



NATIONAL ENTERTAINMENT LAW MOOT COURT COMPETITION

No. 84722-5692

FARSKY STUDIOS AND INTERSTELLAR ENTERTAINMENT

vs.

MOUSE HOUSE INC. AND JAMIE JAMESON

**On Writ of Certiorari from the
United States Court of Appeals
for the Sixteenth Circuit**

Written by Nicole Geiser
J.D. Candidate 2021 Pepperdine Law

United States Court of Appeals,

Sixteenth Circuit

980 F.3d 370

FarSky Studios and Interstellar
Entertainment, Plaintiff/Appellant,
v.

Mouse House Inc. and Jamie Jameson, a
Nirvana Corporation, Defendant/Appellee.

No. 84722-5692

Argued and Submitted: May 8, 2021
Decided: June 1, 2021

Appeal from the United States District Court
for the Southern District of Nevada;
C. Williams, District Judge, Presiding.

Before: J. HERNANDEZ, Chief Judge, T.
BROWN, and A. SMITH, Circuit Judges.

Opinion by Chief Judge HERNANDEZ.

HERNANDEZ, Chief Judge:

FarSky Studios and Interstellar
Entertainment (collectively, “appellants”),
creators of the videogame, *Valkyrie: Mission
Centauri*, appeal the district court’s
summary judgment to Mouse House Inc.
and Jamie Jameson (collectively,
“appellees”), creators of the award-winning
film, *Aladar*, for copyright infringement and
trademark infringement. Appellants assert
that the district court erred in concluding
that *Aladar* and *Valkyrie: Mission Centauri*
are substantially similar. They also appeal
the district court’s conclusion that “Discover
Pantera” violated Appellee’s trademark,
“Discover Pantora.”

For the reasons set forth below, we *reverse*
the judgment of the district court.

I. Factual Background

The following facts are not in dispute.
On December 18, 2010, *Aladar*, one of the
most highly anticipated films of the century,
was released and soon became the second
highest-grossing movie of all time, grossing
over \$2.8 Billion. Mouse House Inc., one of
the most prominent film production
companies, owns the rights to *Aladar*.
Aladar was created by Jamie Jameson, who
also directed, produced, and co-edited the
film. When asked about his inspiration for
the film during an interview with
Entertainment Daily, Jamie Jameson stated:
“[m]y inspiration is every single science
fiction book I read as a kid[.]”

After the worldwide success of the first
Aladar, Mouse House Inc. confirmed the
release dates for two sequels to be released
in 2022 and 2024. Both sequels have
completed the production phase and are now
in the editing process. Mouse House Inc. has
also released a statement regarding their
plans to develop land within its theme parks
built to look like Pantora, the moon from
Aladar. The land will be called “Discover
Pantora,” and will be open to the public on
January 1, 2022. The Mouse House theme
park in Anaheim, CA and Orlando, FL, has
already begun construction. Mouse House
Inc. has a registered trademark for the
phrase “Discover Pantora,” for the theme
parks as well as merchandise that will be
sold at the parks, such as shirts, shorts, hats,
sweatshirts, socks, jackets, pajamas,
Halloween and masquerade costumes and
masks.

Although the theme parks and merchandise
have yet to be released to the public, Mouse
House Inc. and Jamie Jameson have done
extensive advertising, spending more than
10 million on commercials, internet ads, and
billboards. Advertisements began on
February 1st, 2020. An expert witness
testified that the advertisements were

estimated to have reached over 150 million people worldwide (with a 10% margin for error). The commercials are similar to a trailer for a movie. However, all internet ads and billboards display a still picture of the main character, Jake Scully, in his Aladar body, with the trademarked phrase “Discover Pantora,” at the bottom:

Discover Pantora

Mouse House Inc. primarily creates and sells television shows, movies, and memorabilia. However, they also have a small presence in the video game industry, creating video games based on their television shows and movies. Compared to the top video game creators and producers, like FarSky Studios and Interstellar Entertainment, Mouse House Inc. produces only ¼ the amount of video game content they do.

The alleged copyright infringement arises from FarSky Studios and Interstellar Entertainment’s alleged use of several key elements from the movie *Aladar*, in their new video game, *Valkyrie: Mission Centauri*. The alleged trademark infringement arises out of FarSky Studios and Interstellar Entertainments use of the phrase “Discover Pantera,” which Mouse House Inc. and Jamie Jamerson claim would cause a likelihood of confusion with its trademarked phrase, “Discover Pantora.”

(A) Summary of Works

ALADAR

The film, *Aladar*, is set in the year 2154 on a moon called Pantora in the Alpha Centauri System. The name “Pantora” is in reference to the first woman of Greek Mythology, who has been said to have released evil onto the earth when she opened a box. When she

discovered her mistake, she quickly closed the box and managed to contain one evil: “Hopelessness.” Thus, providing humans with hope which would be strong enough to conquer the evils she released. Jamie Jameson stated in an interview: “We decided on the name ‘Pantora’ because it demonstrates that even with all the evils in the world, humans can always succeed if they have hope. And the primary conflict our protagonist faces is the battle between good and evil.”

The geography of Pantora is very similar to Earth’s. It has jungles, mountains, volcanos, plains, and oceans. Moreover, while Earth’s surface is primarily water, Pantora’s surface is 80% jungle. At night, some vegetation displays bioluminescent qualities that cause plant life to glow green, blue, and purple. The natives, as well as some of the creatures, also have this quality.

The film follows a former paraplegic Marine, Jack Scully, who travels to the moon of Pantora along with scientists and a military force called the Resource Expansion Administration (REA). The REA is on Pantora to collect a rare and valuable mineral called unobtanium. Humans began mining unobtanium as an alternative energy source to help Earth’s energy supply. The REA wants to obtain a monopoly over the mineral.

On the moon of Pantora live the Nanki. The Nanki, which in English means “tree people,” are indigenous to Pantora. They are extraterrestrial humanoids (human-like) who stand 10ft tall, with a slender build, and have blue skin with barely visible darker stripes. The stripes are displayed similar to a tigers. Like many other life forms on Pantora, the Nanki display bioluminescent markings that appear to follow the path of their central nervous system, and that can change

depending on their mood. Their appearance is feline-like with long tails, pointed ears, triangular faces, flat noses, and large golden-yellow eyes. They also feature dark braided hair with multi-colored beads and feathers intertwined and one long braid that drops down to the small of their back. The Nanki are primarily hunter-gatherers and battle-ready warriors who fight with bows and arrows. They also have developed a deep and sophisticated spiritual connection to the life around them.

The Nanki is also known for riding a creature called a Mountain Banshee. Mountain Banshees are large, dragon-like aerial predators that are native to Pantora. It breathes through air inlets or gill-like slits that face forward at the front of the chest cavity. The banshee has two primary eyes, but it also has smaller secondary eyes that can move independently from the primary eyes. The pupil is similar to a bird, large and round. The banshee has four wings, two large front wings, and two smaller back wings, with claws or fingers that they use to cling onto the side of mountains. Their skin displays a wide range of complex colors. No two appear to be the same. Males display orange and yellow skin, while females have purple and blue skin tones. They are used by the Nanki for hunting, traveling longer distances, and fighting in battle from the air.

To communicate with the Nanki, the scientists create a hybrid of Nanki and humans called “Aladar’s.” The Aladar’s are controlled mentally by human operators and have the body of a Nanki. In his new Aladar form, Jack Scully’s mission is to interact with the Nanki, gain their trust, and convince them to move from their home so that the REA can mine for unobtainium. During his time with the Nanki, Jack Scully falls in love with a beautiful female Nanki and eventually becomes an official member

of the tribe. His love for the Nanki and the nature and life on Pantora forces him to rethink his imperialistic mission. As Jack’s relationship with the Nanki deepens, he decides to help the Nanki fight back against the REA. A long hard battle ensues as the REA attempts to destroy the Tree of Souls, the most spiritual place on Pantora. The Nanki feel the strongest connection to their spiritual deity at the Tree of Souls. The Tree of Souls is a massive tree that stretches upwards of over 200ft, and its roots reach thousands of miles across the moon of Pantora. The Nanki fight against armored helicopters and bombers with their bows and arrows, and just as it appears that the REA is going to win, the animals of Pantora join the Nanki to fight back and together they are able to defeat the REA.

VALKYRIE: MISSION CENTAURI

The first *Valkyrie* game was released in 2000 and was set on Earth during World War I. However, over time, the series has seen games set in modern times, the midst of the Cold War, outer space, and its latest release, alien worlds. The new game, *Valkyrie: Mission Centauri*, is set to be released in December 2021. Several advertisements promoting the new videogame have been released, starting in April, 2020, including commercials on the major networks, internet ads, and large billboards in all the major metropolitan cities in the United States, including the city in which this lawsuit has been filed. All internet ads and billboard advertisements feature a close-up still picture of a member of the Valkyrie with the caption “Discover Pantera,” at the bottom:

DISCOVER

PANTERA

FarSky Studios and Interstellar Entertainment have paid a significant amount of money to promote the new game, spending almost 8 million in advertising. Appellants' expert witness has determined that these advertisements have reached over 120 million people (with 10% margin for error).

Valkyrie: Mission Centauri is set in the year 3000 on the moon of Pantera. According to creators, "Pantera" is a fictitious word heavily used in the Natives language, and means "faith." The moon of Pantera from Valkyrie: Mission Centauri is also a moon in the Alpha Centauri System. About 73% of Pantera's surface is covered in water, similar to Earth. The other 27% is land covered in a lush and vibrant forest with towering trees. Other than the richness of the varying vibrant colors, the trees and vegetation resemble those from Earth. At night, many of the plant life, creatures, and natives display vibrant bioluminescent colors. The only color, however, that has bioluminescent qualities is blue. The ocean water also displays a bright blue bioluminescent quality seen with every wave and ripple of the water.

Valkyrie: Mission Centauri is centered around a battle for control of the Alpha Centauri System. The player in the game is a Valkyrie warrior sent to the moon of Pantera to prevent the Revitalization Confederation (RC), an extremist group, from taking over the Alpha Centauri System in order to extract a rare and valuable mineral, Celgite. Celgite is one of the most highly sought-after items on the black market because of its rarity and value. In an attempt to stop the RC from taking over the Alpha Centauri system, the United Nations sends an elite

squad of highly trained operatives to the moon of Pantera. The elite force is an all-female team called the Valkyrie, inspired by the female warriors of Norse Mythology. This game was created after a significant number of requests were made from its fans to make a video game where the only characters a player can pick are female.

The natives on Pantera are called the Makai, which means "on the sea." The Makai live on an island that consists of one of the largest forests on Pantera and is surrounded by thousands of miles of open sea. The Makai have an appearance that resembles a human being. The Makai are deeply spiritual and believe a higher being connects everything on Pantera. Their features, including their ears, nose, eyes, and face, are similar to humans on earth. However, the Makai have some unique features generally associated with aquatic animals. Their hands and feet are webbed, which allows them to swim faster in the ocean. The Makai are tall and slender, standing 10 feet tall. They are known for being hunter-gatherers and fierce warriors, who use bows and arrows as weapons. The Makai have beautiful rich ebony skin and dark braided hair with white beads and blue colored feathers intertwined. What makes the Makai unique from human beings is that they have blue bioluminescent stripes all over their body, that are laid out and displayed similar to a tiger.

The Makai are usually witnessed on top of a Sea Basilisk. The Sea Basilisk has features of both a serpent and a dragon. It is a large creature with four large wings with webbed claws attached at the end to help them move quickly through water. The eyes of the Basilisk are similar to those of a serpent with slit pupils and bright yellow eyes. The skin of the Basilisk also features a bright array of color with a mixture of blue, purple, orange, and green, as well as some

iridescent qualities on their wings. The Sea Basilisk spends most of its time underwater breathing through gills on its chest cavity, but it can breathe and fly out of water for a short period of time. The Makai ride the Sea Basilisks for hunting and fighting in battles.

The game consists of several levels. Levels 1-5: The first five levels are about exploring the moon of Pantera and trying to make contact with the natives. During these levels they come into contact with several of the dangerous creatures on Pantera. Levels 6-8: The Valkyrie warriors make contact with the Makai and inform them of the RC's plan to destroy their home in order to get to the richest areas of Celgite, including the Well of Life, the most spiritual place on Pantera. The Well of Life is a large pool of water that is sunken into the ground. The Well is surrounded by rock walls covered in vegetation. The Well itself is approximately 50ft wide and 100ft deep. The water comes from streams all over Pantera like branches of a tree. The Makai come to the "Well of Life" to connect with their deity, and they believe this water connects them to all life on Pantera. In these levels, the Valkyrie help the Makai build barriers around the Well of Life and train the Makai on the best ways to fight the RC. Levels 9, 10: The Natives team up with the Valkyrie. The RC brings hundreds of soldiers on foot and in tanks, as well as dozens of helicopters to destroy the Well of Life and obtain the Celgite. It would be a difficult battle because the only weapons the Makai use are bows and arrows. The Makai and Valkyrie fight to stop the RC from destroying their home and are successful.

II. Procedural History

On January 20, 2020, Mouse House Inc. and Jamie Jameson filed an action against FarSky Studios and Interstellar

Entertainment for copyright infringement under 17 U.S.C. § 101 et seq. and trademark infringement under 15 U.S.C. § 1051 et seq.

Both parties filed a motion for summary judgment. Appellee's argued that Appellants' new video game is substantially similar to their copyrighted work, and therefore Appellees should prevail on a claim for copyright infringement. Appellee's also argues that Appellants use of the phrase "Discover Pantera," violates their trademark for the phrase "Discover Pantora," thus resulting in trademark infringement. Conversely, Appellants argued that *Valkyrie: Mission Centauri* is not substantially similar to the movie *Aladar* and that the phrase at issue does not cause the likelihood of confusion to infringe Appellee's trademark.

Judge Carmen A. Williams of the United States District Court for the Southern District of Nirvana, applied the Ninth Circuits "Extrinsic/Intrinsic" test, concluding found that (1) the movie *Aladar* and the videogame *Valkyrie: Mission Centauri* was substantially similar to the protectable copyrighted material in Mouse House Inc.'s and Jamie Jameson's work; and (2) there was sufficient evidence to demonstrate Likelihood of Confusion under the Lanham Act.

The district court granted Appellee's motion for summary judgment on both issues for copyright infringement and trademark infringement. Thus, denying Appellants motion and entered a judgment in Appellee's favor. Appellants timely appealed the grant of summary judgment.

We now reverse the district court's decision on both issues.

III. Standard of Review

We review the district court's rulings on motions for summary judgment *de novo*.

A determination of whether a work is subject to copyright protection is a mixed question of law and fact. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.* (“Krofft”), 562 F.2d 1157, 1164 (9th Cir. 1977). “Although summary judgement is not highly favored on questions of substantial similarity in copyright cases, summary judgement is appropriate if the court can conclude, after viewing the evidence and drawing inferences in a manner most favorable to the non-moving party, that no reasonable jury could find substantial similarity of ideas and expression Where reasonable minds could differ on the issue of substantial similarity, however, summary judgement is improper.” *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (quoting *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir.1990).

IV. Discussion

The film and the videogame are similar in certain aspects but dissimilar in others. Mouse House Inc. and Jamie Jameson allege that the following elements of *Valkyrie: Mission Centauri*, were copied by FarSky Studios and Interstellar Entertainment:

- (1) The plot and storyline of the videogame are similar to the movie *Aladar* and follow a similar timeline.
- (2) The setting is very similar to *Aladar*. Including the year, the name of the moon, its place in the Alpha Centauri system, and several features found on the moon.
- (3) The native inhabitants in the video game are similar to the natives in *Aladar*.

- (4) The antennae, markings, and colors on the Sea Basilisk in the video game are similar to the Mountain Banshee in *Aladar*.
- (5) The Tree of Souls in *Aladar* is similar to the Well of Life in the videogame.
- (6) Several of the significant themes in *Aladar* are present in *Valkyrie: Mission Centauri*.

The first part of our analysis will examine and apply the Ninth Circuit's “Extrinsic/Intrinsic” test. Applying it to this case, we conclude that FarSky Studios and Interstellar Entertainment's new video game *Valkyrie: Mission Centauri* is not substantially similar to the movie *Aladar*.

The second part of our analysis will examine whether Mouse House Inc.'s registered trademark for their clothing line as well as the name of their new theme park worlds, “Discover Pantora,” is being infringed by FarSky Studios and Interstellar Entertainment when it uses “Discover Pantera” to advertise their new game. After applying the Ninth Circuit's eight-part test, we have concluded that FarSky Studios and Interstellar Entertainment's advertising phrase, “Discover Pantera,” would not cause any likelihood of confusion, and therefore does not infringe on Mouse House Inc. and Jamie Jameson's trademark.

A. Copyright Infringement

The primary purpose of copyright law is to protect the author's creativity and freedom of expression while also allowing new information and ideas to be available to the public. However, there needs to be a proper balance between the author's rights and the interests of the public.

The Copyright Act of 1976 outlines what is subject to copyright protection. Section 102 of the Copyright Act provides protection “in

original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C.A. § 102. The Act specifically lists eight works of authorship that are entitled to copyright protection: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. *Id.*

The main works of authorship at issue here are motion pictures and other audiovisual works.

Mouse House Inc. and Jamie Jameson, as owners of the *Aladar* copyrights, owns the exclusive rights to (1) reproduce the copyrighted work; (2) prepare derivative works based on the copyrighted work; (3) distribute copies or phonorecords of the copyrighted work to the public; (4) perform the work publicly; and (5) display the copyrighted work publicly. Mouse House Inc. and Jamie Jameson allege that FarSky Studios and Interstellar Entertainment made an unauthorized derivative work of the copyrighted work, *Aladar*.

To demonstrate copyright infringement, a plaintiff must show “(1) ownership of a valid copyright, and (2) copying of constituent elements of that work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 361 (1991). Appellants do not dispute the ownership of the valid copyright for the *Aladar* movie.

The second element has two sub-elements. Copying may be established by demonstrating (1) “that the [defendant] had

access to plaintiff’s copyrighted work,” and (2) “that the works at issue are substantially similar in their protected elements.” *Cavalier*, 297 F.3d at 822.

As to the first sub-element, *Aladar* is the second highest-grossing movie of all time. Therefore, Appellants do not dispute that they had access to Appellees copyrighted work.

Thus, the only issue to be reviewed by this Court is substantial similarity. Appellants argue that the district court erred in granting Appellee’s motion for summary judgment.

It is also important to note that this Court will be following the precedent set by many circuit courts that “[a]ccess does not obviate the requirement that the plaintiff must demonstrate that the defendant actually copied the work.” *Skidmore as Trustee for Randy Craig Wolfe Trust v. Zeppelin*, 952 F.3d 1051 (9th Cir. 2020). This does not suggest that access cannot be used as circumstantial evidence to prove actual copying; however, access cannot be used to prove substantial similarity. *Id.*

(1) Extrinsic/Intrinsic Test Overview

There are several different substantial similarity tests used by our sister circuits across the U.S. However, this Court has followed the Ninth Circuits “extrinsic/intrinsic” test to determine substantial similarity.

The Extrinsic/Intrinsic test is a two-step test used by the Fourth, Eighth, and Ninth Circuit courts and was initially established in *Krofft*. However, due to the inconsistent application of the *Krofft* test, the Ninth Circuit in *Shaw* presented a revised version of the test. Under the extrinsic test, instead of a comparison of ideas, the first step is a

comparison of objective aspects of the plaintiff's expression. Also, the intrinsic test is no longer a comparison of expression of ideas, rather it is a comparison of subjective aspects of the plaintiff's expression.

Variations of the ordinary observer and extrinsic/intrinsic tests are followed in other circuits. After reviewing each circuit court's substantial similarity test, it is clear these courts apply a similar analysis.

The Extrinsic/Intrinsic test is a two-part test; however, because this is on summary judgment, only the extrinsic test is considered. If Mouse House Inc. and Jamie Jameson can demonstrate that there is a triable issue of fact under the extrinsic test, the intrinsic test should be left to the jury, and FarSky Studios and Interstellar Entertainment's motion for summary judgment must be denied. *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994). If Mouse House Inc. and Jamie Jameson cannot show a triable issue of fact under the extrinsic test, FarSky Studios and Interstellar Entertainment would prevail on their summary judgment claim. The jury would not determine copyright infringement because there would be no substantial similarity without satisfying both extrinsic and intrinsic tests. *Id.*

(2) Extrinsic Test Application

We begin our analysis with the objective extrinsic test, which "focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works." *Kouf*, 16 F.3d at 1045 (internal quotation marks and citation omitted). Also, when applying the extrinsic test, we must separate protectable elements from non-protectable elements. "Familiar stock scenes and themes that are staples of literature are not

protected." *Cavalier*, 297 F.3d at 823 (quoting *Berkic v. Crichton*, 761 F.2d 1289, 1294 (9th Cir. 2002)). "Scenes-a-faire, or situations and incidents that flow necessarily or naturally from a basic plot premise, cannot sustain a finding of infringement." *Id.* Historical facts are not protected by copyright law. *Narell v. Freeman*, 872 F.2d 907, 910-11 (9th Cir.1989).

We agree with the district court that, at a quick glance, these similarities may appear non-substantial, a closer examination of the protectable elements, including plot, setting, characters, themes, and sequence of events, exposes many more similarities than differences between Appellees film and Appellants videogame. No evidence was presented by either party for dialogue and the mood was determined to be neutral on its face and not contested by either party.

(a) Plot/Sequence of Events

When applying the extrinsic test, we must look "beyond the vague, abstracted idea of a general plot." *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.1985). Although the film and the videogame display several of the same basic plot premises, a closer look reveals that they are actually very different.

In both the film and the videogame, groups of humans travel to an alien moon where a military force attempts to collect a rare and valuable mineral. It is not surprising that the two stories share similar elements as well as the sequence of events when they share the same premise. In both, the Antagonist is a military force driven by money and power to obtain a rare mineral. Both antagonists threaten to drive the natives from their home to obtain the mineral. In both, the protagonist attempts to gain the trust of the Natives and warn them about the military threat. And in both, a large battle ensues as a

result of the Natives refusal to abandon their home. In both works, the battle takes place at the most sacred place on the moon and the Natives are outmatched by the military's modern technology.

Despite these similarities, a closer look reveals that the two works are strikingly different.

The protagonist in the film is a paraplegic, former marine who falls in love with a member of the Nanki. In the video game, the player is the protagonist along with the other members of the Valkyrie, an all-female squad. In the film, a group of scientists create a hybrid of Nanki and humans called "Aladar's" to communicate with the natives and learn more about their culture. There is no parallel in the video game to the "Aladar's." The Valkyrie, on the other hand, are in charge of communicating with the natives, but are not there to learn about their culture. Also, the REA is a private military organization that wants a monopoly over the mineral to sell to the government. On the contrary, the RC, is an extremist group who wants to sell the mineral on the black market because it is rare and valuable. In the film, the turning point of the battle occurs when the native creatures of Pantora fight alongside the Nanki. In the video game, the battle was won with the help of the Valkyrie. In the film, the battle is primarily from the air with the military using helicopters and bombers. In the videogame, the military's primary attack is from the ground.

Unlike the film, which is largely about the protagonist's inner battle between right and wrong, Appellants video game displays a strong aspect of female empowerment and the protection of an alien world from human greed and thirst for power. The film and video game tell fundamentally different

stories, though they share several of the same elements that would flow naturally from the premise. As stated in the facts, Jamie Jameson admitted in an interview that his inspiration for the film, "is every single science fiction book [he] read as a kid[.]" The video game is also separated by levels where the player has to accomplish something before moving onto the next.

(b) Setting

It is not surprising that these two works share similar settings, given that both works involve humans traveling to an alien world. Both works are set far in the future when humans have the capability to travel to different worlds. Both alien worlds are on a moon in the Alpha Centauri System. The alien words share similar names – Pantora and Pantera. Both worlds display similarities with Earth. It has jungles, mountains, volcanos, plains, and oceans. Both works also show land with plants, creatures, and natives who display bioluminescent qualities. Both lands have a strong spiritual element.

However, some of the settings are quite different. The moon from the film, Pantora, has a surface that is 80% jungle. The moon from the video game is only 27% land covered in lush forest, with about 73% of its surface covered in water, similar to Earth's. The film's spiritual element comes from the Tree of Souls, a massive 200ft tall tree with roots that stretch for thousands of miles across the moon of Pantora. In the video game, the natives' spiritual place is a Well with smaller streams that connect the land to the ocean. The Well is 50ft wide and 100ft deep, and the water branches out from the pool into smaller streams that stretch all over the land until it reaches the ocean.

While the works share common settings, some are unprotectable elements. For example, Alpha Centauri is a real system, the closest system to earth, even though the moon is not a real moon in the Alpha Centauri system. Also, the natural landscapes, similar to those found on earth, are also not protectable. “Facts – scientific, historical, biographical, and news of the day . . . may not be copyrighted, and are part of the public domain available to every person.” *Feist Pubs., Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340, 348 (1991) (internal quotation marks omitted); *see also Crane v. Poetic Prods. Ltd.*, 593 F. Supp. 2d 585, 590 (S.D.N.Y. 2009) (describing that the facts surrounding the death of Pope John Paul I is a historical fact and therefore not protected). Also, hundreds of films and video games have taken place on alien worlds where humans have the capability to travel in space. *See Cavalier*, 297 F.3d at 824 (“[T]his setting naturally and necessarily flows from the basic plot premise ... [and] therefore ... constitutes scenes-a-faire and cannot support a finding of substantial similarity.”).

Therefore, we do not believe the similarities are enough to show that these two works are similar.

(c) Characters

Mouse House Inc. and Jamie Jamerson argue that there are several similarities between various characters in the two works, including the natives and the Mountain Banshee. However, after close examination of the characters in the two works, there are very few similarities. First, we will compare the similarities and differences between the natives from *Aladar*, the Nanki, and the natives from *Valkyrie: Mission Centauri*, the Makai.

Both the Nanki and the Makai have human-like features with a slender build and stand 10ft tall with dark braided hair with beads and feathers intertwined. Both also have stripes along all over their body, similar to a tiger. Both are primitive hunter-gatherers, but also fierce warriors, skilled in bows and arrows. Modern technology and weapons are notably absent. Both also have a deeply spiritual connection to life on the moon as well as a spiritual deity that they believe connects all living creatures. Most of the similarities are traits that flow naturally from the works' shared premises. *See Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1451-53 (9th Cir. 1988).

In the film, the natives are called Nanki, which means “tree people.” The Nanki live in a lush forest surrounded by towering trees. In the videogame, the natives are called Makai, which means “on the sea.” The Makai live on an island surrounded by vast stretches of ocean, thus giving them their name. Although they share some similarities in appearance, there are more differences. The Nanki have blue skin with barely visible darker stripes that display bioluminescent markings that follow the path of their central nervous system. While the Makai has stripes similar to the Nanki, the Makai's stripes are brighter and more noticeable. The Makai have rich ebony skin with light blue bioluminescent stripes. Also, the Nanki have more feline-like features with long tails, pointed ears, triangular faces, flat noses, and large golden-yellow eyes. The Nanki also has a single long braid that drops to the small of their back. The Makai, on the other hand, have features similar to humans, with the only feline-like feature being stripes. The Makai also have some features that are usually found on aquatic animals. Their hands and feet are webbed, which helps them swim in the ocean.

Next, the Mountain Banshee from *Aladar*, and the Sea Basilisk from *Valkyrie: Mission Centauri*. Both have several similar features to a dragon, large wings, gill-like slits in their chest cavity for breathing, and large claws at the end of their wings. However, the Mountain Banshee has two large wings and two small wings, whereas the Sea Basilisk has two large wings. The Mountain Banshee looks more like a dragon or a large bird, while the Sea Basilisk has features of both a serpent and a dragon. Also, the claws at the end of the wings are used for two different purposes. The Mountain Banshee uses them to cling to the side of mountains. While the Sea Basilisks are webbed to help them move quickly through the water. The Mountain Banshee spends most of its time in the air or on the side of a mountain. The Sea Basilisk spends most of its time underwater, however, it can breathe and fly in the air, but only for a short period of time. Both have colorful skin tones ranging from yellow and orange to blue and green, as well as some bioluminescent qualities on their wings. The Mountain Banshee, however, have different skin colors based on their gender. Males have orange and yellow skin, and females have purple and blue skin tones. The natives use both for hunting as well as in battle. Both have similar eyes with two primary eyes and two secondary eyes; however, they are different in appearance. The Basilisks are similar to those of a serpent with slit pupils, whereas the Banshee has eyes similar to a bird with larger round pupils.

It is also important to note that a number of characters from the film do not have a parallel in the videogame. For example, in the videogame, the player is the protagonist, along with the other Valkyrie warriors. Whereas, in the film, Jack Scully is the protagonist, and he is a former Marine and

paraplegic and appears to have no similarities with the Valkyrie. Also, the scientists in the film do not have a parallel in the videogame. The two works share similar antagonists, the military force trying to mine a valuable mineral. However, this is the basis of the primary premise for both works. Most of the similarities are traits that flow naturally from the works' shared premises. *See Olson*, 855 F.2d at 1451-53.

(f) Theme

Both works explore similar general themes, including the human exploitation of the natives, indigeneity, or the sanctity of native boundaries and land, the large presence of spirituality and its connection to nature. However, the central theme of both works is quite different. The central theme of the film is love. The protagonist's fight between right and wrong comes from his love for the Nanki as well as the love for Pantora. In *Valkyrie: Mission Centauri*, the primary theme is female empowerment. The video game follows an elite squad of female warriors entrusted to save the natives from a dangerous military force.

(3) Copyright Infringement Conclusion

After a thorough review of the similarities, the works are not sufficiently similar to satisfy the extrinsic test.

B. Trademark Infringement

First, addressing the standard of review issue for likelihood of confusion, “[w]hether likelihood of confusion is more a question of law or one of fact depends on the circumstances of each particular case. To the extent that the conclusion of the trial court is based solely upon disputed findings of fact, the appellate court must follow the conclusion of the trial court unless it finds

the underlying facts to be clearly erroneous.” *AMF Inc. v. Sleekcraft Boats*, (“*Sleekcraft*”) 599 F.2d 341 (9th Cir. 1979). However, “[w]here the conclusion of the trial court is based solely upon disputed findings of fact, the appellate court need not follow the conclusion of the trial court where it finds the underlying facts to be clearly erroneous.” *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149, 191 (9th Cir. 1963).

In the present case, the facts are not in dispute, thus, we must review the district court’s analysis and conclusion regarding the likelihood of confusion with the undisputed facts.

The issue alleges that there is a likelihood of confusion in the marketplace regarding the source of the new videogame. If a party owns the rights to a registered trademark, they can sue for trademark infringement. 15 U.S.C. §§ 1114. The Lanham Act is the federal statute that governs trademarks and defines a trademark as “any word, name, symbol, or device, or combination thereof” that is used “to identify and distinguish ... goods ... from those manufactured or sold by others and to indicate the source of the goods.” 15 U.S.C. § 1127. If the goods are completely unrelated, there would likely be no infringement because there would be no likelihood of confusion. When the accused work directly competes with the trademark, the district court will likely not look any further, and infringement will generally be found. However, when the goods are related but not directly competing, several factors need to be considered.

Mouse House Inc. and Jamie Jameson argue that although the goods are not related, one being a film and the other a video game, they are still competitive because they are both audiovisual works. Also, Mouse House

Inc. points out that they have produced several video games related to some of their content. The district court found that although Mouse House Inc. primarily creates television shows and movies, they do have a videogame presence, although relatively small, compared to the amount created by FarSky Studios and Interstellar Entertainment. However, the district court found that although there was a possibility for some overlap in potential customers, the two appealed to separate sub-markets. The movie/film market is different from the videogame market. *Valkyrie: Mission Centauri* is a videogame aimed at a younger, more interactive audience, with the average player age being 18 years old, as well as hardcore gamers and sci-fi fans. *Aladar*, the movie, aimed to reach a broader audience, from adults, families, teenagers, sci-fi enthusiasts. While there are some similarities here, it does not appear that these two markets directly conflict. We, therefore, affirm the district court’s finding that, despite the potential market overlap, the two are related, but not directly competitive.

In order to prevail on a trademark infringement under the Lanham Act, Mouse House Inc. and Jamie Jameson must show that they (1) have a valid and legally protectable mark (2) it owns the mark; and (3) the use of the trademark would cause a likelihood of confusion. 15 U.S.C. § 1114; *see A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198 (3rd Cir. 2000).

The first two elements are not in question here as Appellants conceded that Appellees own a legally protected and registered trademark.

The final element of trademark infringement requires Appellees to show that Appellants'

mark creates a likelihood of confusion as to the “source or sponsorship.” *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1206 (9th Cir. 2000). This Court has followed the eight-factor *Sleekcraft* test used in the Ninth Circuit which includes: (1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; (8) likelihood of expansion of the product lines. 599 F.2d at 348-49. This list of factors is not exhaustive, and no single factor is dispositive and does not require a positive finding on the majority of the factors listed above.

The following factors weigh in favor of Mouse House Inc. and Jamie Jameson and a likelihood of confusion, and have been sufficiently pleaded:

- Both parties agree that they use the internet as well as their respective websites as a significant marketing channel
- The degree of care likely to be exercised by a purchaser is relatively low

The following factors weigh in favor of FarSky Studios and Interstellar Entertainment and a likelihood of confusion, and have been sufficiently pleaded:

- Mouse House Inc. and Jamie Jameson did not allege that FarSky Studios and Interstellar Entertainment used the mark in bad faith.
- Mouse House Inc. and Jamie Jameson did not address the likelihood of expansion in its pleading, except that they produce

video games. They did not, however, provide any evidence that they have plans to make a video game based on the film, *Aladar*.

The following factor is neutral on the face of the complaint, and is not contested by either party:

- Mouse House Inc. and Jamie Jameson did not present any evidence of actual confusion, although evidence of actual confusion is not required.

Therefore, the only factors we will be addressing are (1) Strength of the Mark; (2) Proximity of the Goods; and, (3) Similarity of the Marks.

(1) Strength of the Mark

The stronger the mark, the greater the protection it is afforded under trademark law. First, this Court must look at the conceptual strength of the mark, which involves the classification of the mark “along a spectrum of generally increasing inherent distinctiveness as generic, descriptive, suggestive, arbitrary, or fanciful.” *Brookfield Commc’ns Inc. v. West Coast Ent. Corp.*, (“*Brookfield*”), 174 F.3d 1036, 1058 (9th Cir. 1999). Fanciful marks are made-up and receive the strongest protection. Arbitrary marks are existing words that have no relation to the goods and services offered. Arbitrary marks also receive strong protection. Suggestive marks imply, but do not directly state, something about the goods or services being provided, and receive an adequate level of protection. Descriptive marks describe the goods and services, whether by function, quality, ingredient, etc. Descriptive marks are considered to be weak and alone cannot receive protection. However, if a party can

show secondary meaning – when consumers recognize the mark with a specific producer, rather than the product itself – the mark can become distinctive and gain protection.

Classification largely depends on the connection between the trademarked word, phrase or symbol, and the good. Registration can be sufficient enough to determine a mark’s strength; however, “while the registration adds something on the scales, we must come to grips with an assessment of the mark itself.” *Zobmondo Ent., LLC v. Falls Media, LLC*, 602 F.3d 1108, 1115 (9th Cir.2010). It is important to remember that companies do not own words or symbols outright, rather, with trademark protection, they may own the exclusive right to use that word or symbol for a particular good or service. This is the situation we have here. “Pantora” is a registered trademark to multiple companies other than Mouse House Inc., including a jewelry franchise and a music streaming company. However, we must look at the mark as a whole, not just a single word. *Sleekcraft*, 599 F.2d at 351; See *GoTo.com, Inc.*, 202 F.3d at 1207 (Concluding that the “GoTo” mark must be considered as a whole even though “Go” is a common word for websites on the internet).

Mouse House Inc. and Jamie Jameson assert that “Discover Pantora,” is an arbitrary mark and is therefore entitled to wide protection from infringement. The district court, however, correctly disagreed with this argument. The district court came to the conclusion that the mark is suggestive and therefore deserved protection from infringement, because it “requires a mental leap from the mark to the product,” *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137, 1150 (9th Cir. 2011) (quoting *Brookfield*, 174 F.3d at 1058).

Whether “Discover Pantora” is descriptive or suggestive is a tough question, and the line between the two isn’t always clear. There are several criteria this Court can look at to find the distinction between descriptive and suggestive marks. *Sleekcraft*, 599 F.2d at 349. The first, and primary criteria, is the “imaginativeness involved in the suggestion,” or “how immediate and direct is the thought process from the mark to the particular product.” *Sleekcraft*, 599 F.2d at 349 (internal citations omitted). Pantora is not a made-up word. Therefore, it is not fanciful or arbitrary, but it does require a mental leap from the mark to the product. It is difficult to determine whether, from the view of a consumer, “Discover Pantora” would conjure up the image of *Aladar* or Mouse House Inc. and Jamie Jameson, however, several other images might also pop-up, including the jewelry store and the music streaming service. The second criterion is whether granting Mouse House Inc. and Jamie Jameson a limited monopoly over their trademark will prevent legitimate use of the mark by other sellers. However, no evidence has been presented to show that others have the desire to use the mark to describe similar goods. The next criteria is “whether the mark is actually viewed by the public as an indication of the product’s origin or as self-serving description of it.” *Sleekcraft*, 599 F.2d 349. Because the word “Pantora” is a mark used by various companies – a jewelry store and music streaming service – it is difficult to determine whether consumers are searching for a specific company or product.

Second, this Court must look at the commercial strength of the mark, which is based on “actual marketplace recognition,” where “advertising expenditures can transform a suggestive mark into a strong mark.” *Brookfield*, 174 F.3d at 1058. “Discover Pantora” is a mark that will be

used for theme parks and clothing items, both of which have not been released to the public yet. However, Mouse House Inc. has done extensive advertising for the opening of its new theme parks and has been using the phrase “Discover Pantora.” Mouse House Inc. and Jamie Jameson argue that because they advertise to a broader audience and the advertising has been going on for several months prior to FarSky Studios and Interstellar Entertainment’s release of the advertisement for *Valkyrie: Mission Centauri*, when people are searching for “Discover Pantora,” they are looking for their goods and services. However, the difference between the amount spent on advertisement, the amount of people reached, and the time frame, is relatively small. Mouse House Inc. and Jamie Jameson have spent more than 10 million on commercials, internet ads, and billboards. Appellants began releasing advertisements on February 1st, 2020 and an expert witness testified that the advertisements reached 150 million people (10% margin of error). Respondents have spent 8 million in advertising on commercials, internet ads, and billboards. Respondents started releasing its advertisements on April 1st, 2020, and reached over 120 million people, according to their expert witness (10% margin for error). We don’t believe this minute difference is significant enough.

Based on the above criteria and the district court's findings, we hold that the mark is suggestive because one must make a mental leap from the phrase to the goods and is therefore subject to protection. Although Mouse House Inc. and Jamie Jameson’s mark is protectable, we believe it is still a weak mark only entitled to a narrow range of protection. Some amount of imagination is required to connect the product with the source, but the word “Discover” is common and used often, and “Pantora” is well known

as a name for other companies, as well as its significance in Greek mythology. Thus, only if this Court finds that the proximity of the goods is closely related and the marks are similar, will we find that infringement has taken place. *See Sleekcraft*, 599 F.2d at 350. (“[O]nly if the marks are quite similar, and the goods closely related, will infringement be found.”).

(2) Proximity of the Goods

For goods that are related and share similar aspects, there is a danger that consumers will mistake one product for another or one party’s goods for another party’s goods. However, unrelated goods are less likely to cause consumer confusion. *Brookfield*, 174 F.3d at 1055. “The more likely the public is to make such an association, the less similarity in the marks is requisite to a finding of likelihood of confusion.” *Sleekcraft*, 599 F.2d 350.

The proximity of goods is determined by whether the products are: (1) complementary; (2) sold to the same class of purchasers; and (3) similar in use and function. *Sleekcraft*, 599 F.2d at 350. The proximity of the goods would become less important if the consumers exercised a high degree of care, and the advertisements were clearly labeled. However, the district court concluded that the degree of care likely to be exercised by a purchaser is relatively low, due to the relatively low price, the products have a similar value, and are advertised in similar mediums. Therefore, when unsophisticated consumers are presented with an advertisement from *Valkyrie: Mission Centauri* with the words “Discover Pantera,” they might be confused as to the source of the good due to its similarity to *Aladar* advertisements. So, are Mouse House Inc. customers likely to associate the FarSky Studios and Interstellar

Entertainment’s video game as a new game from Mouse House Inc. in relation to *Aladar*?

The district court believes that there is a thin line between movies and video games, especially with new technology. This Court disagrees. The main products sold by Mouse House Inc. are movies, television shows, and memorabilia. However, Mouse House Inc. does have a presence in the video game industry. We believe it is safe to say that Mouse House Inc.’s target audience is everyone, while FarSky Studios and Interstellar Entertainment targets gamers – hardcore gamers as well as casual gamers. These product lines are non-competing, one being a film and the other a video game, and are clearly different in use and function. The video game is highly interactive and is made to enhance the player’s experience, while a film is created around a story intended to create emotions. Also, video games create strong social interaction. With films, you can go to a movie theater and watch a film with friends and family but it is largely an individual mode of entertainment. With videogames, you can play with friends and family or random people from around the world and team up for battles, compete in sporting events, and play puzzle games, etc. This creates skills such as teamwork and leadership that films do not provide. Thus, this factor is in favor of FarSky Studios and Interstellar Entertainment.

(3) Similarity of the Marks

“Obviously, the greater the similarity between the two marks at issue, the greater the likelihood of confusion.” *GoTo.com, Inc.*, 202 F.3d at 1206. The district court’s findings on the similarity of the marks must be upheld unless they are found to be clearly erroneous. *J. B. Williams Co., Inc. v. LeConte Cosmetics, Inc.*, 523 F.2d at

192. There is no dispute as to the actual appearance of the marks. And it is important to note that marks can be similar in appearance and not cause a likelihood of confusion to the source, especially when the other factors are considered. *Id.*

“Similarity of the marks is tested on three levels: sight, sound, and meaning. Each must be considered as they are encountered in the marketplace.” *Sleekcraft*, 599 F.2d at 351 (citations omitted). Although differences are important to note, similarities will weigh heavier. *See GoTo.com, Inc.*, 202 F.3d at 1206.

Looking at the two phrases, side-by-side, “Discover Pantora” and “Discover Pantera” have several similarities. *See Rockwood Chocolate Co. v. Hoffman Candy Co.*, 372 F.2d 552, 555, 54 C.C.P.A. 1061 (1967) (likelihood of confusion found for Cup-o-Gold and Bag-o-Gold, but not for Rockwood Bag-o-Gold). The district court concluded that the only difference is a single letter. FarSky Studios and Interstellar Entertainment argue that the distinctive advertisements and how the mark is presented should negate any similarity the court finds of the phrase. We agree. Even though the marks appear similar in spelling and layout, they appear dissimilar when viewed on advertisements. Mouse House Inc. and Jamie Jameson’s advertisements for the theme parks and clothing appear on commercials, the internet, and on billboards. In the advertisements that appear on the internet and billboards, “Discover Pantora” is displayed at the bottom with Jake Scully pictured prominently in his Avatar body. This is what the font and writing appear like:

Discover Pantora

The video game displays the words “Discover Pantera” at the bottom with a Valkyrie warrior holding a sword and shield.

**DISCOVER
PANTERA**

The font from *Aladar* appears more organic, which appropriately fits with the story. On the other hand, the font and look of Valkyrie: Mission Centauri screams outer space. Also, both phrases may be at the bottom of the advertisements, but they are positioned differently. “Discover Pantora” is side-by-side, while “Discover Pantera” is on top of one another. Even though there are similarities in sight when the two phrases are looked together, when looked at in advertisements and the way the phrase is presented, the two look very different.

The sound is also an important factor to consider. The two sounds are distinguishable, but they do sound very similar. The only difference here is a single syllable in “Pantora” and “Pantera.” See *Survivor Media, Inc. v. Survivor Productions*, 406 F.3d 625, 633 (9th Cir. 2005) (“Phonetically, “Survivor” and “Survivor” are nearly identical”). The district court found that they sounded very similar and that the similarities outweighed the differences. When spoken in conjunction with one another, the differences you can see are not as distinguishable by sound. We agree with the district court’s conclusion. Therefore, the similarity of the marks depends on our conclusion of the final factor – meaning.

If the two marks are close in meaning, this can verify a claim of similarity. See

Sleekcraft, 599 F.2d at 352. This Court believes the meaning between the two words are entirely different. Mouse House Inc. named the moon “Pantora” to reference the first woman of Greek Mythology, who unleashed evil onto the earth, but the one evil she saved from being released was “Hopelessness.” Jamie Jameson clarified this by stating that, “[w]e decided on the name ‘Pantora’ because it demonstrates that even with all the evils in the world, humans can always succeed if they have hope. And the primary conflict our protagonist faces is the battle between good and evil.” Also, fans of the film as well as the theme parks go to “Discover” and experience the land that they saw in the film through rides and merchandise. On the other hand, “Discover Pantera” is speaking directly to the new player, inviting them to buy and play the new videogame. Also, according to the creators, the word “Pantera” is used in the native language to mean “faith,” referencing their strong spirituality and connection to life on the moon. The district court argued that “faith” is a synonym of “hope” and therefore convey the same meaning, but we disagree. “Faith,” according to Merriam-Webster, means “allegiance to duty or a person” or “belief and trust in and loyalty to God.” “faith.” Merriam-Webster Online Dictionary. 2020. <https://www.merriam-webster.com/> (Aug. 21, 2020). “Hope,” on the other hand, is defined as “to cherish a desire with anticipation: to want something to happen or be true.” “hope.” Merriam-Webster Online Dictionary. 2020. <https://www.merriam-webster.com/> (Aug. 21, 2020). Therefore, this Court finds that the two phrases convey two different meanings.

Despite the district court’s findings, we hold that the marks are not similar on two levels. Therefore, this factor weighs in favor of Appellants.

(4) Trademark Infringement Conclusion

After evaluating the remaining factors, this Court finds that FarSky Studios and Interstellar Entertainment did not infringe on Mouse House Inc. and Jamie Jameson's trademark.

V. Conclusion

Because of the foregoing, we reverse the district court's findings.

REVERSED AND REMANDED.

END OF DOCUMENT