

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TEXARKANA DIVISION

KEVIN BENNETT ATKINSON d/b/a  
ROGUE SATELLITE COMICS,

*Plaintiff,*

v.

NETFLIX, INC. et al.,

*Defendants.*

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Case No. 5:21-CV-0079-RWS

**DEFENDANTS' MOTION TO DISMISS FOR  
FAILURE TO STATE A CLAIM**

## INTRODUCTION

The face of Kevin Bennett Atkinson’s complaint, and the materials the complaint incorporates, all show that Defendants’ *The Umbrella Academy* works copied nothing from Atkinson. No reasonable layperson would look at Defendants’ fishbowl-headed character, Atlas Jericho Carmichael (“Carmichael”), and conclude it was copied or derived from Atkinson’s character, Kingfish. The mere *idea* of a fantasy character with a fishbowl head cannot be copyrighted. And a side-by-side comparison of Defendants’ Carmichael and Atkinson’s Kingfish is enough to end the inquiry as a matter of law: Carmichael—a natural shubunkin goldfish who lives within a water-filled bell jar stationed atop a suit-wearing, human male body—bears no *actionable* resemblance to Kingfish, a multi-fanged fish-like creature brooding within a crowned and intubated bell jar, sitting atop a cape-wearing, metallic-looking frame and whose robotic-looking hands grasp a bat-topped scepter. Copyright law does not give Atkinson a monopoly over all fishbowl-headed characters. Atkinson’s complaint should therefore be dismissed *with prejudice* because Atkinson cannot amend around the substantially dissimilar images and literary elements at the center of his complaint.<sup>1</sup>

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<sup>1</sup> For the reasons shown below—and consistent with Rule 12(b)(6)—Defendants submit with their motion a collection of *The Umbrella Academy* comics as Doc. 32-1 through Doc. 32-6, which are consecutively paginated for ease of citation. Accordingly, citations such as “Doc. 32-5 at 88” are citations to the page numbers imposed on the collection. Defendants have separately submitted a collection of episodes from Season 2 of the Netflix series *The Umbrella Academy* as Doc. 32-7, which also includes a 90-second recap of Season 1, which are stored on discs delivered to the Court. When Defendants cite to relevant episodes listed in Doc. 32-7, the citation refers to the season number, episode number, and the runtime where the material begins and ends (e.g., “Doc. 32-7 S1:Recap,” or “Doc. 32-7, S2:E2 at 2:35 to 4:48”). Defendants have also provided and consecutively paginated Atkinson’s collected works as Doc. 32-8 through Doc. 32-10, and cite to that collection consistent with Docs. 32-1 to 32-6 (e.g., “Doc. 32-8 at 47”). Although these materials are widely available, Defendants have sought leave to maintain these materials under seal (Doc. 31) to ensure they are not publicly accessible and thus to preserve their value.

## ISSUES PRESENTED

I. Copyright infringement is actionable only if a side-by-side comparison of the *protectable* elements of the plaintiffs' copyrighted works shows that the defendants' later work can fairly be regarded as appropriating the plaintiffs' earlier, original expression when viewed as a whole. Ideas, basic plot devices, stock characters (e.g., talking animals), and objects occurring in nature are all examples of *unprotectable* features. Here, viewed as a whole, Atkinson's works and Defendants' *The Umbrella Academy* share only unprotectable features: plot devices, talking animal characters, items found in their natural or common state, etc. Can Defendants' *The Umbrella Academy* works be fairly regarded as having appropriated anything from Atkinson?

II. Copyright infringement requires a plausible showing of "factual copying," which, in turn, requires a showing of "plausible similarity," i.e., that comparative features in the parties' works (whether protectable or not) suggest that, in the normal course of events, the works' similarities would not arise independently. Here, even looking beyond protectable features, no one could conclude that, in the normal course of events, *The Umbrella Academy*'s similarities to Atkinson's works (e.g., uses of ubiquitous plot devices, supernatural powers, etc.) resulted from copying rather than independent creation. Can Atkinson state a claim for copyright infringement?

III. A plausible showing of "factual copying," requires plaintiffs to plead facts showing that the defendants had a reasonable opportunity to view the copyrighted work before creating the infringing work (i.e., "access"). Facts indicating nothing more than a mere possibility of access are insufficient. Here, Atkinson alleges merely that Defendants have been in the comic book industry with sufficient time to know about Atkinson's works. Has Atkinson's complaint plausibly shown access?

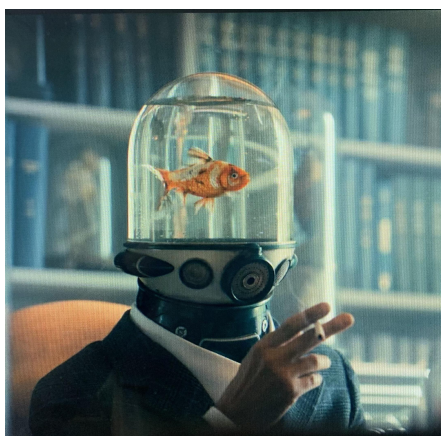
IV. Although leave to amend is typically granted before an action is dismissed and final judgment entered, leave to amend should not be given when amendment would be futile. Atkinson cannot amend around the substantial dissimilarities in the parties' established works. Should Atkinson be given leave to amend his complaint?

## FACTUAL BACKGROUND

*The Umbrella Academy* series on Netflix is inspired by the comics of the same name, which were written by Gerard Way. *See* Doc. 1 at 7–9. To make a long story short (and spoiler-free), *The Umbrella Academy* series and comics tell the story of the titular Umbrella Academy, a collection of extraordinary *human* youths with supernatural powers who were born under extraordinary conditions and then gathered and trained for an extraordinary purpose—to stop the apocalypse (on Earth). *E.g.*, Doc. 32-1 at 9–15; Doc. 32-7, S1:Recap. Fulfilling their purpose requires The Umbrella Academy (or at least some of its members) to travel through time,

which, in turn, often leads to clashes with the “Temps Commission” (known in the comics as “Temps Aeternalis”), an organization that exists outside of time to ensure that all historical events that are supposed to happen do happen (like the assassination of John F. Kennedy). Doc. 32-4 at 32–41; Doc. 32-7, S1:Recap. Carmichael chairs the Temps Commission. Doc. 32-5 at 77, 87–89; Doc. 32-7, S2:E2 at 2:26 to 4:40. And the Temps Commission looks unfavorably on The Umbrella Academy’s temporal trespasses. Doc. 32-6 at 157–58; Doc. 32-7, S2:E9.

Carmichael in the Netflix series resembles (and is based on) the Carmichael portrayed in *The Umbrella Academy* comic books:



As the comic panel states, and as both pictures show, the sentient being Carmichael is not some imagined creature of fantasy. He is an ordinary shubunkin goldfish, albeit a speaking and reasoning one, “having transparent scales covering a mottled skin and slightly lengthened fins.” *Webster’s Third New International Dictionary Unabridged* 2108 (2002). And that goldfish is housed where goldfish are typically housed—in a container (a bell jar) filled with water. Carmichael’s bell jar sits atop and is mounted on a well-dressed male human body, through which Carmichael smokes, walks, talks, and carries out the Temps Commission’s business. Carmichael is at the center of this action.

On June 7, 2021, Atkinson sued Defendants for copyright infringement arising out of Defendants’ *The Umbrella Academy* productions. According to Atkinson’s

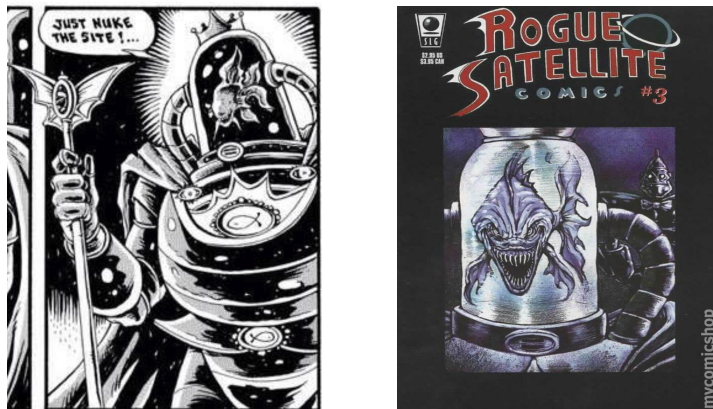
complaint, Atkinson created and issued (or re-issued) seven comic books under the name “Rogue Satellite Comics,” and obtained a registered copyright for each publication, a collection that Atkinson deems “the Copyrighted Works at Issue.” Doc. 1 ¶¶ 14–21. Although Atkinson “specifically *asserts* copyright infringement through Defendants’ use of many scenes and features from the Copyrighted Works at Issue,” he identifies only one such feature in his complaint: “the character that Defendants call Carmichael[.]” Doc. 1 ¶ 26 (emphasis added).

For example, while Atkinson asserts that “portions of *The Umbrella Academy* storyline are substantially and strikingly similar to the Copyrighted Works at Issue,” Doc. 1 ¶ 34, Atkinson does not plead any facts suggesting that *The Umbrella Academy*’s time-bending, Earth-based storyline is similar to anything from his Rogue Satellite comics (other than Carmichael). *See* Doc. 1 at 9–11. In fact, Atkinson’s complaint mentions nothing about his comics’ storyline: where they’re set, who their main players are, the arc for his characters, etc. A very few plot points may be gleaned from the Rogue Satellite Comics panels that Atkinson did include. *See* Doc. 1 ¶¶ 36, 38.<sup>2</sup> And those panels indicate that Atkinson’s comics are something very different from *The Umbrella Academy*: the setting appears to be outer space not Earth; the characters appear to be on some sort of spaceship; and there are only two human-looking characters in the bunch. Doc. 1 ¶¶ 36, 38.

Kingfish—the piscine character that the complaint identifies as allegedly shared between the parties’ works—isn’t one of those human-looking characters. And, as shown below, he’s no goldfish.

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<sup>2</sup> Atkinson provides another panel in his complaint at paragraph 38 but the text, even when magnified, is illegible. The panel depicted in paragraph 38 may, however, be found in Doc. 32-9 at 115.



Doc. 1 ¶¶ 36–37. In the one color panel depicted in Atkinson’s complaint, Kingfish’s visage is, in a word, *demonic*. Kingfish’s gaping jaws reveal a capacious mouth with a collection of fangs that would make any vampire envious. A large dragon-like spine protrudes from Kingfish’s back. Abnormally large fins protrude from his sides. His tail fills almost the entire height of the large coronated tank in which he broods. And, with the assistance of large metallic-looking tubes, Kingfish’s tank sits atop a metallic-looking, cape-adorned frame that wields a bat-topped staff or scepter and boasts an ornate chest-piece and girdle, both of which bear symbols closely resembling Christian iconography (i.e., the ubiquitous “Jesus fish”). Moreover, Kingfish’s metallic-looking frame consists of a series of stacked circles or rings such that his body looks more like the Michelin Man® than a human one (like Carmichael).<sup>3</sup>

Although Atkinson alleges further that “the striking similarities between [Carmichael] and the Copyrighted Works at Issue” suggest that “Defendants had access to the Copyrighted Works at Issue before creation,” Doc. 1 ¶ 28, he pleads no other facts that would suggest access. At no point, for example, does Atkinson allege any facts indicating Way actually saw or had a copy of any Rogue Satellite Comics before commissioning Carmichael. To the contrary, Atkinson’s allegations about Way

<sup>3</sup> The Michelin Man® may be seen in service as the mascot of Michelin Tire on the United States Trademark Registry at <https://tess2.uspto.gov/bin/showfield?f=doc&state=4801%3A4noah.4.16>.



are limited merely to “the small size of the commercial comic book world and Way’s involvement in it[.]” Doc. 1 ¶ 23. Atkinson makes similar industry-based allegations about “Defendant Dark Horse” (ostensibly both of them). *Id.* ¶ 24. There are no allegations of access against Netflix, Inc., Netflix Studios, LLC, or Universal Content Productions, LLC.

None of these allegations state a claim for copyright infringement upon which relief may be granted. Atkinson’s complaint relies on and expressly incorporates the content of his own comics and of Defendants’ works. And those works themselves disprove Atkinson’s claims—as a matter of law.

### RELEVANT LEGAL STANDARDS

Rule 12(b)(6) exists to thin from the Court’s docket facially implausible claims and cases like this one. *See Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742 (5th Cir. 2008). Claims are facially plausible only when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Gonzales v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (cleaned up).<sup>4</sup> The complaint must therefore offer more than an “unadorned, the-defendant-unlawfully-harmed-me accusation,” and must “permit the court to infer more than the mere possibility of misconduct[.]” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Otherwise, “the complaint has alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* (cleaned up). In deciding a motion to dismiss, all well-pleaded facts are accepted as true, and are viewed in the light most favorable to the plaintiff. *Gonzales*, 577 F.3d at 603. But, because of their conclusory nature, neither

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<sup>4</sup> The parenthetical “cleaned up” is used to indicate that internal quotation marks, citations, or other alterations have been omitted from a quotation provided in the brief. Although still new to some, the parenthetical is being used with increasing frequency. For examples of its use in published opinions, see *Brownback v. King*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 740, 748 (2021), and *Future Proof Brands, LLC v. Molson Coors Beverage Co.*, 982 F.3d 280 (5th Cir. 2020). Professor Eugene Volokh also provides a helpful summary of the parenthetical’s origins and wide use on his blog at <https://reason.com/volokh/2021/03/12/cleaned-up-parenthetical-arrives-in-the-supreme-court>.

a formulaic recitation of the elements nor legal conclusions receive a presumption of truth. *Iqbal*, 556 U.S. at 678.

Rule 12(b)(6) applies as much to claims of copyright infringement as any other claim in civil litigation. See *Randolph v. Dimension Films*, 634 F. Supp. 2d 779, 787 (S.D. Tex. 2009) (collecting cases), *summarily aff'd* 381 F. App'x 449 (5th Cir. 2010); *accord Tanksley v. Daniels*, 902 F.3d 165, 171 & n.2 (3d Cir. 2018) (collecting cases); *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64–65 (2d Cir. 2010) (collecting cases); *Taylor v. IBM*, 54 F. App'x 794 (5th Cir. 2002). When considering such a motion within the copyright-infringement context, courts consider not only the facts alleged within the complaint's four corners but also any documents attached to the complaint as exhibits or that the complaint's allegations incorporate by reference. *Randolph*, 634 F. Supp. 2d at 787; *accord Tanksley*, 902 F.3d at 172 (“[C]ourts are not limited to the four corners of the complaint, but may also consider evidence integral to or explicitly relied upon therein.” (cleaned up)); *Peter F. Gaito Architecture*, 602 F.3d at 64 (“It is well settled that in ruling on such a motion, a district court may consider the facts as asserted within the four corners of the complaint together with the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference.” (cleaned up)); *cf. Robles v. Ciarletta*, 797 F. App'x 821, 831–32 (5th Cir. 2019) (affirming district court's decision to grant defendant's Rule 12(b)(6) motion against plaintiff's civil rights claims based on the content of the body-camera footage and a police report because the plaintiff's complaint referred to both and both were central to the plaintiff's claims).

Under these standards, Atkinson's complaint should be dismissed *with prejudice* because the complaint's allegations—and all materials central to or incorporated by those allegations—show that Atkinson has no claim for copyright infringement against the Defendants as a matter of law.



## ARGUMENT

Pleading a plausible copyright claim requires fact-based allegations showing “(1) ownership of a valid copyright; (2) factual copying; and (3) substantial similarity.” *Digital Drilling Data Sys., LLC v. Petrolink Servs., Inc.*, 965 F.3d 365, 373 (5th Cir. 2020) (cleaned up).<sup>5</sup> Here, Atkinson’s allegations are insufficient—and never will be sufficient—to show that Defendants’ *The Umbrella Academy* works are substantially similar to Atkinson’s Kingfish character or his comics generally. In fact, Atkinson can’t even satisfy the much more lenient “plausible similarity” standard needed to allege factual copying. And there are no facts in Atkinson’s complaint that suggest any Defendant had access to Atkinson’s protected works before creating their own *The Umbrella Academy* works—another showing needed to establish factual copying. In short, beyond his alleged ownership, Atkinson cannot plausibly plead any elements of his claim against Defendants. His complaint should therefore be dismissed *with prejudice* because amendment would be futile.

### **I. No Reasonable Layman Who Conducted a Side-By-Side Comparison of Atkinson’s and Defendants’ Works Would Conclude That They Are Substantially Similar.**

Atkinson’s complaint—and the materials central to it—conclusively show that there is no “substantial similarity” between Atkinson’s Rogue Satellite Comics and *The Umbrella Academy*. “Works are substantially similar within the intendment of copyright law if they are so alike that the later (unprotected) work can fairly be regarded as appropriating the original expression of the earlier (protected) work.” *Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 67 (1st Cir. 2009); accord *Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC*, 958 F.3d 532, 539 (6th Cir. 2020). “[C]ourts have justified consideration of substantial similarity at the pleading stage by noting that no discovery or fact-finding is typically necessary.” *Tanksley*, 902 F.3d at 172 (cleaned up). This is because substantial similarity hinges not on a plaintiff’s

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<sup>5</sup> For the purposes of this Motion only, Defendants do not challenge Atkinson’s allegations regarding ownership.

self-serving *characterizations* about the parties' works but on the *content* of the works themselves. *See id.*

In examining the respective works for substantial similarities, courts conduct a side-by-side comparison of the original work and the accused work “to determine whether a layman would view the two works as substantially similar.” *Nola Spice Designs, LLC v. Haydel Enters., Inc.*, 783 F.3d 527, 550 (5th Cir. 2015) (cleaned up). And because this determination hinges on the layman's perspective, no aid or suggestion or critical analysis by others is needed—or permitted. *Nola Spice Designs*, 783 F.3d at 550.

Applying the reasonable-layperson standard requires courts to isolate the protectable elements of the copyrighted works from the unprotectable ones. Courts then examine whether those protectable elements of the parties' respective works are substantially similar. *Nola Spice Designs*, 783 F.3d at 550. In weighing the substantial similarity of compared works, courts look to the works as a whole and then weigh the qualitative and quantitative significance of the respective works' protected features. *Id.* at 552. “As a matter of logic as well as law, the more numerous the differences between two works the less likely it is that they will create the same aesthetic impact so that one will appear to have been appropriated from the other.” *Randolph*, 634 F. Supp. 2d at 788–89 (cleaned up). After viewing the materials, and drawing all inferences in the light most favorable to the nonmovant, courts will dismiss copyright claims at the pleadings stage when “no reasonable [person] could find substantial similarity of ideas and expression.” *Randolph*, 634 F. Supp. 2d at 787 (cleaned up); accord *Tanksley*, 902 F.3d at 171 & n.2 (collecting cases); *Peter F. Gaito Architecture*, 602 F.3d at 64–65 (collecting cases). In such cases, “justice is best served by putting ‘a swift end to meritless litigation.’” *Randolph*, 634 F. Supp. 2d at 787 (quoting *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980)).

Under this record and these standards, justice would be best served by putting a swift end to *this* litigation because pointing out the differences between the parties' works as a whole, or even as to Carmichael and Kingfish only, is like shooting fish in a barrel.

**A. Taken as a Whole, There Are No Substantial Similarities Between the Protectable Elements of Atkinson's Episodic Rogue Satellite Comics and Defendants' *The Umbrella Academy* Works.**

Once the protectable elements of the parties' works are separated from their unprotectable elements, a reasonable layperson could reach only one conclusion: taken as a whole, Defendants' works are substantially *dissimilar* to Atkinson's. A work's protectable elements never include mere ideas (i.e., a fishbowl-headed character, time travel, etc.); copyright protects only the unique expressions of ideas. *E.g.*, *Computer Mgmt. Assistance Co. v. Robert F. DeCastro, Inc.*, 220 F.3d 396, 400 (5th Cir. 2000); *accord Concrete Mach. Co., Inc. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606 (1st Cir. 1988) ("[M]ere identity of ideas expressed by two works is not substantial similarity giving rise to an infringement action."). Nor may copyright owners "prove infringement by pointing to features of [their] work that are found in the defendant's work as well but that are so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another." *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004) (cleaned up).

Unprotectable and commonplace features in two works include "stock characters": "a drunken old bum[,] a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels, a masked magician, or a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress." *Id.* (cleaned up). Otherwise, "[i]t would be difficult to write successful works of fiction without negotiating for dozens or hundreds of copyright

licenses, even though such stereotyped characters are the products not of the creative imagination but of simple observation of the human comedy.” *Id.*

Unprotectable and commonplace features also include ideas first expressed in nature, such as “an eagle with talons extended to snatch a mouse; a grizzly bear clutching a salmon between its teeth; a butterfly emerging from its cocoon; a wolf howling at the full moon; [and] a jellyfish swimming through tropical waters.” *Enchant Christmas Light Maze & Mkt.*, 958 F.3d at 538 (cleaned up) (quoting *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003)). These kinds of features are instead “the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them.” *Enchant Christmas Light Maze & Mkt.*, 958 F.3d at 537–38 (cleaned up).

Here, although Atkinson *asserts* that the larger storyline in *The Umbrella Academy* is substantially similar to his Rogue Satellite Comics (Doc. 1 ¶¶ 28, 34), he pleads nothing to *show* it. Atkinson provides no overview of his comics’ storyline at all, saying nothing of a comparison between that storyline and Defendants’ *Umbrella Academy* works. And with good reason: there is *no* substantial similarity between the parties’ works.

As Rule 12(b)(6) permits (*e.g.*, *Randolph*, 634 F. Supp. 2d at 787), Defendants have submitted with their motion a copy of their *The Umbrella Academy* works (the comics and select episodes of the Netflix series) and a copy of Atkinson’s comic books, which are compiled in *Rogue Satellite Comics*. Even a cursory review of these materials shows that the two storylines, taken as a whole, are wholly distinct.

Atkinson’s comics concern the random hijinks of a menagerie of eccentric characters—the vampire cyborg Caleb Steele,<sup>6</sup> the strange egg-shaped Moon,<sup>7</sup> the Oz

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<sup>6</sup> Doc. 32-10 at 181–94.

<sup>7</sup> Doc. 32-8 at 65.

Squad,<sup>8</sup> among others<sup>9</sup>—whose storylines have multiple settings and arcs and are often totally independent of each other. But none of Atkinson’s characters were, for example, born under supernatural circumstances and then harvested from their families and trained in a special school so that they could thwart Earth’s apocalypse while also avoiding run-ins with a special (and especially violent) commission charged with keeping the Earth’s temporal existence in good order—the arc of *The Umbrella Academy*.<sup>10</sup> Other substantive differences abound after even a cursory comparison of the two works.<sup>11</sup> And where there are similarities, they’re unprotectable ones: plots involving elements of time-travel, stock characters, stock settings, and or other natural or unavoidable features. Put simply, there is nothing in *The Umbrella Academy* comics or series that, when viewed as a whole, indicate that their protectable elements were lifted from any of Atkinson’s works.

**B. There Is Nothing Substantially Similar About Carmichael and Kingfish—Assuming Kingfish Is Entitled to Protection in the First Instance.**

Reducing Atkinson’s copyright-infringement claim merely to the two characters identified in his complaint—Carmichael and Kingfish—does nothing to improve his claim. “Not every comic book, television, or motion picture character is entitled to copyright protection.” *Daniels v. Walt Disney Co.*, 958 F.3d 767, 771 (9th Cir. 2020) (cleaned up), *cert. denied* 141 S. Ct. 1050 (2021). Characters like Atkinson’s

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<sup>8</sup> Doc. 32-8 at 57–64.

<sup>9</sup> See, for example, the bewildering tale of “the Black Glider” and “Beyonda,” Doc. 32-8 at 83–90, or the strangeness of “A Silver Age Tale of Tomorrowman,” Doc. 32-10 at 237–40, neither of which have any conceivable connection with Kingfish or the storylines in which he may appear.

<sup>10</sup> *E.g.*, Doc. 32-4 at 45–65; Doc. 32-5 at 66–82, 105–07; Doc. 32-6 at 139–49; Doc. 32-7 at S1:Recap; *id.* at S2:E2.

<sup>11</sup> Another obvious difference is the works’ respective aesthetic differences—their overall feel. *Nola Spice Designs*, 783 F.3d at 550. Atkinson’s works adopt a more classic comic/news-strip style versus *The Umbrella Academy*’s more vivid and avant-garde style. Moreover, each set of works’ execution of their stock literary elements vary wildly: *The Umbrella Academy* engages in time-travel through “traditional” means (e.g., cosmic powers or mechanical means). *E.g.*, Doc. 32-6 at 134–37; Doc. 32-7 at S2:E1 at :10 to 7:10. Atkinson’s characters, on the other hand, travel through time using very *untraditional* means, such as by flinging time-travel-inducing goo from a UFO, Doc. 32-8 at 55–56, or by using blankets to ride the “time slides,” which resemble something experienced at a McDonald’s Playland. Doc. 32-8 at 83–84.

Kingfish are entitled to independent copyright protection only if “(1) the character has physical as well as conceptual qualities, (2) the character is sufficiently delineated to be recognizable as the same character whenever it appears and displays consistent, identifiable character traits and attributes, and (3) the character is especially distinctive and contains some unique elements of expression.” *Id.* (cleaned up). And, here, Atkinson makes no showing that Kingfish is especially distinctive or that he contains unique elements of expression. Kingfish’s appearance is clearly derivative of myriad characters from venerable works of science fiction and fantasy, including Robby the Robot from *Forbidden Planet*,<sup>12</sup> and Mysterio from Marvel’s *Spiderman*.<sup>13</sup> Yet, despite this backdrop, Atkinson’s complaint pleads no *facts* that show Kingfish is especially distinctive. The Court may therefore cite this deficiency as yet another reason to dismiss this action with prejudice.

That said, dismissal with prejudice would be justified even assuming that Kingfish is protectable as an independent work. There is *nothing* substantially similar about Kingfish’s protectable elements and those of Carmichael.

In addition to the unprotectable features identified above (stock characters, items in nature, etc.), common anatomical features on animals or cartoon figures (e.g., arms, legs, faces, fingers, etc.) all fall in the realm of commonplace and unprotectable features. *Nola Spice Designs*, 783 F.3d at 551 (collecting cases). Protectable elements for characters like Carmichael and Kingfish, on the other hand, include any number of aesthetic elements (e.g., appearance, pose, attitude, expression, coloring, lighting, size, shape, etc.), and any number of literary elements (e.g., character arc, what they

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<sup>12</sup> See, for example, IMBD’s “Forbidden Planet” page, which hosts numerous photos of Robby the Robot. See [https://www.imdb.com/title/tt0049223/mediaviewer/rm1706413056/?ref\\_=ext\\_shr\\_lnk](https://www.imdb.com/title/tt0049223/mediaviewer/rm1706413056/?ref_=ext_shr_lnk) (last visited Aug. 9, 2021).

<sup>13</sup> Kingfish mimics not only Mysterio’s domed appearance and caped frame but also the distinctive All-Seeing-Eye shoulder clasps that secure Mysterio’s cape. Compare, for example, Doc. 32-8 at 87, and virtually any image of Mysterio drawn since his debut in 1964, several of which can be found here: Marvel.com, “Who Is Mysterio?” (available at <https://www.marvel.com/articles/comics/meet-mysterio>, last visited Aug. 9, 2021).



say, what they know, etc.). *E.g.*, *Enchant Christmas Light Maze & Mkt.*, 958 F.3d at 537–38; *Coquico*, 562 F.3d at 69; *Gaiman*, 360 F.3d 659–60.

The fact that, like Kingfish, Carmichael is a talking and (allegedly) villainous fish who lives in a bell jar atop a body that ambulates is immaterial. None of those stock features are protectable. No matter how villainous, talking fishes—like talking cats—are stock characters. *See Gaiman*, 360 F.3d at 659. Indeed, fish have been talking in literary works since at least the days of Aesop.<sup>14</sup> Moreover, a talking fish’s residence within a water-filled container is also unprotectable because it is an idea expressed not only in nature, *see Enchant Christmas Light Maze & Mkt.*, 958 F.3d at 537–38, but in venerable works too numerous to count (*The Cat in the Hat*, for one). Recognizing a copyright based only on the mere and abstract idea of a fishbowl-headed character would give Atkinson a monopoly on creative building blocks that copyright law does not afford him.

To show infringement, Atkinson must show similarity in more than the idea of a fishbowl-headed character. He must show similarity of *expression*. But the protectable aesthetic and literary elements expressed in these two characters, once compared, proves that their expression is vastly different. Whether on screen or in print, Carmichael is a common shubunkin goldfish (albeit one with uncommon abilities). Kingfish clearly isn’t. Carmichael’s bell jar sits atop a human male body. Kingfish’s doesn’t. On screen, Carmichael is smartly dressed, donning a tailored suit and tie. In print, Carmichael is clothed more ruggedly, reminiscent of a flinty detective from an old noir film<sup>15</sup>—garb befitting his investigatory role. *See* Doc. 32-5 at 88. Kingfish’s vestments are quite different, however, far more reminiscent of

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<sup>14</sup> Aesop’s Fables, “The Fisher and the Little Fish” (available at <https://etc.usf.edu/lit2go/35/aesops-fables/390/the-fisher-and-the-little-fish/>, last visited Aug. 9, 2021).

<sup>15</sup> Orson Welles’s turn as Captain Hank Quinlan in *Touch of Evil* comes to mind. *See* IMDB, “Touch of Evil” (1958), [https://www.imdb.com/title/tt0052311/mediaviewer/rm4239707648/?ref\\_ext\\_shr\\_lnk](https://www.imdb.com/title/tt0052311/mediaviewer/rm4239707648/?ref_ext_shr_lnk) (last visited Aug. 9, 2021).

Kiss's Gene Simmons, or the aforementioned Mysterio,<sup>16</sup> than Carmichael's smooth executive or grizzled detective personas. Kingfish, as his name implies, wears a crown atop his tank, flanked by large tubes. Carmichael, on the other hand, has no tubes protruding from his tank, and, in the series, he wears nothing atop his tank but dons a bowler hat or fedora in the comics—the kind noir detectives are often shown wearing in movies or other comics.

But vastly different aesthetics are just the beginning. Differences in the characters' literary elements also abound. Carmichael's purpose in *The Umbrella Academy* is to maintain and, when necessary, enforce order in the space-time continuum,<sup>17</sup> something entirely anathema to Kingfish's anarchical mission. *See, e.g.*, Doc. 32-8 at 86–87; Doc. 32-10 at 219–21. Carmichael's appearance and role in *The Umbrella Academy* (on screen or in print) is somber in tone, brutal in action, and Machiavellian in nature.<sup>18</sup> Kingfish, however, is pure camp.<sup>19</sup>

Pointing out similarities in the characters' *protectable* features, however, is much harder. In fact, there are none. The characters' similarities are limited strictly to unprotectable features (e.g., both have fishbowls for heads, both are allegedly villains, both have arms and legs, etc.).

Indeed, Atkinson's description of the alleged similarities between Kingfish and Carmichael in his complaint tacitly concedes this point. Rather than point to the characters' purported aesthetic or literary similarities, Atkinson uses embellished prose to describe and compare Kingfish's appearance to Carmichael's: "a fish with long, flowing fins; he sits inside a glass, bell-jar-shaped container atop a humanoid body with a speaker near the front base of the jar. The fish swims in a clear fluid and is not physically connected to anything inside the container." Doc. 1 ¶ 22. In other

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<sup>16</sup> *See supra* n.13.

<sup>17</sup> *E.g.*, Doc. 32-5 at 75–79; *see also* S2:E2 in the Netflix series, where Carmichael makes his screen debut.

<sup>18</sup> Doc. 32-6 at 142–50, 157–58; Doc. 32-7 at S2:E2 at 2:33 to 4:40; *id.* at S2:E7 at :10 to 4:40.

<sup>19</sup> Doc. 32-8 at 46–51; Doc. 32-10 at 214–15.

words, they are both fish swimming in water-filled bowls. But where else would the public expect to find a fish on land if not swimming in a fishbowl filled with water (i.e. “a clear fluid” and not “physically connected to anything”)? Atkinson cannot use well-written prolixity to appropriate that which is in the public domain. *E.g.*, *Satava*, 323 F.3d at 811–12 (holding that artist who created a glass jellyfish within a clear outer layer of glass could not sue for infringement based on that design “because clear glass is the most appropriate setting for an aquatic animal” and because, concluding otherwise “effectively would give [the artist] a monopoly on lifelike glass-in-glass sculptures of single jellyfish with vertical tentacles,” which are ideas in the public domain). The parties’ two piscine characters are wholly dissimilar. The Court should therefore dismiss the action with prejudice.

## **II. Atkinson’s Complaint Should Be Dismissed Because It Lacks a Plausible Showing of “Factual Copying”—Plausible Similarity and Access.**

Another reason for dismissing this action is Atkinson’s inability to make a plausible showing of factual copying. To satisfy this element of copyright infringement, Atkinson must plead facts from which the Court may infer “(1) that the defendant had access to the copyrighted work prior to creation of the infringing work and (2) probative similarity.” *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1037 (5th Cir. 2015) (cleaned up). Here, however, Atkinson’s complaint fails to make a plausible showing of either element of factual copying. For reasons similar to those already outlined above, Atkinson is incapable—as a matter of law—from showing even probative similarity. And Atkinson’s complaint lacks any plausible showing of access.

### **A. Atkinson’s Complaint Has Not Shown—Because It Cannot Show—Probative Similarity Between His Rogue Satellite Comics and Defendants’ *The Umbrella Academy* Works.**

Whatever Atkinson’s allegations about the purported similarities between Kingfish and Carmichael, he has made no effort in his complaint to show that, taken

as a whole, his Rogue Satellite Comics and Defendants' *The Umbrella Academy* works share even probative similarities. Bald assertions like "portions of *The Umbrella Academy* storyline are substantially and strikingly similar to the Copyrighted Works at Issue," Doc. 1 ¶ 34, are all Atkinson musters. But those allegations are not enough. *See Architettura, Inc. v. DSGN Assocs., Inc.*, No. 16-CV-3021, 2018 WL 3575878, at \*5 (N.D. Tex. July 25, 2018) (holding that bare assertions of factual copying are insufficient to state a plausible claim).

More importantly, the materials cited in and central to the complaint plainly show that there are no probative similarities between the storylines of these two sets of works. Probative similarity for purposes of satisfying the factual copying element is distinct from "substantial similarity" (and the higher showing of "striking similarity"). *E.g., Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 370 (5th Cir. 2004);<sup>20</sup> *see also Tanksley*, 902 F.3d at 173 (distinguishing between the scope of probative similarity for purposes of factual copying and substantial similarity for purposes of infringement and collecting cases). Making a plausible showing of probative similarity requires allegations that (1) identify similarities in two works (whether substantial or not), and (2) show that, viewing the works as a whole, these similarities are of such a nature that, "in the normal course of events," a court would not expect those similarities "to arise independently in the two works and therefore might suggest that the defendant copied part of the plaintiff's work." *Positive Black Talk*, 394 F.3d at 371; *see also Huffman v. Burnt Puppy Music*, No. 16-CV-355-RP, 2017 WL 11046666, at \*3 (W.D. Tex. Feb. 1, 2017) (dismissing claims of copyright infringement under Rule 12(b)(6) because plaintiff's song lyrics were not probatively similar to those of the defendants).

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<sup>20</sup> *Abrogated on other grounds in Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010).

As shown above, the parties' works are wholly dissimilar if limited to their protected elements. And that conclusion does not change even if the Court expands its review of the parties' respective works to their unprotectable elements. Viewed as a whole, the parties' works share no obvious aesthetic elements, even unprotectible ones, indicative of copying. For example, besides being drawn in black and white, the aesthetic style of Rogue Satellite Comics—as they expressly state—are a nod to the classic comic-style (e.g., “the Silver Age”). Doc. 32-10 at 237–40. *The Umbrella Academy* comics, on the other hand, paint in a vivid, surrealist style. *E.g.*, Doc. 32-4 at 11–15, 43. And Atkinson hasn't cited, and cannot credibly cite, a single scene from the Netflix series that copies any of the aesthetics of his comics. And while the parties' works may share certain (unprotectable) *literary* elements, like use of time-travel as a plot device, those elements are hardly indicative of copying. Defendants no more copied their more recent use of time-travel from Atkinson than Atkinson copied his use of that plot device from Robert Zemeckis's<sup>21</sup> or Ray Bradbury's<sup>22</sup> even older works. In short, there is nothing in Defendants' works that, under normal circumstances, would have depended on Atkinson's works. Accordingly, Atkinson's complaint should be dismissed with prejudice because he can't show even probative similarities between the two sets of works.

**B. Allegations that Some Defendants Had Access to Atkinson's Works Merely Because They Have Been in the Comic-Book Industry for Many Years Are Insufficient to Make a Plausible Showing of Access.**

Atkinson's bare allegations that Way and Dark Horse had access to Atkinson's works because of the passage of time and a presence in the purportedly small commercial comic-book industry (Doc. 1 ¶¶ 23–24) are insufficient to plausibly plead

<sup>21</sup> Zemeckis completed his *Back to the Future* trilogy six years before Atkinson published his first Rogue Satellite Comic (1990). *See Back to the Future*, <https://www.backtothefuture.com> (last visited Aug. 9, 2021).

<sup>22</sup> Ray Bradbury, *A Sound of Thunder*, THE GOLDEN APPLES OF THE SUN 203 (1990). Originally published in 1952, *A Sound of Thunder* tells the story of how a time-traveling hunting party irreparably damaged history and returned to an unrecognizable future after a seemingly insignificant accident.

access under copyright law. A plausible showing of access requires Atkinson to plead facts indicating “that the person who created the allegedly infringing work had a reasonable opportunity to view the copyrighted work before creating the infringing work.” *Armour v. Knowles*, 512 F.3d 147, 152–53 (5th Cir. 2007) (cleaned up). Facts indicating nothing more than a mere possibility of access will not suffice. *Id.* at 153. Nor will allegations of “a tortuous chain of hypothetical transmittals.” *Id.* In fact, even bald assertions that “all defendants had access to plaintiff’s original works” are insufficient to plead access plausibly. *Architettura*, 2018 WL 3575878, at \*5 (cleaned up). Such bare assertions are not entitled to a presumption of truth because they lack facts suggestive of access. *E.g., id.*

Here, Atkinson’s complaint lacks even bald assertions of access. There are no facts pleaded from which the Court may draw the inference that any Defendant had a reasonable opportunity to view Atkinson’s works before creating *The Umbrella Academy* or Carmichael. And what Atkinson has alleged—the mere passage of time coupled with a general industry presence—is insufficient as a matter of law to plausibly plead access. *Cf. Guzman*, 808 F.3d at 1038 (holding that evidence of the defendant’s presence in the general area where the plaintiff’s work was played coupled with evidence of the passage of time was insufficient to show access).

In fact, Atkinson’s complaint tacitly concedes that it lacks a plausible showing of access. As noted above, Atkinson’s complaint openly relies on allegations of purported “striking similarities” between the parties’ works. Doc. 1 ¶¶ 26, 28. But a showing of “striking similarities” is required only when no other plausible inference of access may be drawn from the allegations. *See, e.g., Armour*, 512 F.3d at 152 n.3. The complaint therefore concedes it lacks any plausible showing of access by any Defendant and thus should be dismissed.

And while factual copying may still be shown if the pleaded facts show a “striking similarity” between the two works, *Armour*, 512 F.3d at 152 n.3, Atkinson



is incapable of making this showing as a matter of law and for all the reasons shown above. “Striking similarity” requires plaintiffs to show that the defendants’ works are so similar to the plaintiffs’ works that the similarity could be explained *only* through actual copying. *Id.* Here, however, Atkinson is incapable from satisfying the striking-similarity standard because he is incapable of showing even *plausible* similarity between the parties’ works. Simply put, Defendants’ *The Umbrella Academy* works are far too dissimilar from Atkinson’s works to ever be considered “strikingly similar.” *See, e.g., Selle v. Gibb*, 741 F.2d 896, 904 (7th Cir. 1984) (“The judicially formulated definition of striking similarity states that plaintiffs must demonstrate that such similarities are of a kind that can only be explained by copying, rather than by coincidence, independent creation, or prior common source.” (cleaned up)), *cited with approval in Armour*, 512 F.3d at 152 n.3.

### **III. Amending the Complaint Won’t Change Kingfish’s Patently Dissimilar Appearance or the Works’ Wholly Unrelated Storylines.**

Although plaintiffs are typically given leave to amend their complaint before their claims and case are dismissed with prejudice, this is an atypical case. Leave to amend may and should be denied when it is futile. *E.g., Randolph*, 634 F. Supp. 2d at 788. And, for all the reasons shown above, granting Atkinson leave to amend would be the definition of futile. The parties’ works are set in print or on screen. Amendment will not change them. And those works show *conclusively* that Atkinson has no actionable copying claim against Defendants because the parties’ works are wholly *dissimilar*, whether substantially or probatively, and as a matter of law (among still other defects). The action should therefore be dismissed with prejudice and a final judgment entered in Defendants’ favor.

## **CONCLUSION**

There is no copyright claim without copying. Here, the parties’ works, which are incorporated in and central to Atkinson’s complaint, show definitively that

Defendants copied nothing from Atkinson. Moreover, those same works disprove any notion of probative similarity or access asserted—but not shown—in Atkinson’s complaint. Accordingly, rather than give Atkinson a futile opportunity to amend his complaint, the Court should do justice and put a swift end to this meritless action. Defendants’ motion should therefore be granted, and a final judgment entered in their favor along with all such other relief to which they may be entitled.

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Respectfully submitted,

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