

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 21 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JON ASTOR-WHITE, an individual,

No. 19-55735

Plaintiff-Appellant,

D.C. No.

v.

2:15-cv-06326-PA-RAO

DANIEL WILLIAM STRONG, AKA
Strong; et al.,

MEMORANDUM*

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Submitted August 21, 2020**
San Francisco, California

Before: THOMAS, Chief Judge, and HAWKINS and McKEOWN, Circuit
Judges.

Jon Astor-White appeals from the district court's Rule 12(b)(6) dismissal of
his amended complaint for copyright infringement. Astor-White claims that the
defendants' (Fox) television series *Empire* infringed his copyrighted treatment of a

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

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

television series, *King Solomon*. The parties are familiar with the facts, so we do not repeat them here. We affirm.

A panel of our court previously held that Astor-White’s First Amended Complaint did not state a claim for copyright infringement, but remanded the case to afford Astor-White opportunity to amend the complaint. *See Astor-White v. Strong*, 733 F. App’x 407, 407–08 (9th Cir. 2018). He was given two additional opportunities to amend the complaint, but the Third Amended Complaint still fails to plausibly allege that Fox actually “copied” and “unlawful[ly] appropriate[d]” *King Solomon*. *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc).

Astor-White does not adequately allege actual copying. *King Solomon* was not “widely disseminated”; it was shared with only three people. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000), *overruled on other grounds by Skidmore*, 952 F.3d 1051. And Astor-White’s mere allegation that those three people and he had a “working relationship” with or “move[ed] in similar circles” as Fox does not establish that Fox had a “reasonable opportunity or reasonable possibility of viewing” *King Solomon*. *Id.* (internal quotation marks omitted). Nor does Astor-White plead similarities that are probative of copying—rather than “coincidence, independent creation, or prior common source”—such that we could reasonably infer that Fox copied *King Solomon*. *Skidmore*, 952 F.3d

at 1064 (quotation omitted).

Astor-White also fails to plausibly allege that Fox unlawfully appropriated *King Solomon* because the works do not share similarities in protectable expression. *See id.* The additional alleged similarities are forms of literary expression that are unprotectable as a matter of law. *See, e.g., Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985) (“all situations and incidents which flow naturally from a basic plot premise”); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002) (“[f]amiliar stock scenes and themes”). Nor does Astor-White allege similarity in the “*particular way in which the artistic elements form a coherent pattern, synthesis, or design.*” *Skidmore*, 952 F.3d at 1074. The district court correctly concluded as part of the extrinsic test that the two works only share unprotectable “ideas and concepts, material in the public domain, and *scènes à faire.*” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118 (9th Cir. 2018), *overruled on other grounds by Skidmore*, 952 F.3d 1051. Astor-White does not state a viable claim for copyright infringement.

The district court did not abuse its discretion in refusing leave to amend. *See Rich v. Shrader*, 823 F.3d 1205, 1209 (9th Cir. 2016) (after “two opportunities to amend,” the district court has “wide discretion in granting or refusing leave to amend” (internal quotation marks and citations omitted)).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

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