No. 21-5082

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN MICHAEL DUBAY,

Petitioner,

v.

STEPHEN KING,,
MEDIA RIGHTS CAPITAL,
IMAGINE ENTERTAINMENT,
SONY PICTURES ENTERTAINMENT,
MARVEL ENTERTAINMENT, *et al.*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals Eleventh Circuit.

PETITION FOR WRIT OF CERTIORARI

Benjamin Michael DuBay,
Pro Se
69 Peter Island Drive
St Augustine Fl., 32092
727-656-3595
Benjamin.dubay@gmail.com
July 8, 2021 *Pro Se*

QUESTIONS PRESENTED

1. The Copyright Act defines statutorily eligible works in 17 U.S.C. § 102(a). While § 102(a) does not list Comic Book Characters, some Circuit Courts have held that comic book characters are independently protected as components of copyrighted works due to the character's original and consistent aggregation of traits and to characters that are so important to the work that they are considered the story told. Yet, despite the lack of prior art for Restin Dane's essential aggregation of traits and Restin being the story told, the Eleventh Circuit denies protection for Restin independently.

   The first question for this Court is whether distinctive characters, like comic book characters, are protected independently from the copyrighted work due to their original and consistent aggregation of traits, and if so, whether said aggregations are the proper points of comparison?

2. There is a split among the circuits as to whether copyrightability and degree of similarity involve questions of fact. If so, this Court holds that such questions of fact are resolved by the jury—not by a judge's subjectiveness where Constitutional rights are concerned. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

   The second question for this Court is whether copyrightability and degree of similarity involve questions of fact for the jury?

3. This Court tasked the District Courts to serve as gatekeepers to ensure that expert evidence is trustworthy. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, (1993).

   The third question for this Court is whether it is reliable that a real party in interest serving as an expert witness would purely opine, using a soft science, against said interest?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Benjamin Dubay was also a Plaintiff in the District Court and Appellant in the Eleventh Circuit. William DuBay, LLC was a Plaintiff, however said entity was removed prior to Summary Judgment.

RULE 29.6 STATEMENT

Petitioner Benjamin Dubay is an individual. As such, there are not Amended Corporate Disclosure Statements that pertain.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case other than the proceeding from which this petition arises: *Dubay v. Stephen King, et. al.*, No. 19-11224, Am. Opinion (11th Cir. February 23, 2021), addressing appeal from *Dubay v. Stephen King, et. al.*, No. 3:17-cv-00348-J-20MCR, Judgment (March 4, 2019).

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Petitioner Benjamin Dubay petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order denying the petition for panel rehearing and rehearing *en banc*, App. A p. 22, is not reported. The amended opinion of the court of appeals, App. A p. 1-21, is not reported The original opinion of the court of appeals, App. B p. 1-18, is not reported. The opinion and order of the United States District Court granting defendants' motion for summary judgment, App. D p. 1-32, is not reported. The opinion and order of the United States District Court denying Plaintiff's motion for rehearing, App. C p. 1-5.

JURISDICTION

The Eleventh Circuit entered judgment on February 23, 2021. App. 19a-38a. On February 23, 2021, the court of appeals filed an order amending its opinion. App. 39a-46a. On April 16, 2021, the court of appeals filed an order denying the Petitioner's timely petition for panel rehearing and rehearing *en banc*. App. 1a-2a. Jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, Section 8, Clause 8 of the U.S. Constitution: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Amendment VII to the U.S. Constitution: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment XIV, Section 1 to the U.S. Constitution: "No state shall make or enforce any law which... nor deny to any person within its jurisdiction the equal protection of the laws."

17 U.S.C. § 102(a): "(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(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."

17 U.S.C. § 106: "Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: ...

(2) to prepare derivative works based upon the copyrighted work..."

Introduction

For almost 100 years, the courts with the predominant load of Comic Book Character Copyright Infringement matters have held that comic book characters are protected by copyright, independently from the story, due to the expressive aspect of their original and creative aggregations of traits, and that the reproduction of the essential traits of a copyrighted character, save for insignificant or fair uses, is copyright infringement, but not all circuits adhere to these standards.

The rights to a monopoly over such creative discoveries are enumerated in the Constitution, excepted only by *non-infringement as a matter of law;* controlled by the *de minimis* rule and the doctrine of *fair use.* Therefore, the Courts finding congruence in Restin Dane's "most significant and representative" aggregations of traits can only be availed through prior art or *fair use.* Notwithstanding, the District Court for the Middle District of Florida and Eleventh Circuit Court of Appeals found for Petitioner but ruled for Respondents by not carefully considering Copyright Law, prior decisions in its Sister Circuits and This Court, or the Constitutional maxims of exclusive derivative use, right to factual determination by jury, and equal protection.

The controlling doctrines, rules and laws reveal the self-evident truth. Respondent King gained access to the original, creative, and important parts of Restin Dane that Roland Deschain is second comer to. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985). There is infringement. *Fleischer Studios, Inc. v. Ralph a Freundlich, Inc*, 73 F.2d at 276, 278 (2d Cir. 1934).

This Court should address whether copyrightability and degree of similarity involve questions of fact; the outcome of which has Constitutional importance. This Court has held that the Seventh Amendment attaches to fact disputes in copyright cases. *Feltner v. Columbia Pictures Television, Inc.*,

523 U.S. 340, 355 (1998). If copyrightability and degree of similarity involve questions of fact, then Courts—like the Eleventh Circuit here—violate discoverers' Constitutionally guaranteed right to exclusive use in derivative works, when holding that "not substantially similar" means something other than *de minimis* or *fair use*, rather than properly finding *non-infringement as a matter of law*. This issue is important and ripe for This Court to rule because the relevant facts are on the record, and the Eleventh Circuit is at conflict with its Sister Circuits' and This Court's holdings in like matters.

This Court should also accept review because the Eleventh Circuit erred by not carefully considering that the concealed financial interest of Robin Furth and material omissions of the evidence proffered, coupled with Furth misrepresenting those facts at deposition, renders the evidence untrustworthy because This Court holds that an expert's testimony, on cross-examination, is inextricably linked to that opinion evidence. This Court should hold that a financially interested expert's opinions, based on a soft science, are inadmissible at the Summary Judgment phase, or at all, because it is proven unreliable for a real party in interest to purely opine against themselves. This holding would protect all parties from a real party in interest creating or concealing material facts to create or eliminate questions of fact; otherwise permitting advocacy in lieu of objectivity.

STATEMENT OF THE CASE

Petitioner/Plaintiff interposed this litigation seeking to protect Restin Dane AKA "The Rook", a comic book character whose descriptive traits are "distinctive in combination" as expressed.

After Discovery, the Respondents/Defendants moved for Summary Judgment asserting that Restin "alone may be protectible by copyright law" but "Roland is not substantially similar in protectible expression" to Restin "because those few

features... that are distinctively delineated are not part of Roland". Copyrightability is conceded. Congruence of the essential aggregation of traits, presumed original, was found. App D p. 19-29.

Neither Court was convinced that respondent Stephen King independently created Roland free of access to Restin. App A p. 10. Rather, both Courts found congruence in Restin's original and essential aggregations but found the characters to have "different stories and contexts", App. A p. 18., despite not having read *The Dark Tower*. App. D, p. 10.

Respondents deposited a hotly contested opinion summary, prepared by Robin Furth, a real party in interest disguised as an expert, in lieu of *The Dark Tower* novels and comic books that she co-authored. The District Court found that Roland is a time-traveler, and that Furth is financially interested in the litigation, contrary to Furth's testimony. App. D, p. 10-11, 20-21.

A witness, "in any matter within the jurisdiction of the... judicial branch of the Government of the United States, knowingly and willfully- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact" has committed a fraud on the Court. 18 U.S.C. § 1001 (a). "There is no question of the general doctrine that fraud vitiates... judgments." *United States v. Throckmorton*, 98 U.S. 61, 64 (1878).

Neither Court performed a proper *Daubert* analysis because both found that Furth was financially interested; a discrediting factor of the peer standards controlling the operation of a close reading methodology- according to Furth.

Ultimately, the issues were so close, the Circuit Court required oral argument. The Eleventh Circuit upheld the District Court's findings and ruling.

A. Factual Background.

This case provides a unique opportunity for This Court to apply the Constitutional maxims of equal protection, exclusive derivative use, right to factual determination by jury as well as This Court's safeguards held in *Daubert* and *Throckmorton.*

The Eleventh Circuit found for Petitioner by finding congruence in the aggregations of Restin Dane's important parts (App D p. 19-28); by not finding prior art for those aggregations (App. D, p. 29 *footnote*); by not properly finding non-infringement as a matter of law- rather by finding that the differences in the stories and contexts were a permissible use (App. A, p. 18); by not finding that Respondent King independently created Roland Deschain free of access to those original and important aggregations of traits (App D p. 30); by finding that Furth is financially interested contrary to her testimony (App D p. 10-11); and by finding that Roland time-traveled despite this material fact being concealed from Furth's opinion summary evidence. (App D. p. 20).

By finding congruence in 14 of Restin Dane's essential elements (App D p. 19-28), and by not finding prior art for the aggregation of those elements (App. D p. 29 *footnote*), evident by not being able to determine unprotectability, The Eleventh Circuit found substantial similarity instead of properly determining *non-infringement as a matter of law.*

The 14 *most significant and representative* (App D p. 19) traits the District Court found congruent are:

1. Both are adventure seekers. App. D p. 20
2. Both time-travel which is *central* and the *hook* to Restin. App D p. 20-21.
3. Both are familial gunslingers. App D p. 21-22.
4. Both castle towers play a *large role.* App D p. 22.
5. Both have a similar overall look in Old West gunslinger garb. App D p. 24.

6. Both have similar names. App D p. 26.
7. Both have similar histories. App D p. 27.
8. Both have similar birds that are *featured*. App D p. 27-28.
9. Both are brave. App D p. 28.
10. Both are excellent marksman. App D p. 28.
11. Both are born leaders. App D p. 28.
12. Both are determined. App D p. 28.
13. Both excel in hand-to-hand combat. App D p. 28
14. Both are monster fighters. App D p. 28.

The District Court improperly decided that the individual ideas and aggregations are not substantially similar subjectively, rather than determining *non-infringement as a matter of law* by filtering the aggregations through prior art to establish lack of originality; or by determining *de minimis* use of those original aggregations; or by finding permissible use by applying the doctrine of *fair use*. Subjective determinations are for the jury to make.

The District Court admits that it was unable to determine un-protectability (App D p. 29 *footnote*) due to the lack of prior art for those aggregations. The rule then, is for The Court to *simply assume* that the aggregations are protectable and include those in the final substantial-similarity comparison.

Restin Dane was also found to be so important to the work that he is the story told. App D p. 20.

The Eleventh Circuit found congruence in the plead similarities without finding prior art, but determined the characters were not substantially similar in their stories and contexts- imposing its subjectiveness where Constitutional rights are concerned.

Without finding prior art, both Courts found congruence in Restin Dane's original and important aggregations of traits. The Courts have found for Petitioner but have denied Restin Dane equal protection as other characters have been

protected in most circuits and have denied Petitioner equal protection, factual determinations by jury and monopolistic use, each guaranteed under The United States Constitution.

B. The District Court's Proceeding.

The District Court's ruling is in conflict with its Sister Circuits and This Court's prior holdings. The District Court did not carefully consider *Daubert* or the Constitutional maxims of exclusive derivative use, right to factual determination by jury, and equal protection under the law. The District Court has improperly imposed its subjectiveness where Constitutional rights are concerned.

The *Daubert* standards were not carefully considered. Had they been, Furth's concealed financial interests, coupled with impeachment of her summary opinion through the works that she purports to have summarized, would have rendered her opinion as untrustworthy.

Despite that, the District Court found congruence in Restin Dane's *most significant and representative set of traits*, some of which played a *large role*, were *featured*, were *central* and/or were Restin Dane's *hook*. The District Court acknowledges that it could not determine un protectability; when that is what the Court must do, here, to determine *non-infringement as a matter of law.*

Instead, the District found that the characters were different in the stories because the characters' personalities are different. The District Court found Roland to be darker (App. D p. 29), but the District Court also found that Roland softens during the series (App. D p. 23) and that Roland trained from childhood to be a hero. (App. D p. 22). The degree of similarity, as well as the degree of softening that Roland experiences throughout the series and how that softening impacts Roland's darkness as a hero, are factual determinations that are Constitutionally bound for the jury.

C. The Eleventh Circuit Decision.

The Eleventh Circuit Court of Appeals upheld The District Court's findings as well reasoned- agreeing that "different stories and contexts" equals not "substantially similar". App. A p. 18. The Eleventh Circuit, in effect, denied protection to a distinctive character independently from the story, not carefully considering that replicating Restin's essential elements and original aggregations of traits requires prior art to determine *non-infringement as a matter of law* because the flipside of *substantial similarity* is *de minimis* and *fair use*. Neither were found.

The Eleventh Circuit Court of Appeals did not find prior art for the aggregations. Rather, The Eleventh Circuit Court of Appeals reduced the aggregations to their underlying ideas, not carefully considering that all creative works can, similarly, be reduced to ideas- negating Copyright protection. App A p. 10-14. *Judi Boisson v. Banian Ltd,* F.3d 262, 272 (2d Cir. 2001).

The Eleventh Circuit Court of Appeals did not reach its decision easily. In fact, the Eleventh Circuit Court of Appeals Panel is required to deny Oral Argument when:

> "(A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." FRAP 34.

It is not sufficient that the decisional process could be aided. The standard is that the process would be *significantly aided by oral argument*; that the record was not sufficient to affirm; and that sufficient authority does not exist to affirm said lower Court's ruling. The Jury, not the Panel, is the Constitutional safeguard for factual determinations because

it "would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations [or other creative works], outside of the narrowest and most obvious limits." *Bleistein v. Donaldson Lithographing Co.,* 188 U.S. 239, 251 (1903).

The Eleventh Circuit Court of Appeals acknowledges that the issues were too close to decide. These are not the narrowest limits This Court has granted such authority.

The Eleventh Circuit Court of Appeals upheld the District Court's findings regarding Furth's evidence.

Exclusive right to derivative use was denied. Right to factual determination by jury was denied. Equal protection was denied. These rights are guaranteed by the Constitution.

REASONS FOR GRANTING THE WRIT

I. This Court should decide if comic book characters are protected independently from the copyrighted work, and if so, whether said aggregations are the proper points of comparison.

Most modern courts adhere to two tests for protectability beyond the written stories. Landmark cases in the Second and Ninth Circuits provide guidance based on well rooted logic. The Eleventh Circuit's "different stories and contexts" equals not "substantially similar", App. A p. 18., is at conflict with its Sister Circuits' holdings that distinctive characters are independently protected from the story due to their original and creative aggregation of traits.

> "A character is an aggregation of the particular talents and traits his *creator* selected for him. That each one may be an idea does not diminish the expressive aspect of the combination." *Warner Bros. v. Am. Broadcasting Companies,* 720 F.2d 231, 243 (2d Cir. 1983).

> "[C]haracters that are especially distinctive, *or* the story being told, receive protection apart from the copyrighted work." *Daniels v. Walt Disney Co.*, 952 F.3d 1149, 1155 (9th Cir. 2020).

The character must be "sufficiently delineated and display consistent, widely identifiable traits." *DC Comics v. Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015). The Court in *Towle* recognized the necessity of changes in context in episodic works, *i.e.* Batmobile as a tank or missile (*Id.*), because changes in context that do not alter the original aggregation of characteristics are Petitioner's right to derivatives or else that right is not exclusive. Respondents' expert, Robert Gale, agrees that Restin is copyrightable under *Towle*.

The District Court found that there is insufficient evidence to find that Restin's aggregations were un-protectable. App. D p. 29 *footnote*. "Protectability can [not] practicably be demonstrated affirmatively but, rather, consists of the absence of the various species of un protectability." *Id. Compulife Software Inc. v. Newman*, 959 F.3d 1288, 1305-1306, 310. (11th Cir. 2020). "If, for instance, the defendant believes that some part of the copyrighted work is in the public domain, he must narrow the inquiry by indicating where in the public domain that portion of the work can be found." *Id.* Yet, Respondents do not point to anywhere in the public domain showing that the aggregations are unoriginal. The "court should simply assume that the [aggregations are] protectable and include that element in the final substantial-similarity comparison between the works" *Id.*

> "[T]here is a hierarchy of copyright protection in which original, *creative* works are afforded greater protection than derivative works or factual

compilations." *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001).

Reducing the aggregations of Restin's traits to their underlying ideas, reduces creative works beneath factual compilations in the hierarchy of copyright protection. Gail points out that, while time-travel and a Delorean car are not independently protectible, a second comer would appropriate a substantial part of *Back to the Future* if they were to combine time-travel and a car, because he was first.

Two leading historians, Richard Arndt and Jeff Rovin, have testified to the absence of Restin's aggregations in the public domain. Both historians agree with Gale that Restin is entitled to protection. Respondent Marvel has relied on Rovin in like matters for four decades- and still do. Rovin testified that the conclusion must be copying of Restin Dane's original aggregations, based on his observations as an uninterested layman and his fact knowledge as a comic book historian. App. D p. 30. Rovin is a fact witness.

The District Court has also found Restin Dane to be so important to the work that he is the story being told.

The Eleventh Circuit has denied Restin Dane protection, as a distinctive character, due to his consistent aggregation of traits for which there is an absence of prior art, independently from the story; and even when he is so important to the work that Restin Dane is the story told. The Eleventh Circuit is in conflict with its Sister Circuits.

Petitioner has the exclusive right to use Restin's original and consistent aggregation of traits, save for *de minimis* or *fair use*. Otherwise, Copyright Law is Un-Constitutional.

II. This Court should grant review to address whether copyrightability and degree of similarity involve questions of fact for the jury to determine.

Summary judgment, historically, has been withheld in copyright cases because courts do not impose their subjectiveness where Constitutional rights are concerned. *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1247 (11th Cir. 1999). The Circuit Courts have invoked two distinct doctrines to prove *non-infringement as a matter of law. Id.*

> "First, a *de minimis* rule has been applied, allowing the literal copying of a small and usually insignificant portion of the plaintiff's work. Second, under the 'fair use' doctrine, courts have allowed the taking of words or phrases when adapted for use as commentary or parody." *Warner Bros.*, 720 F.2d 231, 242-243.

Petitioner plead that Restin was the first character to dress in Old West gunslinger garb and have the ability to time-travel, whether or not the character was from the Old West. Here, neither is. Respondent denied that Roland is a time-traveler that dressed in Old West gunslinger garb. Despite Respondents' play on words, both Courts found that Roland does time-travel and dress in Old West gunslinger garb. Roland's works were published after Restin displayed this original aggregation of traits. The District Court found time-travel to be the *hook* and *central* to Restin.

The District Court also found that Restin's bird is *featured,* and that his castle played a *large role.* Each are essential to Restin's alter identity as *The Rook.* Gale admits that both are original to Restin. Tellingly, both Restin and Roland adopt the identity of their bird before battle and that of a gunslinger-knight by living in a castle, but only Restin

was first. The congruence of the original aggregations of these characteristics, components of the fourteen *most significant and representative* parts of Restin, is only excepted by *non-infringement* through prior art or *fair use.*

Neither Court found that Roland is a parody or commentary of Restin and the Courts "do not accept [the] mode of analysis whereby every skill the two characters share is dismissed as an idea rather than a protected form of expression. That approach risks elimination of any copyright protection for a character, unless the allegedly infringing character looks and behaves exactly like the original." *Warner Bros.*, 720 F.2d 231, 242-243. Otherwise, Roland would have to be strikingly similar just to be substantially similar-conflating the thresholds.

Can a second comer appropriate the original, creative, and important parts of *Spider-man* and make him serve the underworld to avail infringement? No, "a jury would have to make the *factual determination* whether the second character was [*Spiderman*] gone astray or a new addition to the superhero genre." *Warner Bros.*, 720 F.2d 231, 242-243.

> "The essential characteristics of [Petitioner's] copyrighted character are reproduced... 'It was a unique combination'... as depicted... There is infringement". *Fleischer Studios, Inc.*, 73 F.2d at 276, 278.

The District Court found congruence in Restin's *most significant and representative* aggregation of traits. *Peter Letterese & Associates, Inc. v. World Institute of Scientology Enterprises, International*, 533 F.3d 1287, 1315 (11th Cir. 2008). *Harper & Row, Publishers, Inc.*, 471 U.S. 539, 546.

The District Court found that Roland is second comer to a substantial part of Restin's original aggregation of traits by not finding prior art or *fair use.*

If the Courts are authorized to fact find the degree of similarity, instead of *non-infringement as a matter of law*, the District Court found for Petitioner.

III. This Court should determine whether it is reliable that a real party in interest serving as an expert witness would purely opine, using a soft science, against said interest?

The District Court found that Petitioner disputed Furth's testimony instead of her opinion summary, but cross-examination is the proper challenge to expert opinion evidence. App. D p. 10-11 *footnote.* The District Court found that Furth's omission in her opinion summary, *i.e.* time-travel, was the *hook*, *central* and *most significant and representative.* App. D p. 20-21. In effect, the District Court found that Furth omitted a material fact from her summary opinion evidence and misrepresented the same material fact in her cross-examination testimony.

This Court has previously taken aim, in two landmark cases, to prevent parties from introducing *pseudoscientific* evidence or *junk science* in the court of law.

In *Daubert*, This Court established a gatekeeper standard, or test, to assess whether an expert witness's scientific testimony is based on scientifically valid reasoning, that which can properly be applied to the facts at issue; and how a trial judge must consider an expert witness' opinion and methodology to determine if we are in the presence of "scientific knowledge." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 580 (1993).

1. Can the scientific methodology be tested? Or has it been tested?

2. Was the methodology subjected to peer review and publication?
3. What is the known or possible error rate?
4. Are there standards controlling its operation? And were they adhered?
5. Is there a widespread acceptance of the technique within the scientific community?

A landmark shift of the cross-examination of expert witnesses occurred in *Daubert,* inextricably linking expert evidence to their testimony on cross-examination.

> "Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising 'general acceptance' standard, is the appropriate means by which evidence based on valid principles may be challenged." *Id.*

This is especially true for soft sciences such as a close reading defined as:

> *"Close reading* depends upon inductive reasoning. In other words, beginning with *all of the facts presented in the text*, weighing them carefully and without bias, and then drawing solid, evidence-based conclusions."

In *Kumho*, This Court broadened the scope of the *Daubert* test to apply to soft sciences- in an effort to frustrate those conclusions derived from junk sciences or a pseudoscience from reaching the trier of fact. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137.

Here, The District Court did not carefully consider This Court's instructions in *Daubert* and *Kumho* by not properly performing the *Daubert* test. Soft sciences, such as a close reading, are subject to the same scrutiny that scientific evidence is scrutinized. Had the District Court considered

whether a Rule 1006 summary, derived from all *material* facts presented in the text, could be tested, Respondent King's own writings contained in the work purported to have been summarized are the appropriate challenges on cross-examination. Respondent King plainly writes, in the purportedly summarized works, that Roland time-travels from Earth which is the reason why the District Court found that Roland does time-travel.

Respondents do not dispute that Furth previously made material factual representations in *The Complete Concordance*, an encyclopedia the Furth authored, that are at conflict with Furth's made-for-litigation opinion.

Furth previously summarized *The Dark Tower* in this encyclopedia. Furth previously wrote that Roland aims time like a gun, which she defined as time-traveling to a when or where of his choosing. In the encyclopedia, Furth also defined Mid-World as future Earth and that Roland travels to and from the future to the past. Furth also lied when she testified Mid-World was not Earth. Lying about being from Earth and not being a time-traveler gave new contexts to the work. App. A p. 18.

> "An additional consideration under Rule 702 — and another aspect of relevancy — is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *United States v. Downing*, 753 F. 2d 1224, 1242 (6th Cir. 1985).

Like the Eleventh Circuit, Respondents' expert witness Robert Gale admits that he did not read *The Dark Tower*. Rather, Gale read Furth's summary opinion, but Gale concluded that Roland repeatedly time-travelled to four different times. By contrast, Marty McFly also time-travels to four specific times. But, how could Gale reach this conclusion, similar to the Eleventh Circuit, when time-travel is omitted

from Furth's summary opinion? It is because Gale received "specific clarifying details... through attorney Vincent Cox who served as a go-between between [Gale] and Robin Furth". Gale could not have guessed at these facts.

> "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 137 (1997).

The District Court, by finding that Furth is financially interested, effectively found that Furth's testimony is untrustworthy. Furth's financial interest affects reliability when Furth chooses to lie. Liars are inherently unreliable.

> "Critics are not merely alleging that financial interest biases experts at a subconscious level; they go further and aver outright fraud and perjury." Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. Miami L. Rev. 1069, 1089 (1992).

Had Furth told the truth about her financial interest, her evidence would be at odds with the peer standards controlling the operation of her proffered methodology, by her own testimony- rendering it methodologically flawed. Furth testified "if the person performing the analysis has a financial interest in the work being analyzed... the work produced would be discredited." Furth admits that she read the Amended Complaint in this action before preparing her opinion summary. Furth just avoided incriminating evidence.

> "[T]he Fifth Amendment 'not only protects the individual against being involuntarily called as a witness against himself [or herself] in a criminal prosecution but also privileges him [or her] not to

> answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings.'" *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976).

Furth admits that she is the author of *The Dark Tower* comic books. The lower Courts found her to be a real party in interest. Copyright Infringement is also a criminal offense. 17 U.S.C. 506(A) and 18 U.S.C. 2319. This begs the question. Can a real party in interest be relied on to testify against incriminating evidence that may lead to the expert being held criminally or civilly responsible for copyright infringement?

Furth knew what the material facts were that she must conceal to protect, what amounts to, virtually her entire life's income. How could Furth be expected to reliably opine to inconvenient evidence in these stakes? Furth did not here. Notably, Furth does not assert that her opinion is an accurate summary of the work, just that the summary opinions are her own. If not an accurate summary, how can it be reliable?

IV. This Court needs to resolve this conflict because these issues are of constitutional importance.

The Court's determination of this issue will affect intellectual property discovers' Seventh Amendment right to trial by jury. Juries—not judges—decide factual disputes in copyright cases. *Feltner,* 523 U.S. at 355.

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, (1942).

The lower Courts erred when not carefully considering Restin's aggregation of traits in the absence of the prior art. Congruence of the original and important parts is not *non-infringement as a matter of law*. Rather, it is infringement because a substantial part of Restin Dane's original elements, his essential elements, have been appropriated outside of the excepted uses. However, questions of fact are Constitutionally bound for the juries' perception as lay observers.

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *Declaration of Independence.* The true question for This Court is whether all discoverers are treated equally under the United States Constitution?

V. This case presents exceptionally important issues and is an ideal set of facts for equal protection under the law.

Uniform Federal Copyright Law is vital to equal protection under the law. Equal protection under the law begins with uniform rules, doctrines and laws that govern such protection. Here, the lower courts have found for Petitioner when applying the standards for copyrightability of comic book characters and what constitutes infringement that have been otherwise universally applied for nearly 100 years.

> "The objective of the Copyright Clause was clearly to facilitate the granting of rights national in scope." *Goldstein v. California*, 412 U.S. 546, 555 (1973).

Respondent Marvel is an ideal party to litigate the standard for comic book character copyrightability because if a second comer can appropriate the original and essential aggregations of Restin Dane's traits, a second comer can appropriate the original and essential aggregations of *Spiderman*'s traits, or any of Respondent Marvel's 7,000 comic book characters- due to the Constitutionally mandated maxim of equal protection.

> "The limited monopoly granted to the artist is intended to provide the necessary bargaining capital to garner a fair price for the value of the works passing into public use." *Stewart v. Abend*, 495 U.S. 207, 229 (1990).

Not granting the Writ, will perpetuate uncertainty in the Courts over these important issues. Respondents, themselves, may not be properly incentivized for their creative discoveries should second comer accept This Court's silence as acceptance, and decide to reproduce any or all of Marvel's characters by writing new stories and creating new contexts. The Constitution's framers drafted our charter to ensure that what is good for the goose is good for the gander.

> "The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." *Harper & Row,* 471 U.S. 539, 546 (1985).

There also, the Courts nearly unanimously hold that the degree of similarity is a question of fact for the Jury to decide.

Here, the lower Courts imposed their subjectiveness in reaching *non-infringement as a matter of law*, not by filtering the aggregations through prior art and finding lack of originality; not by determining *de minimis* use due to copying of insignificant portions of Petitioner's work and not by finding parody or commentary or any prescribed fair use. Which means, that the Eleventh Circuit did not properly reach the conclusion of *non-infringement as a matter-of-law*. Rather, the lower Courts decided that "different stories and contexts", App. A p. 18., is a new but not recognized exception that deprives a discoverer of their exclusive right to derivative works. Such a holding deprives Respondent Marvel of their same rights for their body of comic book characters due to the Constitutionally mandated maxim of equal protection.

This case is also the perfect case to address whether a real party in interest can be expected to purely opine against said interest. It would be difficult to imagine a clearer example than this case, where This Court, when confronted with a partisan disguised as an expert, would not preclude the so-called-expert's testimony on the grounds that what little probative value it has is outweighed by its hopelessly partisan nature. That would permit advocacy in lieu of objectivity.

CONCLUSION.

Furth employed a pseudoscience that was neither supported by the text in the works or her testimony on the omissions of the evidence. The District Court and Gale did not rely on Furth's material fact-absent evidence, otherwise the District Court and Gale would have found that Roland does not time-travel. Furth is a real party in interest disguised as an expert. Furth lied because Furth's financial interest discredited a *close reading* methodology according to Furth.

Respondents moved under the premise that the elements Petitioner seeks to protect are not part of Roland;

nor that those elements are essential to Restin. Yet, both Courts found congruence in the original aggregation of traits that are essential to Restin. There is infringement.

Differences in the context of the stories curtails a discoverer's Constitutional right to a monopoly, for a limited time, over those discoveries in new stories and contexts.

The Courts are not free to impose their subjectiveness where Constitutional rights are concerned. Should This Court hold otherwise, the threshold is substantial similarity because neither Court was persuaded that Roland Deschain was independently created free of access to Restin Dane.

Substantial similarity, in its simplest form, means that a substantial part of the original aggregations of traits of Petitioner's copyrighted character were appropriated outside the *de minimis* rule or the doctrine of *fair use*. When applied carefully, the lower Courts have found that the essential characteristics of Petitioner's copyrighted character are reproduced. It was a unique combination as depicted. There is infringement under, what would otherwise be, uniform Copyright Law.

Respectfully, the Courts have found for Petitioner. These truths are self-evident. The District Court's and Circuit Court's Orders are Un-Constitutional *ab initio*.

Petitioner's writ should be granted.

Respectfully Submitted,

Benjamin M. DuBay, *Pro Se*

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