

9th Circuit Resurrects King Solomon's Claim to "Empire"

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In three separate opinions, a panel of the Ninth Circuit revived a *pro se* plaintiff's claim that defendants' television series "Empire" infringed upon his copyrighted "treatment" for a television series entitled "King Solomon." A treatment is a brief, written work that embodies the writer's ideas for a show. The district court dismissed plaintiff's

complaint concluding he had failed to allege facts showing Empire had copied protectable elements of his treatment for *King Solomon*.

While the majority of the Ninth Circuit agreed that plaintiff had failed to allege facts showing copying of protected elements of the treatment, it concluded the district court erred by not granting leave to amend. The majority concluded leave to amend was necessary because plaintiff could have alleged facts showing a striking or substantial similarity between the two works, and additional facts establishing a "plausible chain of events" whereby defendant had access and opportunity to copy plaintiff's work.

In a concurring opinion, Judge Wardlaw also focused on the substantial similarity element of an infringement claim, and argued that it was "virtually unheard of" to dismiss a complaint for lack of substantial similarity at the pleading stage before any discovery. Judge Wardlaw also wrote that judges are not "trained in the process of developing a short treatment into a fully developed television show," and suggested that "[d]iscovery and the expertise of persons who understand the landscape of television at the time *King Solomon* was written would have greatly informed the decision as to substantial similarity." Judge Wardlaw also opined that leave to amend was appropriate.

By contrast, in her dissent, Judge Nguyen acknowledged that plaintiff could potentially

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amend to allege copying, but argued that copying alone is not enough. Instead, a plaintiff must also allege facts establishing “unlawful appropriation,” or copying of *protectable elements*. Judge Nguyen opined that whether an element of a work is “protectable” is a question of law for the court, and that while expert testimony and discovery could be useful for establishing what similarities exist between two works, the court alone decides what elements of the work are protectable. The district court’s role, in the first instance, was to “filter out” the unprotectable components from the protectable, and then decide whether there were any similarities between the protectible expression and the allegedly infringing work. Both works were before the district court and the Ninth Circuit, and Judge Nguyen argued that when the unprotectible ideas were disregarded, there were simply no similarities between the two works as a matter of law.

It will be interesting to see where this case goes next. It is somewhat unusual to have three separate opinions from a three judge panel. Moreover, the concurring opinion and dissenting opinion are like ships passing in the night. The concurring opinion contends discovery and expert opinion is relevant to whether plaintiff can establish copying, but does not address whether such additional information is necessary if there are no *protectable* similarities between the two works. Similarly, the dissent fails to acknowledge that after a court differentiates the protectable from the non-protectable, a fact question could still exist regarding whether any protectable ideas are strikingly or substantially similar, and whether it would be useful to have expert opinion or discovery on this issue. The dissension at the Ninth Circuit makes this case potentially ripe for *en banc* review. The defendants have filed a request for an extension of time to seek *en banc* review, which request has already been granted.