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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Yolanda Buggs,

Plaintiff,

v.

Dreamworks, Inc., et al.,

Defendants.

NO. CV 09-07070 SJO (AGRx)

**ORDER GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**
[Docket No. 58]

The matter is before the Court on Defendants Dreamworks, Inc. ("Dreamworks, Inc."), Dreamworks Animation SKG, Inc. ("Dreamworks SKG"), Dreamworks Animation, LLC ("Dreamworks LLC"), and Paramount Pictures Corporation's ("Paramount") (collectively, "Defendants") Motion for Summary Judgment ("Motion"), filed on August 23, 2010. Plaintiff Yolanda Buggs ("Plaintiff") filed an Opposition to which Defendants replied. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for September 20, 2010. See Fed. R. Civ. P. 78(b). For the following reasons, the Court GRANTS Defendants' Motion for Summary Judgment.

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1 I. BACKGROUND

2 A. Procedural History

3 Plaintiff filed the initial Complaint in this Court on September 29, 2009 and filed a First
4 Amended Complaint ("FAC") on October 16, 2009. Plaintiff brings a single claim for copyright
5 infringement under the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, and alleges that Defendants'
6 animated movie, entitled *Flushed Away*, is substantially similar to Plaintiff's screenplay called
7 "Critter Island." (FAC ¶¶ 21, 25.) Plaintiff seeks statutory damages, attorneys' fees and injunctive
8 relief preventing Defendants from further infringement. On August 23, 2010, Defendants moved
9 for summary judgment. Plaintiff filed on Opposition on August 30, 2010. Defendants filed a Reply
10 on September 3, 2010.

11 B. Synopsis of Plaintiff's Screenplay - "Critter Island"

12 Plaintiff's "Critter Island" is a story about two teenage rival leaders of cockroach gangs -
13 Mario, a water bug, and Vicki, a brown-banded cockroach. Mario is the leader of a gang called
14 the "Water Bugs," and Vicki is the leader of the "Brown Bandits." Although Mario, Vicki, and their
15 respective families live in the same retirement home in Harlem, there are racial, ethnic and political
16 tensions between the two different species of cockroaches. For example, Mario's father, the
17 president of the cockroach community, emphasizes avoiding detection. The brown-banded
18 cockroaches, including Vicki's father, talk of revolt. Likewise, the Water Bugs and the Brown
19 Bandits constantly compete with one another through various activities to determine who is
20 superior. Despite being a leader of a rival gang, Mario has romantic feelings for Vicki and uses
21 the competitions to win a kiss from her.

22 During the beginning of the story, Mario is spotted by a human during a competition
23 between the two gangs. Despite his detection, the Water Bugs decide to participate in a
24 swimming competition with the Brown Bandits, not knowing that Mario cannot swim. The Water
25 Bugs lose the race and abandon Mario for causing the Water Bugs to lose. Vicki finds Mario
26 sitting near a sink where the swimming competition took place, and stays with him. There, they
27 overhear human occupants talk of exterminators who will arrive in three days to eradicate the
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1 cockroaches. Before getting a chance to warn the other cockroaches, however, one of the human
2 occupants unplugs the sink. Mario and Vicki try to avoid detection, but Vicki slips on a bar of soap
3 and gets accidentally flushed down the sink. Mario goes in after her.

4 The two cockroaches end up in the sewer and try their best to return back to the retirement
5 home to warn their families. This is particularly important for Mario because his mother recently
6 gave birth to a new egg sac. During their journey back, they travel through the sewer and onto
7 a subway. They meet Harriet Roachmen, who teaches Mario and Vicki about the importance of
8 unity, and Blinky, who gives Mario love advice. They also travel through a dumpster where they
9 meet Old Timer, the leader of Harlem. Old Timer addresses Mario's inability to swim and gives
10 him more confidence. Old Timer also tells Mario about "Critter Island."

11 With Blinky's help, Mario and Vicki return home and are able to warn the other
12 cockroaches. As soon as they arrive, the exterminators start spraying the cockroaches but, with
13 Mario's help, many survive and leave the retirement home. Mario also swims through a puddle
14 and saves his mother's egg sac. Thereafter, Mario leads the cockroaches to a dumpster truck
15 nearby where they meet Harriet Roachmen and Old Timer. Together, they reach Critter Island.
16 Mario continues to pursue his love for Vicki at the end of the story.

17 C. Synopsis of Defendants' Movie - *Flushed Away*

18 Defendants' *Flushed Away* is about Roddy, a pampered upper class pet rat, who lives in
19 a luxurious home in a posh Kensington neighborhood in London. When the human residents take
20 a vacation, Roddy takes the opportunity to enjoy the entire house. However, Roddy's plan is
21 destroyed when a lower class sewer rat, Sid, comes up from the kitchen pipes and takes over
22 Roddy's home. Roddy attempts to flush Sid back into the sewer, but Sid pushes Roddy into the
23 toilet and flushes Roddy into the sewer.

24 Roddy ends up in a sewer rat civilization called "Ratropolis." In an effort to find a way back
25 home, he meets Rita, a captain of a boat. Prior to Roddy's arrival, Rita had stolen a ruby from The
26 Toad, a genocidal under-lord of Ratropolis. Roddy foils Rita's attempt to hide from The Toad by
27 telling The Toad's henchmen that Rita stole the ruby. Roddy and Rita are both captured, but they
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1 manage to escape with the ruby. After Rita learns that the ruby is fake, Roddy promises to give
2 Rita a real ruby if she returns Roddy back home in Kensington.

3 Along the way, Roddy and Rita are recaptured by The Toad. This time, they manage to
4 escape by using a cable, which ends up being a cable that The Toad surreptitiously plans to use
5 to flood Ratropolis during the halftime bathroom break of the World Cup. The Toad orders his
6 henchmen to capture Roddy and Rita and return the cable. A chase ensues but both Roddy and
7 Rita speed away. Using a plastic bag installed on Rita's boat, Roddy and Rita catch a geyser of
8 steam and blast out of the sewer. Rita returns Roddy to his home. At that point, Roddy realizes,
9 for the first time, his lonely existence and is embarrassed to tell Rita that he is the only rat in the
10 house. Roddy tells Rita that Sid, who has now officially moved in, is his brother. However, Roddy
11 soon discovers that Sid and Rita are friends from Ratropolis. Although Rita feels sorry for Roddy,
12 she decides to return to Ratropolis with her new ruby.

13 At the house, Roddy and Sid begin watching the World Cup. Just before halftime, Roddy
14 realizes The Toad's plan to flood Ratropolis. Roddy voluntarily gives away his home to Sid and
15 asks to be flushed down the toilet again. Roddy returns to Ratropolis, defeats The Toad, and
16 successfully saves Rita and Ratropolis. Roddy becomes Rita's first-mate, and they ride off
17 together.

18 II. DISCUSSION

19 A. Legal Standard

20 Federal Rule of Civil Procedure ("Rule") 56(c) requires summary judgment for the moving
21 party when the evidence, viewed in the light most favorable to the nonmoving party, shows that
22 there is no genuine issue as to any material fact, and that the moving party is entitled to judgment
23 as a matter of law. See Fed. R. Civ. P. 56(c); *Targin v. County of Los Angeles*, 123 F.3d 1259,
24 1263 (9th Cir. 1997).

25 The moving party bears the initial burden of establishing the absence of a genuine issue
26 of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). That burden may be
27 met by "'showing' - that is, pointing out to the district court - that there is an absence of evidence
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1 to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its initial
2 burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific
3 facts that show a genuine issue for trial. *See id.* at 323-24; *Anderson v. Liberty Lobby, Inc.*, 477
4 U.S. 242, 248 (1986). "A scintilla of evidence or evidence that is merely colorable or not
5 significantly probative does not present a genuine issue of material fact." *Addisu v. Fed Mever*,
6 198 F.3d 1130, 1134 (9th Cir. 2000). Only genuine disputes where the evidence is such that a
7 reasonable jury could return a verdict for the nonmoving party over facts that might affect the
8 outcome of the suit under the governing law will properly preclude the entry of summary judgment.
9 *See Anderson*, 477 U.S. at 248.

10 To prevail on Plaintiff's copyright infringement claim, Plaintiff must prove that she owns a
11 valid copyright of "Critter Island," and that Defendants copied the protected expressions from it.
12 *See Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1044 n.2 (9th Cir. 1994);
13 *Funky Films, Inc. v. Time Warner Entertainment Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006).
14 Defendants do not dispute Plaintiff's ownership of "Critter Island." The only question before the
15 Court is whether Defendants engaged in copying.

16 Copying may be established by showing that the works in question are substantially similar
17 in their protected elements and that the infringing party had access to the copyrighted work. *Rice*
18 *v. Fox Broadcasting Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003). Copyright law only protects
19 expression of ideas, not the ideas themselves. 17 U.S.C.A. § 102. In addition, Plaintiff cannot
20 protect general plot ideas. *See Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985). Similarly,
21 scenes-à-faire, which flow naturally from generic plot-lines, are not protectable. To survive
22 summary judgment, Plaintiff must show that genuine disputes of material fact exist as to both
23 substantial similarity and access.

24 B. Substantial Similarity

25 "When the issue is whether two works are substantially similar, summary judgment is
26 appropriate if no reasonable juror could find substantial similarity of ideas and expression." *Kouf*,
27 16 F.3d at 1045. In other words, it is not enough for a plaintiff to show that the ideas are
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1 substantially similar. A plaintiff must show "substantial similarities of *both* ideas and expression."
2 *Litchfield v. Sprilberg*, 736, F.2d 1352, 1357 (9th Cir. 1984). Although substantial similarity is a
3 fact specific inquiry, it "may often be decided as a matter of law." *Sid & Marty Krofft Television*
4 *Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977). "The test for 'substantial
5 similarity of ideas' compares not the basic plot ideas for stories, but the actual concrete elements
6 that make up the total sequence of events and the relationships between the major characters."
7 *Berkic*, 761 F.2d at 1293 (citation omitted). Therefore, a "determination of substantial similarity
8 requires a detailed examination of the works themselves." *Funky Films*, 462 F.3d at 1075.

9 The substantial-similarity test in a copyright infringement case contains an extrinsic and
10 intrinsic component. *Shaw v. Lindheim*, 919 F.2d 1353, 1364 (9th Cir. 1990). "The 'extrinsic test'
11 is an objective comparison of specific expressive elements." *Cavalier v. Random House, Inc.*, 297
12 F.3d 815, 822 (9th Cir. 2002) (citation omitted). "The 'intrinsic test' is a subjective comparison that
13 focuses on 'whether the ordinary, reasonable audience' would find the works substantially similar
14 in the 'total concept and feel of the work.'" *Id.* (quoting *Kouf*, 16 F.3d at 1045). At summary
15 judgment, courts apply only the extrinsic test because the intrinsic test examines an ordinary
16 person's subjective impressions of the similarities between two works, which is exclusively the
17 province of the jury. *Funky Films*, 462 F.3d at 1077. If Plaintiff fails to satisfy the extrinsic test,
18 Plaintiff cannot survive the motion for summary judgment. See *Olson v. Nat'l Broad. Co.*, 855 F.2d
19 1446, 1448-49 (9th Cir. 1988).

20 The extrinsic test is an objective test based on specific expressive elements and " focuses
21 on articulable similarities between the plot, themes, dialogue, mood, setting, pace, character and
22 sequence of events in two works." *Kouf*, 16 F.3d at 1045. This requires the Court to "filter out and
23 disregard the nonprotectable elements in making [the] substantial similarity determination."
24 *Cavalier*, 297 F.3d at 822. "[P]rotectable expression includes the specific details of an author's
25 rendering of ideas." *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir.2002). "A court must take
26 care to inquire only whether the protect[able] elements, standing alone, are substantially similar."
27 *Cavalier*, 297 F.3d at 822.

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1 Plaintiff alleges that there are many substantial similarities of protected expression between
2 "Critter Island" and *Flushed Away*. (Pl.'s Opp'n 8:9). However, Plaintiff must show similarity at
3 a level of expression more specific than general plot ideas. See *Litchfield*, 736 F.2d at 1356
4 (holding that the extrinsic test for similarity of ideas looks beyond the vague, abstract idea of a
5 general plot and instead "focuses on . . . the objective details of the works."). Here, aside from
6 alleging general ideas, Plaintiff has failed to provide sufficient details to demonstrate that the two
7 works are substantially similar.

8 1. Plot

9 Plot is defined as the sequence of events by which the author expresses his theme or idea
10 that is sufficiently concrete to warrant a finding of substantial similarity if it is common in both
11 works. 4 *Nimmer on Copyright* § 13.03[A][1][b], at 13-42 (2003). Plaintiff argues that the plot of
12 "Critter Island" and *Flushed Away* are substantially similar because: (1) both are stories of
13 anthropomorphic pests who live "up above" ground in a human dwelling; (2) who are accidentally
14 flushed "down below" through a bathroom drain into the sewer; (3) where they form an unlikely
15 alliance with a tough, tomboy female character to find their way home; and (4) along the way, fall
16 in love and become heroes who save their respective communities. (Pl.'s Opp'n 9:1-6).

17 Both "Critter Island" and *Flushed Away* are stories of anthropomorphic pests who are
18 flushed down a drain. In each story, the pests go through adventures in the sewer and save their
19 respective communities. However, the basic plot idea of pests with human attributes getting
20 flushed and saving their communities is not protectable. See *Berkic*, 761 F.2d at 1293 (holding
21 that plaintiff's basic plot idea of young people investigating and exposing a criminal organization
22 is not protectable expression). Plaintiff must show similarities of expressions in more specific
23 details rather than allege similarities of general plot ideas. See *Litchfield*, 736 F.2d at 1356.
24 Plaintiff fails to provide sufficient details to demonstrate substantial similarity.

25 Rather, upon closer examination of the details, the two works are substantially dissimilar.
26 "Critter Island" is a story about cockroaches. *Flushed Away* is a movie about rats. "Critter Island"
27 takes place in a Harlem retirement home in New York. *Flushed Away* includes scenes in a posh
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1 single-family home located in a wealthy neighborhood of Kensington in London. The details
2 surrounding the human dwellings are also different. For example, in "Critter Island" the
3 cockroaches have no right to be at the retirement home and must steal food to survive. They are
4 unwanted pests - hence the need for exterminators. On the other hand, in *Flushed Away*, Roddy
5 is a house pet and a welcomed member of the household. Roddy is also provided with abundant
6 amounts of food.

7 Furthermore, in "Critter Island," getting flushed down the sink prevents Mario and Vicki from
8 warning the other cockroaches. Mario and Vicki must race against time and return to the
9 retirement home before the exterminators arrive. In *Flushed Away*, getting flushed down the toilet
10 is surreptitious. It provides Roddy with the opportunity to save Rita and Ratropolis. Roddy is
11 deliberately flushed down the toilet when Sid, a sewer rat, comes up from the pipes to take over
12 Roddy's home. Roddy meets Rita in the sewer, and she helps Roddy return home. At this point,
13 Roddy realizes The Toad's plan and must be flushed down again to save Rita and Ratropolis.

14 Plaintiff alleges that the two stories are substantially similar because both stories have
15 unlikely alliances between the two main characters. Plaintiff, again, fails to provide sufficient
16 details to demonstrate any concrete and articulable similarities. Details of the two works
17 demonstrate that the unlikely alliance in "Critter Island" is different than that found in *Flushed*
18 *Away*. In "Critter Island," the unlikely alliance is between Mario and Vicki. Tension between the
19 two characters is established from the beginning of the story as both try to compete with one
20 another. This tension is reinforced by the racial and political divide in the cockroach community.
21 Despite the tension between the two characters, Mario and Vicki rely on one another for a
22 common objective: to warn their families about the exterminators. *Flushed Away* has no racial
23 tension between the characters. The tension between Roddy and Rita arises out of betrayal when
24 Roddy foils Rita's attempt to hide from The Toad's henchmen. The alliance is also different than
25 that found in "Critter Island" because Roddy and Rita rely on each other for their own individual
26 objective: Roddy wants to return home, and Rita wants the ruby.

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1 Plaintiff also alleges that both stories include moments when the two lead characters
2 temporarily separate and reunite to establish trust. (Pl.'s Opp'n 9:24-25.) Plaintiff fails to provide
3 sufficient details to demonstrate substantially similarity. In "Critter Island," Mario and Vicki
4 temporarily separate when Mario accidentally loses his grip and falls out of a taxi. Vicki fears that
5 she must find her way back alone but is relieved when Mario uses his parachute pack to find Vicki.
6 At this point, trust is established. Yet, despite the temporary separation, tension between Mario
7 and Vicki remains throughout the story. In contrast, Roddy and Rita of *Flushed Away* temporarily
8 separate because Roddy thinks Rita will sell him to The Toad. Roddy then steals Rita's boat and
9 attempts to return home without Rita's help. Rita catches up with him and they clear up the
10 misunderstanding. At this point, trust between Roddy and Rita is established. The tension
11 between the two characters then dissolves.

12 Plaintiff alleges that in both stories, the two lead characters have a love/hate relationship
13 but ultimately find love. (Pl.'s Opp'n 9:21-22.) The idea of a love/hate relationship and becoming
14 heroes are general plot ideas, and therefore, not protectable. See *Berkic*, 761 F.2d at 1293-94
15 (denying protection to "familiar scenes and themes [which] are among the very staples of modern
16 American literature and film"). Furthermore, the two stories are dissimilar because Mario in "Critter
17 Island" never successfully makes Vicki his girlfriend. In fact, despite their adventure, when he tries
18 to steal a kiss from Vicki, she rejects him. In *Flushed Away*, Roddy becomes Rita's "first-mate."

19 Plaintiff strings together other plot elements that are similar in both stories: harmless
20 antagonists, a parachute device, presence of gangs or mobs, freezing victims, G.I. Joe characters,
21 singing creatures, narcoleptic characters, same audience, and gymnastic scenes. (Pl.'s Opp'n
22 12:25-13:7.) Plaintiff relies on *Metcalf v. Bochco*, 294 F.3d 1069, to allege that unprotected
23 expressions in a particular sequence can be protectable. (FAC ¶ 24.)

24 In *Metcalf*, the Ninth Circuit determined that "the particular sequence in which an author
25 strings a significant number of unprotected elements can itself be protectable." However, this
26 holding was based on the striking similarities between the plaintiffs' and defendants' work:

27 [b]oth Metcalf and Bochco works are set in overburdened county hospitals in inner-
28 city Los Angeles with mostly black staffs. Both deal with issues of poverty, race

1 relations and urban blight. The works' main characters are both young, good-
2 looking, muscular black surgeons who grew up in the neighborhood where the
3 hospital is located. Both surgeons struggle to choose between financial benefits of
4 private practice and the emotional rewards of working in the inner city. Both are
5 romantically involved with young professional women but develop strong attractions
6 to hospital administrators. Both new relationships flourish and culminate in a kiss,
but are later strained when the administrator observes a display of physical intimacy
between the main character and his original love interest. Both administrators are
in their thirties, were once married but now single, without children and devoted to
their careers and to the hospital. In both works, the hospital's bid for reaccreditation
is opposed by Hispanic politicians.

7 *Id.* at 1073-74. Plaintiff, however, fails to point to any string of unprotected elements in "Critter
8 Island" and *Flushed Away* in the sort of magnitude articulated by the *Metcalf* court. Rather,
9 Plaintiff only points to random similarities found in the two works. However, courts have routinely
10 rejected *Metcalf* claims over random similarities. See, e.g., *Flynn v Surnow*, 2003 WL 23411877
11 (C.D. Cal. Dec. 9, 2003) (rejecting *Metcalf* theory because the alleged similarities are "randomly
12 scattered throughout the works and have no concrete pattern or sequence in common"); *Kouf*, 16
13 F.3d at 1045-46 ("And, we are equally unimpressed by Kouf compilation of random similarities
14 scattered throughout the works."); *Litchfield*, 736 F.2d at 1356 (rejecting a list of similarities
15 between works because "they are inherently subjective and unreliable and holding that we are
16 particularly cautious where, as here, the list emphasizes random similarities scattered throughout
17 the work").

18 Furthermore, Plaintiff's alleged similarities do not have any concrete pattern or sequence
19 in common. For example, the harmless antagonist in "Critter Island" is Blinky, a mouse. Blinky
20 is a central character in "Critter Island" who teaches Mario about love, introduces Mario and Vicki
21 to Old Timer, and ultimately takes Mario and Vicki back to the retirement home. In *Flushed Away*,
22 the harmless antagonists are slugs. The slugs do not have a central role in *Flushed Away* and
23 only sing at random moments for added entertainment.

24 The parachute devices are also different. In "Critter Island," Mario's parachute is inside his
25 backpack and is always with him wherever he goes. Mario encounters many obstacles throughout
26 his journey and uses his parachute pack to escape various situations. For example, Vicki and
27 Mario try to enter a taxi cab but Mario falls and is left behind. Mario, however, uses his parachute
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1 to follow the taxi cab and reunite with Vicki. Mario also uses his parachute to avoid capture by a
2 spider. In *Flushed Away*, the parachute device is a plastic bag installed to slow down Rita's boat.
3 Roddy and Rita use the plastic bag to escape the sewer and return home. The plastic bag is
4 never used again throughout the story.

5 Plaintiff fails to direct the Court to concrete details that show that the gangs in "Critter
6 Island" are substantially similar to the gangs found in *Flushed Away*. In "Critter Island" the two
7 lead characters are members of gangs. Mario is the leader of the Water Bugs, and Vicki is the
8 leader of the Brown Bandits. The gangs compete with one another to determine who is superior.
9 In *Flushed Away*, Roddy and Rita are not members of gangs, but rather, are chased by a gang
10 of henchmen hired by The Toad. Initially, The Toad and his henchmen capture Rita for stealing
11 a ruby. Thereafter, the henchmen chase after Roddy and Rita to retrieve a cable. The details of
12 the two works demonstrate that the existence of gangs are substantially dissimilar. Plaintiff also
13 fails to direct the Court to any concrete pattern or sequence in common with the rest of the plot
14 elements that Plaintiff alleges is similar in both stories.

15 2. Characters

16 The male characters in "Critter Island" and *Flushed Away* are substantially different. For
17 example, Roddy in *Flushed Away* is an adult, dapper, clever, cautious, and lonely British rat living
18 as a pet in the Kensington neighborhood of London. Roddy ultimately chooses to live with Rita
19 in the sewer rather than to have a lonesome life of luxury above ground. In contrast, Mario in
20 "Critter Island" is an adolescent. He is not a loner, but rather, a leader of the Water Bugs, a son,
21 and a prominent young member of the cockroach community at the retirement home. Mario is
22 adventurous and takes risks without worrying about the consequences. Furthermore, while it is
23 true that both male characters cannot swim, the consequences of their inability to swim are
24 substantially different. For example, in "Critter Island," Mario's inability to swim leads him and
25 Vicki to be flushed down the sink. Mario also becomes a hero because he swims through a
26 puddle to save his mother's egg sac. In *Flushed Away*, Roddy's inability to swim only adds to the

1 comic relief of the story when he is flushed down the toilet and realizes that the water level only
2 reaches his knees.

3 The female characters are also very different. Rita of *Flushed Away* is a single adult female
4 rat who captains a boat around the sewer waterways. Rita plays an active role in *Flushed Away*.
5 For example, Roddy evades capture from The Toad and returns home only because of Rita. In
6 contrast, Vicki is an adolescent cockroach and a leader of the Brown Bandits. Unlike Rita, Vicki
7 does not lead, but rather, follows and supports Mario through their journey.

8 The villains in the two works are, again, different. For example, in "Critter Island," the
9 exterminators are the villains only by the fact that the exterminators' job is to eradicate pest
10 infestation. In *Flushed Away*, the villain is The Toad. The Toad wants to flood and destroy
11 Ratropolis because he has a genuine hatred towards all rats. The Toad was a former favorite pet
12 of Prince Charles who, ironically, flushed The Toad down the toilet after replacing him with a new
13 pet rat.

14 Furthermore, there are no similar counterparts to the other characters in the stories. For
15 example, Harriet Roachmen of "Critter Island" teaches Mario and Vicki about the importance of
16 unity. Blinky is a mouse who gives Mario and Vicki a ride on his fur and gives Mario lessons on
17 love. Old Timer gives Mario a different perspective of life and helps him overcome his insecurities.
18 In *Flushed Away*, no one teaches Roddy about love; he merely comes to realize that he would be
19 better off and happier living in the sewer with Rita than to live a lonely life of luxury. Furthermore,
20 there is no counterpart to Blinky. Roddy and Rita ride Rita's boat to travel through the sewer
21 waterways.

22 3. Themes

23 The underlying theme in "Critter Island" is completely lacking in *Flushed Away*. For
24 example, "Critter Island" focuses on racism and the importance of unity based on different species
25 of cockroaches. Mario and Vicki need to work together in order to return home despite being in
26 rival gangs and being different species. In contrast, *Flushed Away* focuses on different economic
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1 classes and the importance of companionship. Roddy lives in a wealthy home but is lonely.
2 Roddy decides to give up his life of luxury and return to the sewer to be with Rita.

3 4. Settings, Pace and Mood

4 Plaintiff alleges that both works are substantially similar because "Critter Island" and
5 *Flushed Away* take place in metropolitan cities and in sewers. (Pl.'s Opp'n 11:23-28.) Generalities
6 aside, a detailed comparison of the settings in both works demonstrates differences in "Critter
7 Island" and *Flushed Away*. For example, the metropolitan city in *Flushed Away* takes place in
8 Ratropolis, a well-developed city of rats in the sewers of London. The metropolitan city in "Critter
9 Island" is New York. "Critter Island" does not have a well-developed city of cockroaches.
10 Furthermore, in "Critter Island," Mario and Vicki briefly pass through the sewers of New York to
11 a subway, whereas in *Flushed Away*, the majority of the story takes place in Ratropolis. The rest
12 of "Critter Island" takes place in the streets of Harlem, a dumpster, a dump truck, a parking lot, and
13 a landfill, which the cockroaches refer to as Critter Island. *Flushed Away* has none of these
14 settings.

15 Plaintiff also alleges that the mood of "Critter Island" and *Flushed Away* are substantially
16 similar in that they are both action-adventure stories and that both stories are fast-paced and
17 intertwined with comic relief. (Decl. of Buggs in Supp. of Pl.'s Opp'n. ("Buggs Decl.") 7:19-23.)
18 The Ninth Circuit has addressed this issue and held that such similarities do not demonstrate
19 substantial similarity. See *Olson*, 855 F.2d at 1451 (finding that the comic mood is "common to
20 the genre of action-adventure television series and movies therefore do not demonstrate
21 substantial similarity"). Plaintiff fails to direct the Court to other evidence to demonstrate, apart
22 from generalities, how the mood in both works are substantially similar.

23 5. Dialogue

24 Plaintiff does not allege that there are any substantial similarities in dialogue between
25 "Critter Island" and *Flushed Away*. (Buggs Decl. 7:27.) Upon closer examination of the two works,
26 there are no similarities in dialogue between "Critter Island" and *Flushed Away*.

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1 6. Sequence of Events

2 The significant differences in the sequence of events between the two works demonstrate
3 that the two works are substantially dissimilar. For example, in "Critter Island" the story starts out
4 with young cockroaches competing with one another in the kitchen. There, Mario is detected by
5 humans despite warnings from his father to avoid detection. Soon after, the two gangs arrange
6 a swim-off competition. The Water Bugs lose the competition because Mario cannot swim. Mario
7 and Vicki then hear about the exterminators who will arrive in three days to control the pest
8 infestation. At this point, Mario and Vicki get flushed down a sink into the sewer. They meet other
9 insects like Harriet Roachmen, who teaches Mario and Vicki about the importance of unity and Old
10 Timer, who gives Mario more confidence. Blinky, Mario and Vicki return to the retirement home
11 and reunite with their families. They evacuate the cockroaches from the retirement home while
12 evading the human exterminators. Mario is able to save his mother's egg sac by swimming across
13 a puddle. They board a dumpster truck and arrive at a landfill known as Critter Island. Mario
14 continues to chase Vicki and seeks her affection.

15 In *Flushed Away*, the human residents leave for a vacation and leave Roddy all alone with
16 plenty to eat. Roddy comes out of his cage and plays with various toys around the house. Then
17 Sid, a sewer rat, comes up from the pipes and invades Roddy's space. Roddy attempts to flush
18 Sid back into the sewer, but Sid pushes Roddy into the toilet and flushes Roddy down into the
19 sewer. There, Roddy roams around Ratropolis, a highly developed city in the sewer, and tries to
20 find his way back home. He finds Rita who was trying to evade capture from having stolen The
21 Toad's ruby. Roddy and Rita get captured, but manage to escape. Thereafter, Rita learns that
22 the ruby is fake, and Roddy promises to give Rita a real ruby if Rita returns Roddy back home.
23 They make it back to Roddy's home. Rita discovers Roddy's lonely lifestyle but returns to the
24 sewer with her new ruby. At this point, Roddy realizes The Toad's plan and is flushed down the
25 toilet back into the sewers. There he saves Rita and Ratropolis from The Toad. Roddy then
26 becomes Rita's "first-mate."

1 In reviewing the plot, character, theme, setting, pace and mood, dialogue, and sequence
2 of events of "Critter Island" and *Flushed Away*, the two stories are not substantially similar to one
3 another. Plaintiff fails to provide concrete elements that demonstrate substantial similarities and
4 therefore fails to meet the requirements of the extrinsic test.

5 C. Reasonable Access

6 The next step in evaluating Plaintiff's claim for infringement is to examine the Defendants'
7 degree of access to "Critter Island." Whether Defendants had access to Plaintiff's work is in
8 dispute. Plaintiff argues that Defendants had access to "Critter Island." More specifically, Plaintiff
9 alleges that she gave Chris Kuser ("Kuser"), Plaintiff's classmate at American Film Institute ("AFI")
10 and Defendants' intern, copies of "Critter Island." Plaintiff alleges that Kuser originated the idea
11 of *Flushed Away*, and because Defendants acknowledge Kuser's receipt of "Critter Island," Plaintiff
12 alleges that Defendants conceded to access. (Pl.'s Opp'n 4:7, 5:6-10.)

13 Defendants concede that Kuser did, at one point, obtain copies of Plaintiff's "Critter Island."
14 (Defs.' Mot. 2:13.) However, Defendants argue that *Flushed Away* was not created by Kuser.
15 (Defs.' Mot. 16:26-17:2.) Instead, Defendants allege that *Flushed Away* was independently
16 created based on two different screenplays, "City Sewer" and "Ratropolis," written by third parties
17 who did not have access to "Critter Island" and who completed the screenplays before meeting
18 Kuser. (Defs.' Mot. 16:26-17:2.)

19 Defendants point out that "City Sewer," was originally created in 1998 or 1999 by Steven
20 Moore ("Moore"), a cartoonist with no connection to any Defendants. For his daily comic strip,
21 Moore thought of an incident from his childhood when his mother mistakenly believed his pet lizard
22 was dead and flushed it down the toilet. (Defs.' Mot. 4:1-3). By February 2001, Moore had
23 developed a more detailed story premise about a pet lizard being flushed down the toilet into the
24 New York City sewers where he leads other rejected pets back home. (Defs.' Mot. 4:7-8.)

25 "Ratropolis" was developed in late 2000 by Sam Fell ("Fell") of Aardman Animation located
26 in Bristol, England. Fell imagined a romantic period-piece story about two rats from opposite
27 social classes who have adventures in the sewer. The heroes of "Ratropolis" had a relationship
28

1 modeled after the Humphrey Bogart and Katherine Hepburn roles in the 1952 movie "African
2 Queen," but with the gender roles reversed. The concept of what is now *Flushed Away*, was first
3 mentioned and pitched to Dreamworks in 2002. (Defs.' Mot. 4:26-28.)

4 Nonetheless, Plaintiff alleges that Defendants failed to offer any evidence to show that
5 Kuser did not have access to Plaintiff's work. (Pl.'s Opp'n 13:17-19.) Plaintiff asserts that all dated
6 exhibits attached to Defendants' Declarations post-date Kuser's access on December 1, 2000.
7 (Pl.'s Opp'n 14:1-2.) Plaintiff relies on the "inverse ratio" rule, which lessens the level of proof
8 required to show copying when the plaintiff can show that the defendant had a "high degree of
9 access" to the protected work. *Three Boys Music Corp. v. Bolton*, 212 F.3d at 485 (9th Cir. 2000).

10 Even assuming, *arguendo*, that Defendants had a high degree of access to Plaintiff's work,
11 the inverse ratio rule does not aid Plaintiff because "[n]o amount of proof of access will suffice to
12 show copying if there are no similarities" between the protected expressions in the two works.
13 *Funky Films*, 462 F.3d at 1081. In other words, even under a relaxed standard, the requisite
14 similarities must be "concrete or articulable" to demonstrate substantial similarity pursuant to the
15 extrinsic test. *Id.* at 1081-82. Even under the relaxed standard, Plaintiff fails to demonstrate
16 concrete or articulable similarities between "Critter Island" and *Flushed Away* and has only alleged
17 similar general plot ideas, which are not protectable. See *Berkic*, 761 F.2d at 1293.

18 III. RULING

19 For reasons discussed above, Defendants' Motion for Summary Judgment is GRANTED
20 in its entirety.

21 IT IS SO ORDERED.

22
23 Dated: December 28, 2010.



24
25
26 S. JAMES OTERO
UNITED STATES DISTRICT JUDGE