

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES - GENERAL

<b>Case No.</b>	CV 10-1748 PA (JCx)	<b>Date</b>	August 9, 2010
<b>Title</b>	John J. Musero, III v. Mosaic Media Group, Inc., et al.		

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**Present: The Honorable** PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Paul Songco

N/A

N/A

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None

None

**Proceedings:** IN CHAMBERS–MOTION TO DISMISS

Before the Court is a Motion to Dismiss filed by defendants Mosaic Media Group, Inc., John Elliot, Sacha Baron Cohen, Anthony Hines, Daniel Mazer, Jeffrey Schaffer, Larry Charles, Cold Stream Productions, LLP, and Media Rights Capital, II, LP. (collectively “Defendants”). (Docket No. 18). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for August 9, 2010, is vacated, and the matter taken off calendar.

## I. Background

In 2007, plaintiff John J. Musero, III (“Plaintiff”) completed a screenplay entitled “Himbos,” which satirizes the fashion industry. Plaintiff later registered his screenplay with the Writers’ Guild of America and the United States Copyright Office. According to the complaint, Plaintiff pitched his screenplay in March 2008 to John Elliot, a manager for the talent management firm, Mosaic Media Group, Inc. (“Mosaic”). Elliot expressed interest in Plaintiff’s screenplay and requested a copy to review. Plaintiff then e-mailed the screenplay to him.

The next month, Elliot informed Plaintiff that Mosaic had decided not to develop “Himbos,” given that the firm was already developing another screenplay set in the fashion world, entitled “Bruno.” In one of the scenes in “Bruno,” the lead character wears a Velcro suit that sticks to various items of clothing and a curtain, and walks down a fashion show runway without permission, ultimately leading to his arrest by Italian police. Plaintiff alleges that this scene was taken from “Himbos,” in which the main character wears a full Velcro suit at a fashion event, gets caught on a number of objects and costumes, falls, and is chased.

On March 10, 2010, Plaintiff filed an action against Defendants in this Court, alleging claims for: (1) copyright infringement; (2) vicarious and/or contributory infringement; (3) breach of implied in fact contract; (4) breach of the implied covenant of good faith and fair dealing; and (5) breach of implied in law contract. Now, Defendants are moving to dismiss the complaint in its entirety.

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## II. Standard on Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) allows dismissal of a complaint for “failure to state a claim upon which relief can be granted.” In order to survive a Rule 12(b)(6) motion, typically a complaint need only give “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “All allegations of material fact are taken as true and construed in the light most favorable to the plaintiff.” In re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996)(quoting In re Wells Fargo Sec. Litig., 12 F.3d 922, 925 (9th Cir. 1993)). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)” Id. (citations omitted). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)(quoting Bell Atlantic, 550 U.S. at 570, 127 S. Ct. at 1974). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief’.” Id.

## III. Analysis

### A. Copyright claims

“There is ample authority for holding that when the copyrighted work and the alleged infringement are both before the court, capable of examination and comparison, non-infringement can be determined on a motion to dismiss.” Christianson v. West Pub. Co., 149 F.2d 202, 203 (9th Cir. 1945).

The elements of copyright infringement are: (1) ownership of a valid copyright and (2) unauthorized copying by the defendant of protected elements of the work. See Rice v. Fox Broadcasting Co., 330 F.3d 1170, 1174 (9th Cir. 2003). “Copying may be established by showing that the infringer had access to plaintiff’s copyrighted work and that the works at issue are substantially similar in their protected elements.” Cavalier, 297 F.3d at 822 (citing Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990)). When determining whether two works are substantially similar as a matter of law, the Ninth Circuit employs an extrinsic test that objectively compares the specific expressive elements in the two works. Funky Films, Inc. v. Time Warner Entm’t Co., L.P., 462 F.3d 1072, 1077 (9th Cir. 2006).

“The extrinsic test is an objective test based on specific expressive elements: the test focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works.” Benay v. Warner Bros. Entm’t, Inc., 607 F.3d 620, 624 (9th Cir. 2010). The court “compares, not the basic plot ideas for stories, but the actual concrete elements that make up the

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total sequence of events and the relationships between the major characters.” Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985). In applying the extrinsic test, it is the plaintiff’s burden to identify the sources of the alleged similarity between the plaintiff’s work and the allegedly infringing work. See Apple Computer, 35 F.3d at 1443. Once the plaintiff has identified the alleged similarities, “[u]sing analytic dissection, and, if necessary, expert testimony, the court must determine whether any of the allegedly similar features are protected by copyright.” Id. In comparing these features, the Court must first filter out any “unprotectable elements.” Id. “Among the ‘unprotectable elements’ which the court must ‘filter’ out of its comparison of a copyrighted work and an allegedly infringing work are: ‘ideas,’ as distinguished from the ‘expression’ of those ideas; facts, historical events, or other information over which no individual is entitled to claim a monopoly . . . ; elements borrowed from another author or from the ‘public domain’; instances in which a particular ‘expression’ at issue ‘merges’ with the ‘idea’ being expressed; and/or a similar instance in which the form of the ‘expression’ is so ‘standard’ in the treatment of a given ‘idea’ that it constitutes a scenes a faire, or a ‘scene which must be done.’” Idema v. Dreamworks, Inc., 162 F. Supp. 2d 1129, 1176-77 (C.D. Cal. 2001) (internal citations omitted).

Under the “inverse ratio” rule, a plaintiff may show infringement based on a lesser degree of similarity between the copyrighted work and the allegedly infringing work, if it can be shown that the defendant had access to the copyrighted work. Shaw, 919 F.2d at 1361; see also Rice v. Fox Broad. Co., 330 F.3d 1170, 1178 (9th Cir. 2003).

To state a claim for vicarious copyright infringement, a plaintiff must allege that the defendant has (1) the right and ability to supervise the infringing conduct and (2) a direct financial interest in the infringing activity. Perfect 10, Inc. v. Visa Int’l Serv. Ass’n, 494 F.3d 788, 802 (9th Cir. 2007). In contrast, contributory copyright infringement is a form of secondary liability with roots in the tort-law concepts of enterprise liability and imputed intent. Id. at 794-95. A defendant is a contributory infringer if it (1) has knowledge of a third party’s infringing activity, and (2) induces, causes, or materially contributes to the infringing conduct. Id.

Here, Defendants contend that Plaintiff’s copyright claims should be dismissed because the idea of a man wearing a Velcro suit that sticks to non-Velcro items and subsequently results in comic mayhem is not protectable. More specifically, Defendants contend that this concept is not subject to copyright protection because it is either nothing but a mere idea, or an idea combined with expressions that flow inevitably from that idea. In response, Plaintiff argues that the Velcro scene is more than a mere idea; it is a unique combination of elements. Plaintiff contends that the “particular way in which [he] has set up the ‘particular sequence’ of events in his Velcro scene -- in which a somewhat clueless man walks into a Fashion Week event wearing a Velcro suit, and subsequently gets himself into an array of shenanigans by sticking to everything in sight -- is consequently entitled to protection.” (Opposition, p. 6.)

The Ninth Circuit has held that even where generic, non-protectable elements are used in a work, a unique combination of those elements may be subject to copyright protection:

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The particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element. Each note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection. A common pattern that is sufficiently concrete . . . warrants a finding of substantial similarity.

Metcalf v. Bochco, 294 F.3d 1069, 1074 (9th Cir. 2002) (internal citations omitted). In contrast, “‘scenes a faire,’ which flow naturally from generic plotlines, are not protectable.” Funky Films, 462 F.3d at 1077. For example, in Funky Films, Inc., the Ninth Circuit concluded that two works were not substantially similar even though they shared numerous similarities: both works told the story of a family-run funeral home operated by two brothers after the unexpected death of their father; an older brother who moved home to help the business survive against a larger competitor, and a younger brother who changed his church affiliation in order to increase the funeral home’s client base. 462 F.3d at 1077-78. Because the plots of the works developed differently insofar as one was a murder mystery and the other was a character study, the court concluded that summary judgment was properly granted in the defendant’s favor. Id. at 1081-82. Similarly, in Benay v. Warner Bros. Entertainment, Inc., 607 F.3d 620, 629 (9th Cir. 2010), the Ninth Circuit held that the film “The Last Samurai” did not infringe on the plaintiffs’ screenplay of the same name because although both works shared numerous elements -- both protagonists started in America, traveled to Japan, met the Japanese Emperor, introduced modern warfare to the Imperial Army, encountered a samurai rebellion, suffered personal crisis and were transformed thereafter -- these similarities were largely between historical facts and scenes a faire that flowed naturally from the shared premise of an American war veteran who traveled to Japan to combat a samurai uprising. Id. at 628-29.

Here, Plaintiff contends that the Velcro scene in “Himbos” is protectable because the string of elements contained within it is unique. The scene begins with the protagonist in his Velcro suit, emerging from a car, leaving crushed rabbit food in his seat. The protagonist, along with two of his friends, is attending a “texture party” at a mansion during LA Fashion Week. At the party, to which they were told to “wear something people would enjoy touching,” the protagonist encounters models and other guests wearing costumes of fur, velour, chinchilla, feathers, bubble wrap, and silk. As the evening progresses, a rabbit gets stuck to the back of the Velcro suit, and then two cats and part of a bear suit become stuck to the suit. The protagonist then goes outside to the pool area, where more cats try to lunge at the rabbit that is stuck to the Velcro suit. As the protagonist tries to fight off the cats, he gets attached to a canopy, which causes him to pull the canopy down and knock over statues, plants and other decorations. After twirling around, the protagonist becomes attached to a waiter. He is then hit by another cat and falls into the pool, taking the waiter with him.

In the Velcro scene in “Bruno,” the lead character gets a backstage pass to a fashion show in Italy, and wears the “jewel of his wardrobe,” his Velcro suit, to the event. As the character is getting out of a car to go to the fashion show, the back of his suit gets stuck to the seat and he needs assistance in getting out. The character is then shown interviewing a model booking agent backstage, to whom he brags that his

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Velcro suit is a prototype. As the interview comes to an end, the Velcro suit gets stuck to the curtain behind the lead character. While trying to get the curtain unstuck, the character crashes into a clothes rack, and the suit gets stuck to the clothes on the rack. The lead character then crashes through another curtain, and ends up on the runway, where he proceeds to walk down the runway as if he was part of the fashion show.

Plaintiff contends that the two scenes have the following similarities: (1) both characters attend an event in Fashion Week; (2) both wear Velcro suits to attend these events; (3) both get caught on numerous items that have no Velcro on them; (4) both scenes attract the attention of the surrounding individuals, thus highlighting the characters' actions as they try to "unstick" themselves; (5) both characters lose their balance, fall, and get caught in a curtain or canopy, taking it down with them; and (6) both cause mayhem due to their inadvertent attachment to everything around them. Plaintiff argues that these similarities are not scenes a faire flowing naturally from the idea of a Velcro suit because wearing a Velcro suit would not inevitably cause a person to attend a fashion event and stick to non-Velcro items. Similarly, Plaintiff argues that the merger doctrine does not apply because "[i]f the notion of a Velcro suit was so closely merged with it being worn to fashion events and sticking to non-Velcro items to cause havoc, then the scenes at bar would not be valuable to a comedy, and Defendants would likely not be so tempted to steal it from Plaintiff." (Opp., p. 13.)

To determine whether these similarities are sufficient to satisfy the extrinsic test, the Court must examine whether there are any "articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in [the] two works." Benay, 607 F.3d at 624.

With regard to the plot, or sequence of events, in the two Velcro scenes, the Court finds that there are very few similarities between the two works once the unprotectable elements are filtered out of the analysis. Although both scenes are generally similar in that they each involve a character wearing a Velcro suit who becomes stuck to a variety of objects and subsequently causes "mayhem," this basic plot idea is not protected by copyright law.

The Ninth Circuit has consistently held that "no one can own the basic idea for a story" because "[g]eneral plot ideas are not protected by copyright law." Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985) (finding works were not substantially similar even though they both dealt with young professional's investigation and exposure of criminal organization that murdered healthy young people, and removed and sold their vital organs to wealthy people in need of organ transplants); see also Cavalier v. Random House, Inc., 297 F.3d 815, 824 (9th Cir. 2002) (finding works were not substantially similar where both shared "the general premise of a child, invited by a moon-type character, who takes a journey through the night sky and returns safely to bed to fall asleep."). Similarly, "[s]cenes-a-faire, or situations and incidents that flow necessarily or naturally from a basic plot premise, cannot sustain a finding of infringement." Cavalier, 297 F.3d at 823 (finding that night sky setting and moon character flowed naturally from idea of child's journey through night sky); see also Williams v. Crichton, 84 F.3d 581, 589

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(2d Cir. 1996) (finding that electrified fences, automated tours, dinosaur nurseries, and uniformed workers naturally flowed from uncopyrightable concept of dinosaur zoo).

Here, the idea of the Velcro suit itself is not subject to copyright protection because it is merely an idea. The expressive elements that Plaintiff alleges he added to this idea -- a character who wears a Velcro suit to a public event, gets stuck to a number of objects, falls and causes mayhem -- are scenes a faire which flow naturally from the idea of a Velcro suit and are therefore unprotectable; a character who wears a suit that starts sticking to everything around him will inevitably try to “unstick” himself and, in the process, fall and cause mayhem. When these elements are filtered out of the analysis, there are few similarities between the sequence of events in each Velcro scene. In the “Bruno” scene, the lead character gets stuck to a curtain, crashes into a rack of clothes, gets stuck to the clothes, and tumbles out onto a runway. In contrast, the “Himbos” protagonist gets crumbled rabbit food stuck to the back of his suit that attracts a rabbit, followed by a cat, and then multiple cats that are trying to get to the rabbit. The protagonist gets stuck to a canopy in the course of fighting off the cats, gets stuck to a waiter, and then falls into a pool. Also, whereas the “Bruno” character gets up after he falls and starts “modeling” the bundle of objects attached to his Velcro suit, the “Himbos” character gets out of the pool and quickly leaves the party to avoid any trouble.

The characters in each scene also do not share any similarities. The lead character in “Bruno” is a self-proclaimed fashion expert who has his own television show and attends a fashion show in Milan to conduct interviews with the people backstage. In comparison, the protagonist in “Himbos” is a salesman at Macy’s who manages to sneak into a series of events during Los Angeles’ Fashion Week in an effort to meet fashion models.

Likewise, the themes of the two works are very different. Whereas “Bruno” is driven by a series of outrageous misadventures in the lead character’s quest for stardom, “Himbos” is based on the events that take place when a group of friends, in an effort to meet fashion models, sneak into events that are held during Fashion Week.

Although both Velcro scenes take place at fashion-related events, their settings share no other similarities. The “Bruno” scene takes place at an actual fashion show during Milan Fashion Week. The scene starts backstage where the lead character is interviewing a model booking agent, and then moves to the runway, where the character disrupts the fashion show by trying to walk with the models. In contrast, the “Himbos” scene does not take place at a fashion show; it takes place at a party held at a private mansion during Fashion Week.

The mood and pace of the two scenes are also different. Whereas the “Bruno” scene unfolds in linear fashion and is centered only on the actions of the lead character, the build-up of events in the “Himbos” scene is stretched out over the course of a party, during which there are flashes to scenes involving other characters. In addition, the moods of the scenes are different insofar as the “Bruno” character is not the least bit shy or ashamed to get up after his fall and model his Velcro suit, but the

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“Himbos” character hurries to leave the party after the scene at the pool.

The dialogue in the two scenes share no similarities. While the “Bruno” scene involves little more than a few lines exchanged between the lead character and the booking agent he is interviewing at the beginning of the scene, the “Himbos” scene contains ongoing dialogue between different characters that not only touches on the Velcro suit, but also develops the flirtatious relationships between the characters.

Given the lack of similarities between the two Velcro scenes, the Court finds that they are not substantially similar. Even under the lower burden of proof required under the inverse ratio rule, Plaintiff has failed to show that the two scenes share concrete, articulable elements that are subject to copyright protection. Accordingly, because there are no additional facts that Plaintiff could allege to support his copyright claims, the Court dismisses Plaintiff’s claim for copyright infringement without leave to amend. Because Plaintiff’s claim for vicarious or contributory infringement requires a finding of infringement, that claim is also dismissed without leave to amend.

**B. State law claims**

The Court has supplemental jurisdiction over Plaintiff’s remaining claims under 28 U.S.C. § 1367(a). Once supplemental jurisdiction has been established under § 1367(a), a district court “can decline to assert supplemental jurisdiction over a pendant claim only if one of the four categories specifically enumerated in section 1367(c) applies.” Executive Software v. U.S. Dist. Court for the Cent. Dist. of Cal., 24 F.3d 1545, 1555–56 (9th Cir. 1994). The Court may decline supplemental jurisdiction under § 1367(c) if: “(1) the claim raises a novel or complex issue of state law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.”

Here, the Court has dismissed all of the federal claims over which it has original jurisdiction. Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiff’s state law claims. See 28 U.S.C. § 1367(c)(3). The Court therefore dismisses Plaintiff’s remaining claims without prejudice.

**Conclusion**

For the foregoing reasons, Defendants’ Motion to Dismiss is granted. Defendants’ Request for Judicial Notice is denied as moot. Plaintiff’s claims for copyright infringement and vicarious or contributory infringement are dismissed without leave to amend. The Court declines to exercise supplemental jurisdiction over Plaintiff’s remaining claims and dismisses those claims without prejudice. Pursuant to 28 U.S.C. § 1367(d), this Order acts to toll Plaintiff’s statute of limitations on his state law claims for a period of thirty (30) days unless state law provides for a longer tolling period.

IT IS SO ORDERED.