

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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CASE TITLE Anas Abdin	DISTRICT Southern District of New York	DOCKET NUMBER 1:18-cv-07543
V.	JUDGE Lorna G. Schofield	APPELLANT Anas Abdin
CBS Broadcasting, Inc., et al.	COURT REPORTER	COUNSEL FOR APPELLANT John Johnson/Allan Chan

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ANAS OSAMA IBRAHIM ABDIN,

4 Plaintiff,

5 v.

18 Cv. 7543 (LGS)

6 CBS BROADCASTING INC., et al.,

7 Defendants.

8 -----x

9 January 8, 2019
11:00 a.m.

10 Before:

11 HON. LORNA G. SCHOFIELD,

12 District Judge

13 APPEARANCES

14 JOHN JOHNSON

15 ALLAN CHAN

Attorneys for Plaintiff

16 LOEB & LOEB LLP

17 Attorneys for Defendants

18 WOOK J. HWANG

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your name for
3 the record.

4 MR. JOHNSON: John Johnson.

5 MR. CHAN: Allan Chan.

6 THE COURT: Good morning.

7 MR. HWANG: Wook Hwang, law firm of Loeb & Loeb, for
8 defendants.

9 THE COURT: Good morning.

10 So we are here for an initial conference in this
11 copyright case. Thank you for your materials.

12 So what caught my eye is that I saw that the plaintiff
13 had wanted to file a, I guess second amended complaint, and
14 that the defendant would consider consenting to it on certain
15 conditions, including that the plaintiff not ask to amend again
16 upon receiving the motion. But I was wondering whether any of
17 that has now transpired, whether the plaintiff provided it to
18 the defendant and where the defendant stands.

19 MR. HWANG: Your Honor, I will be happy to address
20 that. We still have not received the third amended complaint.

21 THE COURT: It's the second amended, isn't it? It's
22 the third complaint, but second amendment.

23 MR. HWANG: Your Honor, there was a first amended
24 complaint filed as of right. The second amended complaint we
25 stipulated to previously.

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1 THE COURT: So this is the third amendment. All
2 right.

3 MR. HWANG: Correct, your Honor.

4 Again, I am speaking for defendants here, just to be
5 clear. We still have not received a copy of the third amended
6 complaint; we are waiting on it. We have no objection in
7 principle to allowing its filing. Of course, we would like to
8 see what it looks like and make sure there is nothing crazy,
9 but otherwise we would rather address it on the merits on a
10 12(b)(6) motion.

11 The one defect that we have raised in our premotion
12 letter that was submitted to Judge Buchwald when she was
13 presiding over this case, the one defect that we believe can be
14 cured is the vague allegations as to what exactly has been
15 infringed. The second amended complaint does attach a copy of
16 the work that plaintiff registered with the copyright office.

17 THE COURT: I confess, I read your letter quickly, but
18 why don't you -- I know you speak from the defendants'
19 perspective, maybe I should hear from the plaintiff first, but
20 give me a little bit more background as to what it's about.

21 MR. HWANG: Yes, your Honor.

22 So defendants are CBS and Netflix, collectively, and
23 there are several CBS entities that have been sued. They are
24 the owners of the rights to the Star Trek: Discovery series,
25 which is the latest iteration of the story franchise. It first

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1 aired, I believe, in January of 2017, but sometime in 2017.
2 The series consists of 15 episodes that focuses -- it's set in
3 the same timeline as the original Star Trek series with Captain
4 Kirk, even though Captain Kirk doesn't make an appearance in
5 this particular series, but it focuses on the genesis of the
6 war with the Klingons, which is a species --

7 THE COURT: I know about the Klingons.

8 MR. HWANG: Throughout these 15 episodes, one of the
9 features in this series that's unique, and contrasts from the
10 prior series in their franchise, is that there is an
11 experimental mycelial spore network drive that powers -- it's
12 an experimental propulsion system that powers the the USS
13 Discovery, and the spores are scattered in a matrix that is
14 everywhere in the universe and provides a platform through
15 which any ship equipped with this propulsion technology can
16 travel.

17 In one of the episodes, the mycelial spore network,
18 because it is experimental, is highly unreliable, and the way
19 that the plot gets around that issue, addresses that sort of
20 conflict, is that they discover that tardigrades, or what
21 appears to be a tardigrade -- and they surmise it's related to
22 the earth-based tardigrades, which is an actual species --

23 THE COURT: What is a tardigrade?

24 MR. HWANG: A tardigrade is a microbial animal that
25 exists on earth, discovered 200 years ago, and what they are

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1 well-known for --

2 THE COURT: Is this real or no?

3 MR. HWANG: This is real.

4 THE COURT: Can you spell it?

5 MR. HWANG: T-a-r-d-i-g-r-a-d-e-s.

6 THE COURT: OK.

7 MR. HWANG: Tardigrades are microbial animals that
8 were found in the most inhospitable environments on earth, like
9 underneath volcanoes and the like. And about a decade ago
10 there were experiments run to see whether tardigrades could
11 survive in space. This actually happened on earth in real
12 life. And they were found to be able to survive in space
13 unprotected, and survived radiation that no other creature
14 really can, at least as far as we know.

15 So the concept of tardigrades being in space has been
16 a subject of fascination, both in the scientific literature and
17 in the science fiction community, for about the last ten years.

18 THE COURT: I think I see where this is going.

19 Go ahead.

20 MR. HWANG: So plaintiff created -- by the way, before
21 plaintiff created this game, there was an article from
22 Scientific American speculating that in one of the recent Star
23 Trek movies that James Pine was in, it was the first movie in
24 the recent movie franchise, that the way the ship survived was
25 through the use of tardigrades within the warp core, which is

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1 the traditional propulsion system used on ships in the
2 Federation.

3 So this is nothing original. The idea of tardigrades
4 being in space, being connected to the Star Trek franchise, has
5 been speculated upon by the science fiction community. And the
6 way it came in to this work -- the Star Trek: Discovery focuses
7 really on the mycelial spore network, and the inspiration for
8 that was there actually is some kind of underground fungal
9 system that exists, I think in the Amazon forest, that
10 scientists in real life have discovered kind of go throughout
11 the Amazon. I may be wrong about whether it's the Amazon or
12 not, but the point is there is an analog in real life. That
13 was the inspiration for that.

14 Tardigrades being in space, being able to survive
15 harsh radiation, is nothing new; these concepts were put
16 together. In the Star Trek story, the mycelial spore network,
17 again, is the key feature of this tribe, and they use the
18 tardigrade to get around one problem. The tardigrade appears
19 in maybe two episodes for mere minutes. It's not blue like the
20 plaintiff's tardigrade. It's enlarged.

21 So, basically, our position is that the similarities
22 between plaintiff's work and defendants' work really consist of
23 an enlarged tardigrade being used in space-based fiction.

24 THE COURT: So let's go back to where I interrupted
25 you, where you said the one thing that you thought could be

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1 cured in the complaint was?

2 MR. HWANG: Yes, your Honor.

3 So if I could take a step back and describe
4 plaintiff's work. And what we have attached to the SAC is a
5 registered compilation, which I believe consists of a summary
6 of plaintiff's undeveloped game concept, which features a large
7 blue tardigrade with some pictures. It doesn't really describe
8 what the tardigrade does in the context of this video game
9 other than that it can survive in space, which is a scientific
10 fact in real life.

11 THE COURT: Was this idea submitted to your client?

12 MR. HWANG: No, your Honor, it was never submitted.
13 The theory of access and copying the plaintiffs propounded is
14 that they posted this undeveloped game concept on various Web
15 sites, including through YouTube videos, a gaming platform
16 called Steam on its own personal blog. That's the theory of
17 access they propounded, but there was never a pre-dispute
18 meeting or any theory by which defendants could have gained
19 access to this other than through the World Wide Web.

20 So back to plaintiff's work. While they have
21 attached, what I will call a treatment or summary of
22 plaintiff's work, they vaguely alleged in the SAC that the
23 original work that has been allegedly infringed -- and that's
24 capital original work, a defined term -- consists of text,
25 artwork and video, presumably posted on these various Web sites

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1 that they have identified.

2 Now, there are literally hundreds of postings, mostly
3 by the plaintiff, on these Web sites, most of them, or much of
4 it, following the commencement of this action, or certainly
5 following the genesis of this dispute, providing its own
6 commentary on the lawsuit and the purported similarities that
7 exist between plaintiff's work and defendants' work.

8 Sifting through that, it's not something that the
9 pleading requirement require defendants or the Court to
10 undertake. The pleading requirement in any copyright
11 infringement case require that the plaintiff specifically
12 identify the work they claim to have been infringed.

13 So that's the one defect that we believe can be cured.
14 If plaintiff wants to rest on this treatment and say this is
15 the entirety of the infringed work, that's fine, we are happy
16 to work with that basis. We are confident that there has been
17 no actual infringement here; they can't establish substantial
18 similarity on the pleadings. So if they want to include other
19 videos, that's fine with us too.

20 THE COURT: It's also clear to me that I know that
21 cases like this can be adjudicated on motions to dismiss, but
22 you need the work so that you can actually look at them.

23 Let me talk to the plaintiffs. I have heard a lot
24 from the defense point of view.

25 Who is speaking from the front table?

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1 MR. JOHNSON: I am.

2 THE COURT: Could you pull the mic right up so that it
3 is -- pull it up to the edge of the table and stand it straight
4 up. That way you won't have to lean over, and I will be able
5 to hear you.

6 MR. JOHNSON: So there was a lot that Mr. Hwang talked
7 about.

8 First, the plaintiff does not claim that he owns
9 tardigrades. And tardigrades are an actual species. We
10 recognize that. What the plaintiff did, which is a little bit
11 different, was the plaintiff actually created a tardigrade that
12 was able to travel in space instantaneously, which is what Star
13 Trek: Discovery is actually based on.

14 So in our opinion, they took the tardigrade, who could
15 travel instantaneously in space, and they used that tardigrade
16 in several of the episodes. And after that, they kind of did a
17 derivative work of that by actually having the tardigrade's DNA
18 injected into a human being, and still traveling through space
19 instantaneously.

20 So the plaintiff has this game that has been greenlit
21 on a site called Steam, and Steam has at any given time 500,000
22 people playing that game. Star Trek: Discovery is actually a
23 member of Steam. And for plaintiff to actually get his game
24 greenlit, he would have to have submitted it to the Steam
25 company, and then people around the Steam community, in the

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1 gaming community, would actually vote on whether or not they
2 wanted to have this game on Steam. And they did; they voted on
3 it. And it is very likely -- and we believe that discovery
4 will prove that -- very likely that Star Trek: Discovery
5 actually voted for that game, or voted against it, but either
6 way they knew that that was the game, and they saw it, they had
7 access to it.

8 And in the second amended complaint, you can see the
9 similarities of not only the characters, but the tardigrade
10 itself, the whole idea of instantaneous space travel. That's
11 not something that the scientists have thought about at all,
12 even though it was portrayed that way, but they haven't.

13 Plaintiff originally came up with this particular idea.

14 With respect to the third amended complaint -- the
15 first complaint, the only thing I did was I actually changed
16 the defendant as of right, and that was before service. The
17 second complaint, we changed some things around. We don't mind
18 or have an issue with actually getting the defendant a third
19 complaint listing all the sites, even though we believe that
20 they are listed. They are also listed in the joint position
21 statement as well. And we can get that to him in about a week
22 or so. So we don't have a problem with that.

23 THE COURT: And will this listing be sufficiently
24 specific that the defendant and the Court -- the latter being
25 more of my concern -- will be able to review the two relevant

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1 episodes of the series and then review something in particular
2 that is fairly precise to see what the similarities are?

3 MR. JOHNSON: We can do that. With respect to the
4 show, though, we would have to get that from the defendant.

5 THE COURT: Obviously.

6 MR. JOHNSON: But in terms of our portion of the game,
7 we can definitely get something and give it to the Court so the
8 Court can make a comparison, sure.

9 THE COURT: So let me ask this. I know both sides
10 were interested in a stay of discovery pending the motion, but
11 I just heard you say that there is at least one important fact
12 that you're looking forward to learning more about in
13 discovery, which is whether or not the defendants voted on the
14 game on this Web site.

15 So I guess you should know I rarely stay discovery
16 during the pendency of a motion to dismiss, and typically I
17 will only do it if I think that the plaintiff's case is
18 completely frivolous. I don't think this is. But I would
19 consider staying discovery if you told me that you thought that
20 the motion to dismiss would likely be dispositive.

21 MR. JOHNSON: I don't think that the motion to dismiss
22 is going to be dispositive.

23 THE COURT: One way or the other.

24 MR. JOHNSON: I believe that, in respect to my client,
25 there is enough similarity there; not only a substantial

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1 similarity, but I believe there is striking similarities to the
2 show, the characters in the show, and we kind of laid that out
3 in the second amended complaint. And I believe that the
4 defendant, the only thing that they were actually looking for
5 was to try to get a listing of where all the games were, but my
6 client didn't put these things every place. So it may be
7 people in the Internet community actually did it. But we would
8 welcome having discovery at least on that issue, if nothing
9 else, so that if there is going to be a dispositive 12(b)(6),
10 then at least we know that we were able to get enough
11 information and there wasn't anything there. But I believe,
12 and the plaintiff believes, that there is something there.

13 THE COURT: The 12(b)(6) will just be on the pleadings
14 and information integral to the complaint, which would be the
15 respective works. But I guess I wouldn't be able to consider
16 anything else you learn unless I convert it into a summary
17 judgment motion.

18 Let me hear from the defendant on the discovery issue.

19 MR. HWANG: We have had discussions about this and
20 both parties have expressed their desire that discovery be
21 stayed pending the outcome of the 12(b)(6) motion.

22 Regarding your Honor's question as to whether it would
23 be dispositive, I am not sure if there was a misunderstanding,
24 but certainly I expect plaintiff to oppose our motion and say
25 it should be denied. But as far as what the motion itself will

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1 constitute, it will certainly be dispositive, if it were
2 granted, of the entire case.

3 Our position, certainly, is that on the substantial
4 similarity issue, as a matter of law, the case should be
5 dismissed in its entirety. There are a host of other defects
6 that we have seen, only one of which is the allegation to
7 access. The case law is clear that merely posting materials on
8 a Web site is not sufficient to demonstrate commercial success,
9 which is what is required to allege access, barring a direct
10 chain --

11 THE COURT: There is something I don't understand
12 about this, and I admittedly don't know the law on the issue of
13 access. But it seems to me that if something is on the
14 Internet, that for pleading purposes at least, that ought to be
15 enough, because how is the plaintiff ever going to know whether
16 defendant accessed the information on the Internet or did
17 anything else with respect to the information?

18 MR. HWANG: Yes, your Honor. I can only go by
19 precedent here. There are numerous cases that dispose of cases
20 on the pleadings pursuant to Rule 12(b)(6) motions where all
21 plaintiff alleges is that the works have been posted on the
22 Internet, because I think the policy or logic behind that case
23 law is that, if posting it on a Web site was sufficient, unless
24 you're --

25 THE COURT: Well, sufficient to get you past the

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1 pleading stage.

2 MR. HWANG: That's what I am addressing, your Honor.
3 There are cases saying it's not sufficient. The idea being
4 that it would open the floodgates, unless you were a YouTube
5 influencer, for example, who posted something and you had 50
6 million views. If you're just a guy with an idea and you post
7 it up and there happened to be something similar halfway around
8 the world, which is what happened in this case -- and by
9 similar I mean just the shared concept of tardigrade being
10 used -- that would open this type of suit to discovery.

11 THE COURT: What about limited discovery on the issue
12 of whether the defendants accessed this -- is it called Steam
13 Web site, and if so, in what way, accessed the Steam Web site
14 specifically with regard to the plaintiff's work, and if so, in
15 what way?

16 MR. HWANG: Your Honor, I think the issues would be
17 that -- obviously, we would prefer not to open ourselves up to
18 discovery, not for any merits-based reason, but purely the cost
19 issue, because we do believe that this case is not just
20 meritless, but at least pushes the boundary of frivolousness,
21 and that's not bluster, that's just our view of the case.

22 There are several other defects other than access.
23 What we could consider is that option or, alternatively, if
24 your Honor and plaintiff agree, and I have to run this by the
25 client, but in whatever stipulation is entered that allows the

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1 filing of the third amended complaint, once we have seen it,
2 assuming we agree, whether or not in a stipulation, I can state
3 it on the record, or otherwise get it in, and give plaintiff
4 reassurance that we could not move to dismiss on access
5 grounds.

6 Now, I don't think that's necessary, because if your
7 Honor believes that that's a factual issue, of course your
8 Honor is going to deny the motion on those grounds, but we do
9 think --

10 THE COURT: The question is sufficiency of the
11 pleading, not whether there is a question of fact.

12 Here is what I am going to do. First of all, I am
13 going to order the plaintiff to submit to you by a week from
14 today the proposed third amended complaint. And then -- let me
15 make sure I understand what the letter says.

16 It says, "Defendants will consider consenting, upon
17 being provided with a copy, and subject to plaintiff's
18 agreement, not to seek leave to once again amend the complaint
19 in response to defendants' motion to dismiss. Plaintiff's
20 counsel has agreed to these conditions."

21 So let me ask the plaintiff's counsel, is that true?

22 MR. JOHNSON: We agreed to it, and we believe that
23 once we put the third amended complaint together, that that
24 will be it. We won't try to do any other amendments.

25 THE COURT: So I don't think we need to have a

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1 separate submission to the defendant in the first instance. I
2 think I can just give you leave to file the third amended
3 complaint. Please do it by a week from today. And please be
4 as specific as you possibly can about the sources where the
5 similarities exist with an eye in response to the motion to
6 dismiss to providing that actual material. OK?

7 MR. JOHNSON: Thank you, your Honor.

8 THE COURT: And then let's set a briefing schedule for
9 the motion to dismiss.

10 How long would you like to file?

11 MR. HWANG: Your Honor, I am trying to run through my
12 calendar in my head. I should have brought copies of my
13 calendar with me.

14 THE COURT: How about this? We will have plaintiff
15 file the third amended complaint by the 15th. And then you
16 could file the motion three weeks later, which would be the 5th
17 of February. And then we would have an opposition three weeks
18 after that, which would be the 26th of February. And then we
19 could have a reply a week after that, which would be the 5th of
20 March.

21 MR. HWANG: Your Honor, most of that should be fine.
22 The only issue is that we still don't know what the entirety of
23 the works are that we are going to have to compare to
24 defendant, and there are 15 episodes of defendants' works.
25 Again, only two of those include tardigrades, but they are

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1 asserting an infringement claim as to the entire series.

2 So I would be a little leery to be able to say that we
3 will be able to get our motion papers in within three weeks,
4 particularly with several clients here. I would request five
5 weeks, if that's possible.

6 THE COURT: So we will compromise at four. What I
7 will do is I will set the schedule as I just recited it but a
8 week later. I will put it in a written order. If the written
9 order contradicts anything that I just said, follow the written
10 order so there is no confusion on anybody's part. OK.

11 MR. HWANG: Yes.

12 THE COURT: Please look at my individual rules, which
13 have limits on the number of exhibits, on page numbers, and the
14 like. But in the event that there are more works than the page
15 limits allow, please write a letter asking me to enlarge the
16 number, and I am sure I will grant it. But that way at least
17 the record will be clear why you have submitted so much.

18 Anything that you submit to me digitally has to be on
19 a CD because that's the only medium on which we can read
20 things, or you can e-mail anything in a zip file to the
21 chambers' e-mail address. But you need something physical to
22 file also I think.

23 In terms of discovery, I am going to allow discovery,
24 and what I am going to ask you to do is limit the discovery,
25 and let me just explain why. The reason is, unfortunately, I

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1 think I have at the moment 35 fully briefed motions, and the
2 number just gets bigger every day, and I can't decide them as
3 fast as they get filed. So it will be a while. I am sorry to
4 say that. So I don't want to lose that time. It seems to me
5 if we have limited discovery, it's not going to be too
6 burdensome for either party, and also, not terribly prejudicial
7 if in fact the works really are dissimilar.

8 So what I am going to limit it to, and you can work
9 out in your discussions the exact parameters, but I am going to
10 limit it to the issue that Mr. Johnson alluded to, which was
11 the defendants accessing and viewing the plaintiff's works on
12 the Steam Web site, and any action or activity with respect to
13 that viewing, including voting. But I would leave it at that.
14 No depositions, at least at this point. So you can do document
15 requests, you can do interrogatories, or both. And I will make
16 the fact discovery date on just that issue, let's say ten weeks
17 out. So that should give you plenty of time. I may not have a
18 decision on your motion by then, but at least you won't have to
19 incur a lot of expense during that period. OK?

20 Anything else we should talk about?

21 MR. JOHNSON: I think we just have to get some copies
22 of Star Trek: Discovery.

23 THE COURT: Yes, you need to get that. Actually, I
24 think they are going to have to attach it to their motion to
25 dismiss. So you will get it that way. And likewise, you will

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1 have to attach the relevant works to your motion to dismiss.

2 So you won't need formal discovery to exchange any of that.

3 MR. JOHNSON: OK.

4 THE COURT: Anything else?

5 Hearing nothing, we are adjourned. Thank you.

6 (Adjourned)

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