satellite world, and that the same is true of the hero in the film "Elysium." However, these ideas are not expressed similarly in the two works. In the screenplay, Arlo requires a fake ID because he is a fugitive on the run from the authorities and can't travel to Uberopolis under his own identity. In the film, Max (or anyone traveling to Elysium) needs an ID burned onto his/her arm so he/she will be recognized as a citizen of Elysium.

There is no support for plaintiff's assertion that the two works are similar in the manner that each hero "witnesses the death of his best friend." Arlo responds to a distress call from Roddy, and arrives just as Roddy (who was shot by bounty hunters) is dying, to learn that bounty hunters are after his (Arlo's) family. Max and his friend Julio are on a mission to kidnap Carlyle and steal data from his brain, when the covert agent Kruger arrives and kills Julio with a sword.

Third, plaintiff contends that in both works, there is a disabled transporter who helps the hero's emigration plan, on condition that the hero accept a dangerous mission. This appears to be an attempt to compare the screenplay's Dylan and the film's Spider – two very different characters who play very different roles in the story. In "Butterfly Driver," Dylan is Arlo's boss at the warehouse, and he plays a minor role by setting Arlo up with a "butterfly run" so that Arlo can earn the money he needs for his family's repatriation. In the film "Elysium," Spider is not Max's boss, and there are no "butterfly runs." Rather, Spider is an independent operator who runs undocumented shuttles from Earth to Elysium. He engages Max to kidnap Carlyle and download data from his brain, and coordinates the effort to reboot Elysium's computers to make everyone on Earth a citizen of Elysium. While it is true that both Dylan and Spider have physical disabilities, there is no comparison between the role played by Spider in the plot of the film "Elysium"

and the minor role played by Dylan in the plot of the "Butterfly Driver" screenplay.

Fourth, plaintiff asserts that there is an agent in each work who is sent by the villain to apprehend the hero, and who accepts the assignment after negotiating. This appears to be an attempt to compare the roles of Jerry and Kruger in the plots of the screenplay and the film, respectively. However, their roles are vastly different. In the screenplay, Jerry is a federal agent working for the State. He investigates Arlo on suspicion of murdering Tamara Gwynn. After discovering that Arlo is innocent, he helps Arlo expose Drexler as a murderer and imposter, and saves Arlo from Drexler. In the film, Kruger does none of those things. Instead, he pursues Max with the goal of obtaining the reboot sequence that has been downloaded into Max's brain. And rather than attempting to rescue Max, Kruger hunts him down and attempts to kill him.

Fifth, plaintiff contends that in each work, the hero carries a "keepsake necklace," which factors in to the story's conclusion. In the "Butterfly Driver" screenplay, Benni, who appears to be interested romantically in Arlo, gives him a yellow butterfly dreamcatcher for good luck. Although Arlo sees the dreamcatcher in Spike the dolphin's eye during his dreamlike vision, its significance to the work is negligible. By contrast, in the film "Elysium," the nun who raises Max in the orphanage gives him a locket with a picture of Earth. This locket is not a dreamcatcher, a good luck charm, or a token of romantic interest. It is a teaching tool to remind Max of the beauty around him. Moreover, the locket plays into the climax of the film in a way that is unrelated to the plot of the screenplay.

Sixth, plaintiff asserts that in each work, the hero threatens the villain with detonating an explosive device. In "Butterfly Driver," Arlo threatens to use the A-cell to blow up Uberopolis if Drexler refuses to dismiss the security guards and meet with him. In the film "Elysium," Max threatens that he will blow up Kruger's shuttle if Kruger or his men try to harm him. The only similar element here is the stock idea of using a threatened explosion as leverage.

Seventh, plaintiff contends that both the screenplay and the film have "techie" programmers who help the hero with fake identification to get into the satellite world. However, this characterization is misleading and does not reflect the actual plot of either work. The identification required by Arlo (fake ID, necessitated by fact that he is a fugitive and can't travel under his own name) is different from the identification required by Max (ID

burned into the arm, which will enable him to pass as a citizen of Elysium).

Eighth, plaintiff asserts that each work includes a primary character who negotiates with insurers (or a hospital) for the life of his/her child. This is a common or even generic idea which, as defendants note, has been previously used in the plot of films such as the 2002 film "John Q" with Denzel Washington. As for the "negotiating," plaintiff appears to be attempting to compare the screenplay's Jerry, whose son Matty needs a "filter room" because of respiratory ailments, with the film's Frey, whose daughter is in the hospital with leukemia. However, Jerry is offered financial help with the "filter room" if he accepts the task of investigating Arlo, but nothing like this occurs with Frey, who is simply forced to take her daughter home from the hospital because her daughter cannot be cured there.

Ninth, plaintiff contends that both "Butterfly Driver" and "Elysium" include a climatic battle between the hero and the villain, during which the hero suffers a terrible headache. Plaintiff appears to be attempting to compare the chase and fight scene between Arlo and Drexler in his screenplay, and the chase and fight scene between Max and Kruger in "Elysium."

These scenes are not similar except at the most general level. In the "Butterfly Driver" screenplay, Arlo confronts Drexler by flying a sky-cycle through the glass windows of his 57th floor office. Not knowing that the conversation is being recorded by surveillance cameras and broadcast on television, Drexler confesses to his crimes including being an imposter. In the ensuing struggle, Arlo and Drexler exit the office through the broken window, but float to the ground unharmed because of reduced gravity on Uberopolis. Their chase and fight scene takes them through the streets of Uberopolis and eventually onto a shuttle. Arlo suffers a headache mid-combat and Drexler seizes the moment to shoot him in the neck. Drexler is about to kill Arlo when Jerry intercedes and saves his life.

By contrast, in the film "Elysium," Max is being held captive in an Elysium control center. He escapes and sees on a video screen that Spider and his men have arrived on the space station. Max rescues Frey and Matilda and tells them to find a med bay. He then meets Spider, and the two of them race to a control room where they can start the reboot sequence in Max's brain. Max and Spider are fleeing Kruger when Max suffers a seizure caused by the defense mechanism that Carlyle coded into the reboot sequence. Kruger

catches up, but Max kills him in a hand-to-hand fight with the help of an exoskeleton that was grafted onto his body to give him added strength. Max and Spider continue to the control room where they succeed in rebooting Elysium's computers. These scenes from the film are nothing like the scenes in the screenplay.

Tenth, plaintiff asserts that both works conclude with a "globally significant resolution." This is a generic idea that is not copyrightable. Moreover, it is not expressed in a similar manner in the two works. The screenplay concludes with Arlo destroying Uberopolis, while the film concludes with the software program that was downloaded into Max's brain rebooting Elysium's computers to open up citizenship to everyone on Earth. While these resolutions may be "global" and even "significant," they are clearly not similar.

In short, none of the "plot features" identified by plaintiff is similar in the two works, except at the highest level of abstraction. Because unprotected elements are irrelevant, it is "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" that must be compared. *Funky Films*, 462 F.3d at 1077 (quoting *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985)). Similarities in general plot ideas are not probative of infringement. *Id.* at 1081; see also *Benay*, 607 F.3d at 624 ("[f]amiliar stock scenes and themes that are staples of literature are not protected"). Likewise, *scènes à faire* – or situations that "flow naturally from generic plot-lines" – are unprotected and therefore ignored under the extrinsic test. *Funky Films*, 462 F.3d at 1077; see also *Benay*, 607 F.3d at 624-25.

Benay, *Funky Films*, and *Berkic* are all cases in which the Ninth Circuit noted similarities between the plaintiff's work and the accused work at relatively high level of abstraction, but many substantial differences upon closer examination. In *Benay*, the authors of a screenplay ("The Last Samurai") sued the creators of a film (also called "The Last Samurai") alleging copyright infringement. Both works told the story of an American war veteran who travels to Japan in the 1870s to train the Japanese Imperial Army in modern Western warfare in order to combat a "samurai uprising." *Id.*, 607 F.3d at 625. In both works, the protagonist meets the Emperor, who is struggling to modernize Japan; the protagonist introduces modern warfare to the Imperial Army, using contemporary Western weaponry and tactics; and the protagonist suffers a personal crisis and is transformed as a result of his interaction with the samurai. *Id.* Nevertheless, the court found that

the two works were similar only at a " cursory " level, and that a closer examination of the protectable elements exposed more differences than similarities. Id.

The court described the screenplay as "largely a revenge story," in which the protagonist "emerges from domestic security, to despair at the loss of his son, to revenge and triumph when he defeats his ruthless antagonist, Saigo." Id. In contrast, the film, which the court described as "more a captivity narrative," somewhat reminiscent of "Dances with Wolves," the protagonist "moves from isolation and self-destructive behavior, to the discovery of traditional values and a way of life that he later comes to embrace." Id.

In Funky Films, the creator of a screenplay ("The Funk Parlor") sued the creators of a television series ("Six Feet Under") alleging copyright infringement. Among other things, both works involved narratives about a family-run funeral parlor, the death of the family patriarch, the inheritance of the business by the family's two sons (one older and more "creative" and the other younger and more "conservative"), and the return of the older brother from a distant city to help run the family business, which was on fragile financial footing and was fighting off a rival funeral parlor. Id., 462 F.3d at 1077-78. Nevertheless, despite these apparent similarities, the court found that an actual reading of the two works reveals numerous significant differences.

For example, the court found that the father's suicide in "The Funk Parlor" sets the stage for a series of additional murders, including several of the main characters. The story revolves around the older brother, who rehabilitates the business, falls in love with one of the central characters, proposes to her, and then discovers she is a serial murderer and feels compelled to kill her to save his own life. Id. at 1078. By contrast, the court noted, "Six Feet Under" is not a murder mystery, and does not revolve around a particular plot line, as the series develops separate plot lines around each member of the family, and examines each character's psyche and his or her interpersonal interactions and emotional attachments in the wake of the cataclysmic death of the patriarch of the family. Id.

In Berkic, the author of a screenplay ("Reincarnation, Inc.") sued the writer/director and producer of a film ("Coma"), which was based on a novel by the same name by Robin Cook. The plaintiff alleged that both the book and the movie infringed his screenplay. The court found that "[a]t a very high level of generality, the works do show a certain gruesome similarity," as both works "deal with criminal

organizations that murder healthy young people, then remove and sell their vital organs to wealthy people in need of organ transplants[.]” In addition, the court noted, both works “[t]o some extent . . . take their general story from the adventures of a young professional who courageously investigates, and finally exposes, the criminal organization.” *Id.*, 761 F.2d at 1293.

However, looking at “the actual concrete elements that make up the total sequence of events,” the court found the plot ideas to be less similar than dissimilar, as the main character in the screenplay does not, until very late in the story, participate in the investigation that exposes the criminal organization, and was in fact a dupe of the criminal organization. *Id.* In addition, the police lieutenant who investigates the deaths was seeking to advance his career, while the main character in the film/book – a doctor investigating the unexplained brain deaths of young, healthy patients – was motivated by personal concerns, as her best friend had previously fallen victim to the organization. *Id.*

Similarly, in the present case, the general plot features identified by plaintiff are unprotected because they share only abstract similarities, and do not reflect objective details that are original to the plaintiff. As such, they do not support a finding that there is substantial similarity between “Butterfly Driver” and “Elysium,” let alone a striking similarity.

Characters

Plaintiff argues that the characters of “hero,” “villain,” and “sick child” in the film “Elysium” are similar to characters in the “Butterfly Driver” screenplay. First, with regard to the heroes, plaintiff claims that there are similarities between Arlo and Max as to age (35-45 years old); general economic status (impoverished); the fact that each carries a “keepsake necklace,” which he received from a “special woman from his past;” and the fact that each “suffers from headaches,” and battles a headache in the climax of the story. He also asserts that each hero has a similar goal – Arlo has less than a week to get from Earth to a satellite world, to get medicine to save his daughter, while Max has less than a week to get to a satellite world, to get medical care to save himself and his “girl-friend’s” daughter, and that in order to accomplish that goal, each hero contacts underworld figures to get I.D. and transport to the satellite world.

It is true that each hero is within the same age range, but that is not a protectable character feature. As for general economic status, that

too is a generic idea. Arlo is a war hero and hover-craft pilot who flies supplies in the Zones outside the "Global State," and is a father of two who goes on a selfless mission to save his daughter, and succeeds. By contrast, Max is unmarried, has no children, is on parole, and works at a local factory making robotic police officers. Also unlike Arlo, Max is on a self-centered mission to save his own life at the expense of the lives of others. Essentially, Arlo and Max are similar only in that each occupies the role of a male protagonist.

It is also true that Arlo and Max both suffer a chronic ailment. However, in "Butterfly Driver," Arlo has a long history of suffering from "ice pick" headaches that sometimes "knock him to his knees." Indeed, Jerry recalls that Arlo was "kicked out" of flight school because he was considered unfit to fly by virtue of the chronic headaches. By contrast, Max, the hero of "Elysium," suffers seizures (not headaches), but this ailment begins only after he downloads the reboot sequence from Carlyle's brain. Moreover, while Arlo suffers a headache and Max suffers a seizure in the climatic scenes of the respective works, those scenes are not similar. In the screenplay, Arlo and Drexler are fighting in a shuttle when Arlo suffers a headache, and Drexler shoots him in the neck. In the film, Max suffers a seizure, which allows Kruger time to catch up, but Max kills Kruger in a fight.

Nor are the heroes similar with regard to what plaintiff refers to as "the keepsake necklace." In "Butterfly Driver," Benni gives Arlo a yellow dreamcatcher for "good luck," and as he faces possible death near the end of the screenplay, he sees the dreamcatcher in a "vision." However, he does not die. In "Elysium," a nun gives Max a locket when he is a child, to remind him of the beauty around him, and as he is dying from the effect of the downloading of the reboot sequence, he looks at the locket and remembers Frey (in a dreamlike way).

Second, plaintiff contends that there are similarities between the two villains (Delacort in "Elysium" and Drexler in "Butterfly Driver") in that each had "genetic reprogramming" to make them appear younger; each orders mass killings of prisoners travelling in space shuttles; each is rich and lives on a crime-free satellite world; each sends an agent to apprehend the hero because of information he possesses; and each is evil but attempts to justify his/her actions as good for the world.

A number of these features (wealth, living on a crime-free satellite world, acting with evil intent but seeking to justify actions as good

for the world) are generic features that are not protectable. Nor are Drexler and Delacort similar in any other way. Drexler is male, and ex-soldier, a former acquaintance of Arlo's and an imposter who murdered the real Drexler and his family and stole Drexler's identity. Drexler is the President of the Global State and owner of Uberopolis, which he built with the money he inherited as "Drexler." By contrast, Delacort is female, has no prior relationship with Max, and holds no position on Earth. She does not own Elysium, but is intent on staging a coup to take over its presidency. While both Drexler and Delacort are ruthless authorities (a type of "stock character"), the similarity ends there.

It is true that both Delacort and Drexler appear younger than they are. In "Butterfly Driver," Drexler had his DNA "reprogrammed," with the result that his "bulging biceps" were three times normal strength and he appeared younger, but the screenplay also makes clear that Drexler had his DNA modified because he was really Midland but was trying to pass as Drexler. By contrast, Delacort and the other citizens of Elysium routinely use the med bays to prevent aging and cure disease – not to "reprogram DNA" – but in addition, only citizens of Elysium are permitted access to the med bays. There is nothing comparable in the screenplay.

Third, plaintiff asserts that there is a similarity between the two works in the use of a "sick child" who will live for less than a week if medical assistance is not provided. This is an attempt to compare Franny to Matilda. This idea of the "sick child" is a generic idea that is expressed differently in the parties' works. In the "Butterfly Driver" screenplay, Franny appears briefly, has little or no dialogue, and is cured without much ado when Arlo returns home with the Drexlerin. In the film "Elysium," Matilda (the daughter of Max's friend Frey) is intermixed in the drama. She is kidnaped by Kruger, taken to Elysium, and eventually successfully uses a med bay on the space station. Moreover, unlike Franny, Matilda is critical to the story arc. She is the catalyst for Max's decision to sacrifice himself at the end of the film.

Plaintiff also contends that there is similarity between what he calls "secondary characters." The court finds, however, that all these character comparisons focus on abstract, unprotected traits. None of the characters are similar at the level of protectable expression. For example, plaintiff attempts to compare Rianna (lives in a slum but is an educated, devoted mother) and Benni (hopeful, beautiful, but disappointed with men around her) in "Butterfly Driver;" with Frey (alleged to be a "hybrid" of Rianna and Benni, who lives in an

uneducated slum, but is educated, tough, and a devoted mother, also beautiful, hopeful, and disappointed with men around her) in "Elysium."

The assertion that Frey is a "hybrid" of Rianna and Benni demonstrates that she is substantially similar to neither of them. And indeed, Frey and Rianna share no similarities except for the unprotected characteristic of having a young daughter who is ill. Moreover, Rianna appears only briefly in the screenplay, but Frey is a critical character in the film—her friendship with Max is a catalyst for his decision to sacrifice his own life. Frey and Benni are even less similar than Frey and Rianna. Benni is a mercenary who guards a warehouse with her brother Louis. She helps Arlo obtain a fake ID to enable him to travel to Uberopolis, and gives him a yellow "dream catcher" for luck. Benni has nothing in common with Frey except that they both have a vague romantic interest in the male protagonist—which is never acted on.

Plaintiff asserts that there are similarities between Jerry (a "good" character who when sent to apprehend the hero by a high-ranking official, bargains for medical care for his son) in "Butterfly Driver;" and Kruger (a "bad" character who when sent to apprehend the hero bargains for a mansion and more before accepting the mission) in "Elysium." These two characters could not be more dissimilar (law-abiding vs. outside the law; former friend of the hero's vs. no former relationship with the hero; attempts to help the hero vs. attempts to kill the hero). The only similarity—that each is an "agent" who pursues the protagonist—is simply a "stock" character feature that is not protectable.

Plaintiff also contends that there are similarities between Dylan (runs an underground base with flight pattern monitors on walls, sometimes transports immigrants, is disabled with missing arm) in "Butterfly Driver;" and Spider (runs an underground base, with flight path monitors on walls, transports immigrants, is disabled, with paralyzed leg) in "Elysium." As noted above, however, Dylan is a minor character in the "Butterfly Driver" screenplay, with virtually no relevance to the story, while Spider in the "Elysium" film is a central character. The fact that one has a missing arm and the other has a paralyzed leg does not make them similar as "characters" in the story.

Finally, it is important to note that there are a number of important characters in each work that have no parallel in the other. For example, Tamara plays an important role in "Butterfly Driver," and

has no possible counterpart in the film "Elysium," while several characters in the film – the nun who raised Max, Carlyle, President Patel, and the robot police force – have no parallel with the screenplay.

Setting

Plaintiff identifies the following attributes of the setting, which he claims is similar to the setting of "Elysium." He describes Uberopolis as a giant satellite world for the superrich, between 1 and 3 miles in diameter, with forests and large aquatic features, and a proposed capacity in the range of 300,000, and which orbits an overpopulated, impoverished earth. Fantastic medical technologies are available there, and it is also where a genetically reprogrammed villain lives; where the final battle transpires; and where prisoners in orange jumpsuits board shuttles bound for earth.

Plaintiff contends that in contrast to this world is a dystopian Earth (impoverished, overpopulated ruin of earth), where the poor have little access to health care; the hero lives in a slum overrun by thugs and crime; police and military vehicles loom in the sky and brutalize the poor; Army ships full of "undesirables" are released into the slums; the poor are brutalized by the government of the satellite world; rich businesses build manufacturing plants to take advantage of cheap labor; and the poor live in the ruins of cities in decay. Plaintiff claims that the "conjoined setting" of rich satellite world and poor dystopian Earth is a "unique" creation, with no connection to any prior storyline with all the same features.

The court finds, however, that the setting of the "Butterfly Driver" screenplay is not similar to the setting of "Elysium," except at the most abstract level. Moreover, although both the screenplay and the film use the common idea of "a giant satellite world for the super-rich," the expressions of these locations is different.

Uberopolis is not exclusive to the "super-rich," as there is a constant shuttling of ordinary citizens between Earth and Uberopolis, and Drexler appears in TV ads urging residents of Earth to buy homes and apartments on Uberopolis. The Global State has "100 per cent employment" and "almost no crime." While there is some poverty in the "Zones," the City of Manhattan is portrayed like a typical major city with apartment complexes, shopping malls, and subways. Citizens on Earth drive sky-cars, sky-cycles, and hover-jets. Moreover, advanced medical care is available both on Earth and on

Uberopolis, and there is no class divide between the populations of Earth and Uberopolis.

By contrast, Elysium is indeed reserved exclusively for the "super-rich," and Earth's population is barred from moving to (or even freely traveling to) Elysium. There are no malls, apartment complexes, or subways on Earth. The population does not drive sky-cars. The entire population is heavily unemployed and extremely poor. They live in shantytowns, with defunct skyscrapers smoldering in the background. They are policed by a abusive robotic police force which has no counterpart in the "Butterfly Driver" screenplay. There is a stark class divide between the population of Earth and Elysium, and the med bays on Elysium are reserved exclusively for "citizens" of Elysium. Nor is there any support for the assertion that both satellites "feature giant forests and aquatic features," as Uberopolis has a flora-sphere and an aqua-sphere beneath the city floor, but there is no description of "giant forests" on the satellite. Apart from the generalized idea of Earth set in the future, there are few similarities between the setting of the two works.

Moreover, a setting that combines "giant satellite world for the super-rich" and "poor dystopian earth" is not new or original with the "Butterfly Driver" screenplay. Defendants have provided a declaration (and report) from their expert Jeff Rovin, who has had a long career as a professional writer, and has authored more than 100 books, both fiction and non-fiction, including several works analyzing films and television series in various genres including science fiction.

The Oxford English Dictionary defines "dystopia" as "[a]n imaginary place or condition in which everything is as bad as possible." According to Mr. Rovin, the word "dystopia" was coined by John Stuart Mill in 1868 to describe the flip side of "utopia." Mr. Rovin explains that in fiction, "dystopia" is typically the result of military, political, and economic oppression that results in dehumanization, often accompanied by poverty and disease. See Declaration of Jeff Rovin ("Rovin Decl."), Exh. A at 8-9.

Mr. Rovin states that a dystopian future (with special privileges for the wealthy and powerful) is an exceedingly common feature of the "prior art," a term he uses to refer to earlier-published works in the same genre (futuristic science fiction). He cites to H.G. Wells' *The Time Machine*, Jack London's *The Iron Heel*, Aldous Huxley's *Brave New World*, Margaret Atwood's *Oryx and Crake*, and also to the

films "Metropolis" (1927), "Soylent Green" (1973), "Demolition Man" (1983), and to the TV series "Rock and Rule" (1983), and "Futurama" (1999-2013). See Rovin Decl., Exh. A at 9-15.

Apart from this, Mr. Rovin also points out that, strictly speaking, the "Butterfly Driver" screenplay does not describe a dystopian world. In the screenplay, citizens of Earth enjoy "100 percent employment" and "almost no crime." While Earth is "overpopulated," it is not unlivable. For example, Manhattan has upscale areas and slums, apartment complexes, shopping malls, and subways. Citizens drive sky-cars, sky-cycles, and hover-jets. Mr. Rovin opines that Earth in plaintiff's screenplay is "futuristic," not "dystopian," and plainly draws on past science fiction in television series and comic books. Rovin Decl., Exh. A at 16-21.

Mr. Rovin asserts further that the idea of a satellite as a refuge for the super-rich is not a novel idea. He cites to the short story "Abercrombie Station" (1952), the "Star Trek" episode "The Cloud Minders" (1969), the novel A Wizard in Bedlam (1979), the novel The Anarch Lords (1981), the August 1981 issue of the comic book Heavy Metal, the novel The Taking of Satcon Station (1982), the novel Touch the Stars (1983), the novel The Lagrangists (1983), and a number of other works. See Rovin Decl., Exh. A at 30-45. He concludes that far from being new, plaintiff's concepts of wealth and privilege in connection with space habitats have been a part of science fiction for decades. Id.

In order to establish similarity in settings, plaintiff must show that his screenplay and the film "Elysium" express the settings similarly. However, plaintiff cannot do that, because the screenplay and the film share nothing more than the generic idea of a futuristic Earth and an orbiting space station.

Themes

Plaintiff asserts that the two works share at least five central themes – (1) survival without adequate healthcare is inhumane; (2) the plight of immigrants is brutal; (3) wealth corrupts and divides us; (4) heroic sacrifice (Arlo for his daughter, Max for Matilda and mankind); and (5) redemption comes from refusing to give up hope.

First, plaintiff contends that the theme that survival without adequate healthcare is inhumane is shown by the fact that in both works, advanced medicine found on the satellite world. However, apart from a generic "medical" theme, this feature is not similar in

the two works. In the "Butterfly Driver" screenplay, the drug Drexlerin is ordinarily equally available on both Earth and Uberopolis. The only question is ability to pay and availability (which is limited for commercial reasons at the time Arlo is attempting to locate the drug for Franny). In the film "Elysium" the "advanced medicine" consists of med bays, not drugs, and those med bays are categorically unavailable to Earth's population, which forces people who are ill to attempt to travel illegally to Elysium to access the med bays. There is nothing akin to that in the screenplay, which has as a theme Arlo's attempt to locate Drexlerin for his daughter Franny.

Second, the "plight of immigrant" theme is a generic theme that is not expressed similarly in the two works. "Butterfly Driver" refers to Arlo's arranging for his family to "repatriate" from the Zones to the "State" to obtain better healthcare for Franny. However, it describes nothing similar to the illegal immigration that occurs in "Elysium," where people on Earth risk their lives to get on board undocumented shuttles, hoping to travel to Elysium to access the space station's med bays, which are restricted to citizens of Elysium.

As for the themes of the corrupting influence of wealth, heroic sacrifice, and redemption, those are abstract concepts that are not protectable. Moreover, plaintiff has not established that the themes in the two works are similar. "Elysium" overtly explores themes of current relevance in the United States and in Blomkamp's native South Africa, including class inequality and availability of universal health care, while "Butterfly Driver" includes none of those themes.

Mood/pace

Plaintiff contends that the film "Elysium" mirrors the mood of the screenplay "Butterfly Driver," and that the pacing of both works is similar – fast but not frenetic. He asserts that both works feature disabled characters, suggesting a brutal government; that both works are serious, with little humor in narrative, dialog, or action; that the settings and themes of both works are identical; and that both works use similar scenes to darken the mood, such as unnecessary, casual police beating of the heroes.

The bare concept of a pace that is "fast but not frenetic" is unprotectable. In addition, any elements relating to the mood/pace of the two works – to the extent they are similarly "serious" or "dark" – are stock or generic ideas, or scènes à faire which are not protectable. See Rice, 330 F.3d at 1177 (overall mood of secrecy and

magic is generic, constitutes scènes à faire, and "merges" with the work at issue). Thus, any similarity is not indicative of striking or substantial similarity.

C. Plaintiff's Motion to Exclude Defendant's
Expert and his Expert Report

Plaintiff seeks an order disqualifying defendants' expert Jeff Rovin and excluding his report. Defendants have established that Mr. Rovin is "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Mr. Rovin is knowledgeable and an expert in the area of "science-fiction genre" – and his testimony has "a reliable basis in the knowledge and experience of his discipline." *Kumho Tire Co. v. Carmichael* 526 U.S. 137, 148 (1999).

As such, Mr. Rovin cites to many previously published works to show that plot features, settings, and characters in "Butterfly Driver" are not new or original as plaintiff suggests, but reflect themes that have appeared numerous times in the past. As defendants' motion makes clear, Mr. Rovin's testimony supports defendants' argument that many of the plot features, themes, characters, and other features of the "Butterfly Driver" screenplay are "stock" or "generic" elements or scènes-à-faire, which are not protectable; and to support their argument that the "Butterfly Driver" screenplay and the "Elysium" film are not strikingly similar or even substantially similar.

CONCLUSION

In accordance with the foregoing, defendants' motion for summary judgment is GRANTED, and plaintiff's motion is DENIED. In addition, plaintiff's motion to disqualify defendants' expert Jeff Rovin is DENIED.

IT IS SO ORDERED.

Dated: October 3, 2014

s/

PHYLLIS J. HAMILTON
United States District Judge

APPENDIX C

**UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF
CALIFORNIA**

STEVE WILSON BRIGGS, Plaintiff,

v.

NEILL BLOMKAMP, et al., Defendants

No. C 13-4679 PJH v.

JUDGMENT

The court having granted defendants' motion for summary judgment and denied plaintiff's motion for summary judgment,

It is Ordered and Adjudged
that plaintiff Steve Wilson Briggs take nothing, and that the action be dismissed.

Dated: October 3, 2014

s/
PHYLLIS J. HAMILTON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVE K. WILSON BRIGGS, Plaintiff-Appellant,

v.

SONY PICTURES ENTERTAINMENT, INC.; et al.,

Defendants-Appellees.

No. 14-17175

D.C. No. 4:13-cv-04679-PJH

Northern District of California, Oakland

Appeal From The United States District Court

For The Northern District Of California

On Petition(s) For Rehearing & Rehearing En Banc

[Filed April 6, 2018]

ORDER

Before: THOMAS, Chief Judge, and TROTT and SILVERMAN,
Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing and Chief Judge Thomas has voted to reject the petition for rehearing en banc and Judges Trott and Silverman so recommend.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

L.A. PRINTEX INDUSTRIES, INC.,

a California Corporation, Plaintiff-counter-defendant-Appellant,

v.

AEROPOSTALE, INC.,

a New York Corporation; Ms. Bubbles, Inc., a California Corporation,

Defendants-Appellees.

No. 10-56187.

Decided: April 09, 2012

Before DOROTHY W. NELSON, RONALD M. GOULD, and SANDRA S. IKUTA, Circuit Judges. Scott A. Burroughs (argued), Stephen Doniger, and Regina Y. Yeh, Doniger/Burroughs APC, Culver City, CA, for the plaintiff-appellant. Deborah F. Sirias (argued) and Robert M. Collins, Lewis Brisbois Bisgaard & Smith LLP, Los Angeles, CA; Jeffrey A. Miller, Lewis Brisbois Bisgaard & Smith LLP, San Diego, CA; Kristin L. Holland, Cory A. Baskin, and Zia F. Moddabber, Katten Muchin Rosenman LLP, Los Angeles, CA; and Jay Shapiro, Katten Muchin Rosenman LLP, New York, NY, for the defendants-appellees.

OPINION

L.A. Printex Industries, Inc. ("L.A. Printex") appeals the district court's summary judgment order in favor of Aeropostale, Inc. and Ms. Bubbles, Inc. ("Defendants") in L.A. Printex's copyright

infringement action. Because there are genuine disputes of material fact on access and substantial similarity, we reverse and remand.

I

L.A. Printex Industries, Inc. ("L.A. Printex") is a Los Angeles-based fabric printing company. Ms. Bubbles is a Los Angeles-based wholesaler of men and women's apparel. Aeropostale is a mall-based retailer that purchases apparel from Ms. Bubbles and other vendors.

In 2002, Moon Choi, an L.A. Printex designer, created a floral design called C30020. Choi created this design by hand, using a computer. On July 17, 2002, the Copyright Office issued a certificate of registration for Small Flower Group A, a group of five textile designs that includes C30020. Small Flower Group A is registered as a single unpublished collection pursuant to 37 C.F.R. § 202.3(b)(4)(i)(B).

Between October of 2002 and May of 2006, L.A. Printex sold more than 50,000 yards of fabric bearing C30020 to its customers, who are fabric converters. Fabric converters show apparel manufacturers textile designs, obtain orders for selected designs, place orders for the designs with printing mills like L.A. Printex, and send printed fabric to manufacturers that then manufacture apparel for sale to retailers.

In 2008, L.A. Printex discovered shirts bearing the Aeropostale trademark and a design similar to C30020. According to Jae Nah, the President of L.A. Printex, the only difference between C30020 and the design on the Aeropostale shirts is that the latter was "printed using cruder, lower-quality techniques and machinery." Aeropostale placed orders with Ms. Bubbles for the shirts in June of 2006, and it offered for sale and sold the shirts between September and December of 2006. The tags on the shirts say "Made in China." Ms. Bubbles, however, stated that it had no understanding or information about the party that created the design resembling C30020.

On April 8, 2009, L.A. Printex sued Defendants for infringement of its copyright in C30020. After bringing this infringement action, L.A. Printex became aware that its copyright registration for Small Flower Group A contained an error. Two of the five designs, but not C30020, had been published before the July 17, 2002 date of registration. On February 22, 2010, L.A. Printex filed an application for supplementary registration to add April 1, 2002 as

the date of first publication for Small Flower Group A. L.A. Printex thereafter contacted the Copyright Office to ask about its registration of a single unpublished work that contained both published and unpublished designs. The Copyright Office told L.A. Printex that the unpublished designs, including C30020, would retain copyright protection but that the previously published designs would not. On May 10, 2010, L.A. Printex filed a second application for supplementary registration to remove the two previously published designs from Small Flower Group A. On June 29, 2010, the Copyright Office approved L.A. Printex's application and issued a certificate of supplementary registration for Small Flower Group A; it states February 25, 2010 as the effective date of supplementary registration.

L.A. Printex and Defendants filed cross-motions for summary judgment. The district court granted Defendants' motion for summary judgment and denied L.A. Printex's motion, holding that there was no genuine issue of material fact as to (1) Defendants' access to C30020 or (2) substantial similarity between the allegedly infringing design on the Aeropostale shirts and C30020. The district court did not address Defendants' alternative argument that L.A. Printex's copyright registration was invalid because of the two previously published designs that were initially included in Small Flower Group A. Defendants then moved for attorneys' fees, and the district court granted their motion. L.A. Printex timely appealed to this court.

II

We have jurisdiction under 28 U.S.C. § 1291. We review the district court's grant of summary judgment *de novo*. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir.2004). Summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Ellison*, 357 F.3d at 1075. A genuine dispute is "one that could reasonably be resolved in favor of either party." See *Ellison*, 357 F.3d at 1075.

III

To establish copyright infringement, a plaintiff must prove two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

The district court granted summary judgment for Defendants because it concluded that there was no genuine issue of material fact as to the second element, Defendants' copying of original elements of C30020.

"Because direct evidence of copying is not available in most cases," a plaintiff can establish copying by showing (1) that the defendant had access to the plaintiff's work and (2) that the two works are substantially similar. *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir.1996). L.A. Printex offered no direct evidence that Defendants copied C30020. To survive summary judgment, it had to show a genuine issue of material fact as to both access and substantial similarity. L.A. Printex contends that the district court erred in holding that there was no genuine issue as to either access or substantial similarity. We agree.

A

"Proof of access requires an opportunity to view or to copy plaintiff's work." *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir.2000) (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir.1977)). "To prove access, a plaintiff must show a reasonable possibility, not merely a bare possibility, that an alleged infringer had the chance to view the protected work." *Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1143 (9th Cir.2009). Absent direct evidence of access, a plaintiff can prove access using circumstantial evidence of either (1) a "chain of events" linking the plaintiff's work and the defendant's access, or (2) "widespread dissemination" of the plaintiff's work. *Three Boys Music*, 212 F.3d at 482.

L.A. Printex seeks to prove access by showing that C30020 was widely disseminated. The district court held that there was no genuine issue of material fact as to Defendants' access because, it found, "the only evidence of widespread dissemination" was Jae Nah's declaration stating that L.A. Printex first sold C30020 in October of 2002 and that L.A. Printex "produced and sold thousands of yards of fabric bearing [Design Number C30020] to numerous customers from 2002–2008." The district court concluded that "such vague and conclusory statements certainly create no more than a 'bare possibility' that Defendants may have had access to Plaintiff's Design Number C30020" and that a "bare possibility" is insufficient to create a genuine issue on access.

However, Nah's declaration statements were not the only evidence of widespread dissemination. The record also contained a printout,

attached as an exhibit to Nah's declaration, entitled "Sales by Item Detail" for the period from January 1, 2002 through August 12, 2009. The printout is a list of invoices for C30020 and shows, for each invoice, the date, invoice number, brief description, customer name, quantity, and dollar amount. Only fabric sold before Defendants' alleged infringement is relevant. The sales records show that L.A. Printex sold more than 50,000 yards of C30020 through May of 2006, before Aeropostale's June orders for the allegedly infringing shirts.

We must decide whether L.A. Printex's sale of more than 50,000 yards of fabric bearing C30020 creates a genuine dispute of material fact as to whether C30020 was widely disseminated. We conclude that it does.

The evidence required to show widespread dissemination will vary from case to case. In *Three Boys Music Corp. v. Bolton*, the plaintiffs argued that their song-one that did not "even make the top 100 for a single week" and was not released on an album or CD before the defendants created their allegedly infringing song-had been widely disseminated during the defendants' teenage years. 212 F.3d at 483. They offered the testimony of three disc jockeys regarding the song's airtime on radio and television. *Id.* We upheld the jury's finding of access "[d]espite the weaknesses of the [plaintiffs'] theory of reasonable access" but indicated that we "might not [have] reach[ed] the same conclusion as the jury regarding access." *Id.* at 484–85. In *Rice v. Fox Broadcasting Co.*, we stated that because the plaintiff's video "only sold approximately 17,000 copies between 1986 and 1999," it could not be considered "widely disseminated." 330 F.3d 1170, 1178 (9th Cir.2003). In *Art Attacks Ink, LLC v. MGA Entertainment, Inc.*, we held that the plaintiff had not widely disseminated its T-shirt designs, even though the designs were displayed (1) at fair booths and kiosks, (2) on persons wearing the T-shirts, and (3) on the internet. 581 F.3d at 1144. Noting, among other things, that the plaintiff sold only 2,000 T-shirts bearing the designs per year, we held, "A reasonable jury could not have concluded that there was more than a bare possibility' that [the defendant] had access to [the plaintiff's] designs," and affirmed the district court's grant of summary judgment for the defendant. *Id.* at 1144–45.

The circumstances here differ from those of our prior cases, and so those cases, though instructive, are not dispositive. In *Rice*, the dissemination occurred worldwide, over a thirteen-year period. 330 F.3d at 1173. In *Art Attacks Ink*, the respective parties sold different goods, T-shirts and dolls. 581 F.3d at 1142. In contrast,

L.A. Printex and Ms. Bubbles operate in the same industry in the same Los Angeles area. L.A. Printex, a fabric printing company, sold more than 50,000 yards of fabric bearing C30020 to fabric converters. It is a reasonable inference that many or most of these purchasers were in the Los Angeles area. Apparel vendors like Ms. Bubbles purchase fabric from fabric printing companies and fabric converters. In addition, the dissemination of C30020 occurred over a four-year period immediately preceding Defendants' alleged infringement. A reasonable jury could find that C30020 was widely disseminated in the Los Angeles-area fabric industry, and hence that there was a "reasonable possibility" that Defendants had an opportunity to view and copy L.A. Printex's design. See *Art Attacks Ink*, 581 F.3d at 1143; *Three Boys Music*, 212 F.3d at 482; see also *Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 397 (5th Cir.2001) (holding that plaintiff rug wholesaler had raised genuine issue as to whether its designer rug "was widely disseminated among those involved in the United States rug trade"). We hold that L.A. Printex raised a genuine dispute of material fact on access.

B

To determine whether two works are substantially similar, we apply a two-part test. *Smith*, 84 F.3d at 1218. The "extrinsic test" is an "objective comparison of specific expressive elements"; it focuses on the "articulable similarities" between the two works. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir.2002) (quoting *Krofft*, 562 F.2d at 1164). The "intrinsic test" is a subjective comparison that focuses on " 'whether the ordinary, reasonable audience' would find the works substantially similar in the 'total concept and feel of the works.' " *Id.* (quoting *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir.1994)).

Summary judgment is "not highly favored" on questions of substantial similarity in copyright cases. *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir.1990) (quoting *Narell v. Freeman*, 872 F.2d 907, 909 (9th Cir.1989)). Summary judgment is appropriate "if the court can conclude, after viewing the evidence and drawing inferences in a manner most favorable to the non-moving party, that no reasonable juror could find substantial similarity of ideas and expression." *Id.* (quoting *Narell*, 872 F.2d at 909–10). "Where reasonable minds could differ on the issue of substantial similarity, however, summary judgment is improper." *Id.*

The district court compared the copy of C30020 that L.A. Printex deposited with the Copyright Office to Defendants' allegedly infringing shirts and concluded that "no reasonable juror could find

that the two works are substantially similar.” The district court reasoned that the “observable similarities” between the designs were “of a surface nature only,” in that “both designs represent small-scale overall floral patterns of approximately the same size.” The district court then stressed “several critical differences” between the designs: (1) the flowers, stems, and leaves on C30020 are “far more detailed” than those on the allegedly infringing shirts, “which have softer edges and are more impressionistic in appearance”; (2) on C30020, “multiple shades of one color are used to give the flowers their definition and sharper edges, while multiple shades of green are used to give the leaves and stems their definition and clean lines,” but on the allegedly infringing shirts, by contrast, “the flowers are of one uniform color, with the leaves and stem a single shade of green”; (3) C30020 “contains an overall background pattern of almost lace-like flowers that is completely lacking” on the allegedly infringing shirts; and (4) the groupings of flowers, stems, and leaves within a vertical row are “spaced much farther apart” on C30020 than on the allegedly infringing shirts.

Notwithstanding these observations by the district court, our comparison of C30020 and Defendants' allegedly infringing design leads us to conclude that a reasonable juror could find that the two designs are substantially similar.

First, we apply the extrinsic test. Because copyright law protects expression of ideas, not ideas themselves, we distinguish protectible from unprotectible elements and ask only whether the protectible elements in two works are substantially similar. See *Cavalier*, 297 F.3d at 822. In comparing fabric designs, we examine the similarities in their “objective details in appearance,” including, but not limited to, “the subject matter, shapes, colors, materials, and arrangement of the representations.” See *id.* at 826 (comparing “art works”).

Original selection, coordination, and arrangement of unprotectible elements may be protectible expression. See *Feist Publ'ns*, 499 U.S. at 362; *Cavalier*, 297 F.3d at 826–27; *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir.2002) (“Each note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection.”). For this reason, the Second Circuit has rejected the argument that, “in comparing [fabric] designs for copyright infringement,” a court must “dissect them into their separate components, and compare only those elements which are in themselves copyrightable.” *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d Cir.1995) (“[I]f we took this argument to its logical conclusion, we might have to decide that there can be no

originality in a painting because all colors of paint have been used somewhere in the past.” (internal quotation marks omitted)). In *Knitwaves, Inc. v. Lollytogs Ltd.*, the court concluded that the defendant's “Leaf and Squirrel sweaters” were substantially similar to the plaintiff's sweaters, citing, among other things, the defendant's selection of “the same two fall symbols,” leaves and squirrels, and its arrangement of the symbols “as felt appliques stitched to the sweaters' surface,” “on strikingly similar backgrounds,” and “in virtually the same color scheme.” *Id.* at 1004. Similarly, in *Hamil America, Inc. v. GFI*, the Second Circuit held that the defendant's and plaintiff's floral patterns were substantially similar because “GFI ha[d] duplicated Hamil America's selection of clustered flowers and leaves, its coordination of these elements in particular spatial combinations, and its arrangement of these design elements on a tossed pattern that appears in repeat.” 193 F.3d 92, 103 (2d Cir.1999). More specifically:

Both patterns depict small clusters of flowers and leaves. The shapes of the flower petals and the leaves are virtually identical, and feature similar defining line work and highlights in the flowers and leaves. Both patterns depict leaves that do not appear to be attached to any of the flowers. Both patterns are “tossed,” which means that they have no top or bottom and are non-directional, and appear in repeat.

Id. at 102.

Though the Second Circuit's “ordinary observer” and “more discerning ordinary observer” tests differ somewhat from our two-part extrinsic/intrinsic test for substantial similarity,² its reasoning, at least in the context of fabric designs, is persuasive, and it guides our comparison of the designs in this case. C30020 is a repeating pattern of bouquets of flowers and three-leaf branches.³ The idea of a floral pattern depicting bouquets and branches is not protectible, and C30020 has elements that are not protectible, for example the combination of open flowers and closed buds in a single bouquet or the green color of stems and leaves. See *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir.2003).⁴ However, L.A. Printex's original selection, coordination, and arrangement of such elements is protectible. See *Feist Publ'ns*, 499 U.S. at 362; *Metcalf*, 294 F.3d at 1074. Because there is “a wide range of expression” for selecting, coordinating, and arranging floral elements in stylized fabric designs, “copyright protection is 'broad' and a work will infringe if it's 'substantially similar' to the copyrighted work.” *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913–14 (9th Cir.2010). That is,

“there are gazillions of ways” to combine petals, buds, stems, leaves, and colors in floral designs on fabric, in contrast to the limited number of ways to, for example, “paint a red bouncy ball on black canvas” or make a lifelike glass-in-glass jellyfish sculpture. See *id.*; *Satava*, 323 F.3d at 812.

Our comparison of Defendants' allegedly infringing design and C30020 reveals objective similarities in protectible elements. Both patterns feature two types of small bouquets of flowers, one featuring the largest flower in profile view, the other featuring the largest flower in an open-face view, and both emerging from three buds. Both patterns also depict small, three-leaf branches interspersed between the two types of bouquets. The shape and number of the flower petals and leaves are similar in the two designs. See *Hamil Am.*, 193 F.3d at 102. The two types of bouquets are arranged at similar angles in both designs, and the bouquets and branches are coordinated in similar spatial combinations on a grid of similar scale and layout. See *id.* at 103.

Moreover, the color arrangement of C30020 in white/berry is markedly similar to the color arrangement of Defendants' design. Though mere variations of color are not copyrightable, and *L.A. Printex's* copyright in C30020 is for the design rather than a specific color arrangement, the similarities in color arrangements are probative of copying. See 37 C.F.R. § 202.1(a); *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1094 (2d Cir.1974) (“The appearance in one of defendant's fabrics of colors identical to plaintiff's is additional evidence of actual copying, as well as another factor leading to the conclusion that the aesthetic appeal of the fabrics is the same.” (internal quotation marks, citation, and alteration omitted)); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.14 (Matthew Bender rev. ed. 2011) (“[S]imilarity of color arrangements may create an inference of copying of other protectible subject matter.”).

The differences noted by the district court do not compel the conclusion that no reasonable juror could find that Defendants' design is substantially similar to C30020. Rather, in light of the similarities described above, the differences support the opposite conclusion, that there is a genuine dispute of material fact on substantial similarity. See 4 Nimmer on Copyright § 13.03[B] [1][a] (“It is entirely immaterial that, in many respects, plaintiff's and defendant's works are dissimilar, if in other respects, similarity as to a substantial element of plaintiff's work can be shown.”).

It is true that the flowers, stems, and leaves in Defendants' design are less detailed than those in C30020, and that Defendants' design does not use multiple shades of color to give the flowers and leaves definition as does C30020. But a rational jury could find that these differences result from the fabric-printing process generally and are "inconsequential," see *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 193 F.2d 162, 165 (1st Cir.1951), or could credit Jae Nah's assertion that these differences result in part from "print[ing] using cruder, lower-quality techniques and machinery," cf. *Peel & Co.*, 238 F.3d at 397–98 (finding genuine issue of material fact on substantial similarity where plaintiff claimed that differences between two rugs were "relatively small" and "consistent with shortcuts taken to make a cheap copy"). Moreover, because we conclude that stylized fabric designs like C30020 are properly entitled to "broad" copyright protection, it is not necessary that Defendants' design be "virtually identical" to infringe. See *Mattel*, 616 F.3d at 914.

In granting summary judgment for Defendants, the district court also reasoned that Defendants' design lacks the background pattern in C30020 and that the groupings of flowers, stems, and leaves are spaced farther apart in C30020 than in Defendants' design. But a copyright defendant need not copy a plaintiff's work in its entirety to infringe that work. It is enough that the defendant appropriated a substantial portion of the plaintiff's work. See *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir.2004); *Cavalier*, 297 F.3d at 825; cf. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir.1936) (Hand, J.) ("[I]t is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate."). A rational jury could find that despite some differences between Defendants' design and C30020, the similarities in the selection, coordination, and arrangement of bouquets and three-leaf branches are sufficiently substantial to support an inference of copying. Accordingly, we hold that objective similarities in the expressive elements of Defendants' design and C30020 present a genuine dispute of material fact under the extrinsic test.

At the intrinsic stage, "we ask, most often of juries, whether an ordinary reasonable observer would consider the copyrighted and challenged works substantially similar." *Mattel*, 616 F.3d at 914. But on a summary judgment motion, a court's attempt to apply this subjective and fact-oriented standard, bypassing decision by the trier of fact, is not correct. See, e.g., *Shaw*, 919 F.2d at 1359 (holding that in copyright action involving literary works,

satisfaction of extrinsic test is sufficient to survive summary judgment on issue of substantial similarity).⁵ As our precedent has evolved, the extrinsic test considers the objective expressive similarities in two works and leaves the subjective evaluation of such similarities to the intrinsic test. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1142 (9th Cir.1994). A subjective evaluation of the expressive similarities in two fabric designs, here intended for public consumption as clothing apparel, is best suited for the trier of fact. Thus, in light of our conclusion that the competing designs present a triable issue of fact under the extrinsic test, on the facts here involving stylized floral fabric designs, the issue of substantial similarity must go to the jury.

IV

Defendants contend that even if the district court erred in concluding that there was no genuine dispute of material fact on access or substantial similarity, summary judgement was proper on the alternative ground that L.A. Printex's copyright registration in C30020 is invalid. We may affirm a grant of summary judgment "on any grounds supported by the record." *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1143 (9th Cir.2003). But the record does not show that L.A. Printex's copyright registration is invalid. Defendants are not entitled to summary judgment on this alternative ground.

Copyright registration is a precondition to filing a copyright infringement action. 17 U.S.C. § 411(a); *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237, 1241 (2010). "A certificate of registration satisfies the [registration requirement], regardless of whether the certificate contains any inaccurate information," unless (1) "the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate," and (2) "the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration." 17 U.S.C. § 411(b)(1). Thus we have held that "inadvertent mistakes on registration certificates do not invalidate a copyright and thus do not bar infringement actions, unless the alleged infringer has relied to its detriment on the mistake, or the claimant intended to defraud the Copyright Office by making the misstatement." *Urantia Found. v. Maaherra*, 114 F.3d 955, 963 (9th Cir.1997); see also, e.g., *Jules Jordan Video, Inc. v. 144942 Canada, Inc.*, 617 F.3d 1146, 1156 (9th Cir.2010); *Lamps Plus*, 345 F.3d at 1145; 2 Nimmer on Copyright § 7.20 [B][1] ("[A] misstatement or clerical error in the registration application, if unaccompanied by fraud, should neither invalidate

the copyright nor render the registration certificate incapable of supporting an infringement action.”).

A copyright owner may file an application for supplementary registration “to correct an error in a copyright registration or to amplify the information given in a registration.” 17 U.S.C. § 408(d); 37 C.F.R. § 201.5. “The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration,” 17 U.S.C. § 408(d), and the earlier registration is not “expunged or cancelled,” 37 C.F.R. § 201.5(d)(2).

The Copyright Act permits the registration of multiple works as a single work. 17 U.S.C. § 408(c)(1). For purposes of registration as a single work, copyright regulations distinguish between published works and unpublished works. See 37 C.F.R. § 202.3(b)(4)(i). A published collection of works must be “sold, distributed or offered for sale concurrently.” *United Fabrics Int’l, Inc. v. C & J Wear, Inc.*, 630 F.3d 1255, 1259 (9th Cir.2011). For unpublished works, “there is no such requirement.” *Id.* A group of unpublished works may be registered as a single work if it consists of “all copyrightable elements that are otherwise recognizable as self-contained works, and are combined in a single unpublished ‘collection.’” 37 C.F.R. § 202.3(b)(4)(i)(B).6

Defendants argue that L.A. Printex's copyright registration is invalid because Small Flower Group A was registered as an unpublished collection but included two designs that were published before the work was registered. L.A. Printex argues that its erroneous inclusion of the two previously published designs in Small Flower Group A does not invalidate its registration because it did not intend to defraud the Copyright Office and because the Copyright Office allowed L.A. Printex to correct the error in its earlier registration through a supplementary registration. We agree with L.A. Printex.

The July 2002 certificate of registration for Small Flower Group A contained an error-the inclusion of two previously published designs in a work registered as an unpublished collection. But that error in itself does not invalidate the registration or render the certificate of registration incapable of supporting an infringement action. 17 U.S.C. § 411(b); *Lamps Plus*, 345 F.3d at 1145; 2 *Nimmer on Copyright* § 7.20[B][1]. There is no evidence that L.A. Printex knew that the two designs had been published at the time it submitted its application for copyright registration, or that it intended to defraud the Copyright Office. See 17 U.S.C. § 411(b)(1)(A); *Lamps Plus*, 345 F.3d at 1145. Upon learning of its

registration error, L.A. Printex corrected it. It filed an application for supplementary registration, communicated with the Copyright Office about the error through email and phone correspondence, and filed a second application for supplementary registration. Moreover, the Copyright Office issued a certificate of supplementary registration. Its decision to do so after it was told of the two designs' prior publication shows that the error was not one that "if known, would have caused the Register of Copyrights to refuse registration." 17 U.S.C. § 411(b)(1)(B). L.A. Printex's registration error does not bar its action against Defendants for infringement of its copyright in C30020.

V

We REVERSE the district court's grant of summary judgment, VACATE the award of attorneys' fees, and REMAND for further proceedings consistent with this opinion.

FOOTNOTES

1. Defendants object to the sales printout's admissibility as a business record and argue that L.A. Printex's differing characterizations of the quantity of yards sold make the document untrustworthy. The district court stated that it had either overruled or not ruled on the parties' objections to evidence. Viewing the sales printout in the light most favorable to L.A. Printex, we may consider it as part of the district court record. The numbers speak for themselves, and if credited, show sales of more than 50,000 yards.

2. See *Knitwaves*, 71 F.3d at 1002–03; *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 766 (2d Cir.1991).

3. We compare Defendants' design to the deposit copy of C30020. Because we conclude that a rational jury could find that the two designs are substantially similar, it is not necessary for us to analyze the similarities between Defendants' design and fabric swatches of C30020. But on remand, the district court—and the jury—may consider fabric swatches of C30020 in applying our two-part test for substantial similarity, so long as the district court determines that the digital prints that L.A. Printex deposited with the Copyright Office constitute "one complete copy" of C30020, and that the fabric swatches are also "copies" of C30020. See 17 U.S.C. § 101 (defining copies as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced,

or otherwise communicated, either directly or with the aid of a machine or device”); *id.* § 113(a) (“[T]he exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.”); *id.* § 408(b)(1) (requiring deposit of “one complete copy” for registration); *Three Boys Music*, 212 F.3d at 486 (stating that “our definition of a ‘complete copy’ is broad and deferential”).

4. In *Satava*, we held that “ideas, first expressed by nature, are the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them.” 323 F.3d at 812. Here too, we stress that we will not give copyright protection to ideas recurring in nature, such as flowers with brightly colored petals, stems, and buds, because brightly colored flowers exist in nature. Unlike *Satava*’s jellyfish sculptures, however, C30020 is “stylized and not lifelike,” and depicts not flowers as they appear in nature but an artistic combination of floral elements that is sufficiently original to merit copyright protection. See *Hamil Am.*, 193 F.3d at 101. What we held in *Satava* about “the common heritage of humankind” is reinforced by the Supreme Court’s recent decision in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, holding that laws of nature are not patentable but that an application of a law of nature may merit patent protection if it “contain[s] other elements or a combination of elements . . . sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the natural law itself.” — S.Ct. —, No. 10–1150, 2012 WL 912952, at *4–5 (Mar. 20, 2012). We commend the general proposition that our laws of intellectual property do not give strong protection to one who merely copies or recites what nature has provided.

5. In *Cavalier*, we left open the question whether the “Shaw rule” applies to art work. 297 F.3d at 826. Our decision today suggests that at least on the facts here presented, it does.

6. A combination of such elements is considered a “collection” if: (1) The elements are assembled in an orderly form; (2) The combined elements bear a single title identifying the collection as a whole; (3) The copyright claimant in all of the elements, and in the collection as a whole, is the same; and (4) All of the elements are by the same author, or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element. Registration of an unpublished “collection” extends to each copyrightable element in the collection and to the authorship, if

any, involved in selecting and assembling the collection.37 C.F.R. §
202.3(b)(4)(i).

GOULD, Circuit Judge:

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