

APPENDIX A

Eleventh Circuit Amended Order and Denial of Rehearing Petition.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11224

D.C. Docket No. 3:17-cv-00348-HES-MCR

BENJAMIN MICHAEL DUBAY,

Plaintiff - Appellant,

WILLIAM B. DUBAY, LLC,

Plaintiff,

versus

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

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(February 23, 2021)

Before NEWSOM and BRANCH, Circuit Judges.*

BRANCH, Circuit Judge:

In this copyright infringement action, Benjamin DuBay appeals the district court's grant of summary judgment to Stephen King, Media Rights Capital, Imagine Entertainment, Sony Pictures Entertainment, Marvel Entertainment, and Simon & Schuster (collectively, "King"). DuBay owns the copyright for a comic book series called *The Rook*, which recounted the adventures of Restin Dane. King is the author of *The Dark Tower* novel series, which features the character Roland Deschain as its protagonist. DuBay sued King for copyright infringement, alleging that Roland Deschain is a copy of Restin Dane. DuBay also sued the other defendants for contributory and vicarious copyright infringement for their respective roles in publishing King's novel series and adapting the book series into graphic novels and a motion picture. After careful consideration and with the benefit of oral argument, we affirm.

I. BACKGROUND

Because the parties are familiar with the facts of this case, we recount only those facts that are necessary to the disposition of this appeal.

* After Judge Martin heard this case at oral argument, facts arose that required her recusal. She did not, therefore, participate in this decision, which is rendered by a quorum. 28 U.S.C. § 46(d).

William DuBay and two other individuals created the comic book character Restin Dane, a.k.a. “The Rook,” in the 1970s. On January 19, 1977, Dane first appeared in a Warren Publications horror/fantasy comic magazine entitled *Eerie* (vol. 82). In 1979, Warren Publications published a comic book series dedicated to *The Rook*. *The Rook* comic book series sold more than 5 million copies from 1977 to 1983.

As the evidence presented in the underlying proceeding established, Restin Dane is a wealthy scientist/inventor who lives in Arizona in a house shaped like a rook chess piece, which is known both as “Rook Castle” and “Rook Manor.” Dane is a time traveler. He invents his own time machines (two resemble rook chess pieces) and “will go anywhere—any *time*—in search of adventure!” During his time-traveling adventures, Dane battles a variety of villains. Dane shares numerous attributes with other traditional heroes from comic books. He is handsome, masculine, courageous, and honorable. Dane is selfless and can always be counted on to “do the right thing.” Dane does not engage in much introspection; his character arc remains constant throughout *The Rook* series. In short, Dane is a traditional comic book hero.

Stephen King is one of the best-known authors of the last half-century. Although King has written more than 50 works of fiction, this case involves what he describes as his “magnum opus”—*The Dark Tower* series. *The Dark Tower* is

comprised of eight novels and a novella, published between 1982 and 2012. In or around April 1970, King began writing the first novel in the series, *The Gunslinger*. First published in book form in 1982, *The Gunslinger* introduced Roland Deschain, the protagonist of *The Dark Tower* series. Between 2007 and 2017, Marvel published licensed graphic novels that were based on *The Dark Tower* novels. And in 2017, Media Rights Capital, Imagine Entertainment, and Sony Pictures Entertainment produced a motion picture adaptation of *The Dark Tower* series by the same name.

Throughout *The Dark Tower* series, Roland Deschain pursues an elusive structure called the Dark Tower—the linchpin of the space/time continuum—and a sorcerer called The Man in Black who serves The Crimson King.

Deschain is a complex character. He is courageous and skilled with a gun, yet he lacks the idealism and morality of the traditional hero. Deschain is a loner who does not value the lives of others and is, thus, willing to sacrifice those who get in his way. Sometimes he appears heartless and uncompassionate; other times he displays an emotional and romantic side that allows him to engage in introspection and—ultimately—change his behavior. Deschain’s character arc throughout *The Dark Tower* series is marked by his search for self-knowledge and redemption. Thus, Deschain’s journey is not only external—chasing the Dark Tower and its sorcerer—but also internal. Deschain’s personal journey is difficult.

He undergoes illness, aging, amputation, and terrible, heart-rending loss. Deschain ultimately realizes that he cannot find redemption until he reflects on his life and admits the evil he has done. In short, Deschain is best described as an anti-hero.

Approximately 35 years after the first publication of *The Gunslinger*, Benjamin DuBay—the nephew of William DuBay¹—sued King for copyright infringement. DuBay brought one count of copyright infringement against all defendants; one count of contributory copyright infringement against Media Rights Capital and Imagine Entertainment; and one count of vicarious copyright infringement against King, Sony Pictures Entertainment, Marvel Entertainment, and Simon & Schuster. DuBay alleged that the similarities between Deschain and Dane were so “shocking and extraordinary” that King must have copied DuBay’s artistic expression.

During discovery, DuBay moved to compel the production of King’s private journals from January to May 1977. King objected and argued that the journals were irrelevant, such production would invade his privacy, and that the request for the journals was overbroad. After conducting an *in camera* review of the relevant

¹ William DuBay died in April 2010. Benjamin DuBay claims that he received an assignment of William DuBay’s ownership in *The Rook*’s copyright. The district court concluded that “the issue of ownership is far from clear.” So it assumed without deciding that Benjamin DuBay owned a share in the relevant copyright. We also assume for purposes of this appeal that Benjamin DuBay owns an interest in the copyright.

journal entries, a magistrate judge denied DuBay's motion. DuBay did not file objections to the magistrate judge's ruling.

King eventually moved for summary judgment. He submitted a copy of the first novel, *The Gunslinger*; *The Dark Tower* motion picture; and excerpts from *The Dark Tower* graphic novels. Given the volume of the works at issue (totaling approximately 4,200 pages), King supported his motion with an expert report written by Michael Gale, which analyzed the issue of substantial similarity.² King also engaged Robin Furth to write character and plot summaries and analyze quotations from the works at issue.³

In his opposition to the motion for summary judgment, DuBay did not enter any additional works into the record. DuBay argued that King had access to *The Rook* and that the characters were substantially similar because they shared similar literary and visual elements. DuBay also argued that the "overall look and feel" of the characters was substantially similar.

² Gale is an accomplished writer (best known for co-authoring the 1985 motion picture *Back to the Future*) and has read extensive collections of science fiction in comics, including the works at issue in this case. Gale has also provided expert testimony in numerous other copyright cases.

³ Furth was a research assistant to King and wrote *Stephen King's The Dark Tower: The Complete Concordance* as a writer's tool for King's use. Furth has also published more than 50 articles about *The Dark Tower* series, co-authored the Marvel graphic novels based on *The Dark Tower* series, appeared in documentaries and interviews related to the series, and served as a consultant for the 2017 motion picture and a forthcoming television franchise.

The district court concluded that the characters were not substantially similar and granted summary judgment to all defendants.

DuBay then moved for relief from judgment under Fed. R. Civ. P. 59(e), 60(b)(1), and 60(b)(3), urging the court to reconsider its decision for various reasons. The district court denied those motions. DuBay timely appealed.

II. DISCUSSION

DuBay raises two issues on appeal. First, DuBay contends that the district court abused its discretion by failing to exclude Furth's character and plot summaries and Gale's expert report. Second, he contends that the district court erred when it found that the characters were not substantially similar.⁴ We address each issue in turn.

A. Expert Evidence⁵

First, DuBay contends that the district court abused its discretion by failing to apply the *Daubert* standard to the evidence provided by Furth and Gale. *See*

⁴ Dubay also challenges the district court's denial of his motion to compel production of King's journals. Dubay, however, abandoned this claim by failing to object below. *See* Fed. R. Civ. P. 72(a) (providing that when a magistrate judge decides a "pretrial matter not dispositive of a party's claim or defense," a "party may serve and file objections to the order within 14 days after being served with a copy" of the decision, and, "[a] party may not assign as error a defect in the order not timely objected to."). Because DuBay failed to object to the magistrate's denial of his motion to compel within 14 days, he "waived his right to appeal [that] order[] in this Court." *Smith v. Sch. Bd. of Orange Cty.*, 487 F.3d 1361, 1365 (11th Cir. 2007). Accordingly, we will not consider DuBay's argument.

⁵ We review decisions regarding the admissibility and reliability of expert testimony for abuse of discretion, and we will "not reverse an evidentiary decision of a district court unless the

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). DuBay argues that Furth's character and plot summaries were inadmissible because those summaries were unreliable and irrelevant. According to DuBay, Furth's summaries were unreliable because she had a financial interest in the outcome of the case, and she misrepresented *The Dark Tower* series by claiming that Deschain does not travel through time. Furthermore, he contends that the summaries were irrelevant because they covered elements that were not at issue and, therefore, did not assist the district court. DuBay also argues that Gale's expert report was unreliable because Gale conceded that if Deschain were a traditional time traveler, the premise of his expert report would be completely undermined.

Expert testimony is admissible if: (1) "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;" (2) "the testimony is based on sufficient facts or data;" (3) "the testimony is the product of reliable principles and methods;" and (4) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702; *see also Crawford v. ITW Food Equip. Grp., LLC*, 977 F.3d 1331, 1338 (11th Cir. 2020) (explaining that *Daubert* requires courts to assess reliability by considering "(1) whether the expert's testimony can be and has been

ruling is manifestly erroneous[.]" *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc) (quotation omitted).

tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community” (quotation omitted)).

The Federal Rules of Evidence separately permit a party to introduce “a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.” Fed. R. Evid. 1006; *see also United States v. Francis*, 131 F.3d 1452, 1457 (11th Cir. 1997) (“Rule 1006 allows the district court to admit . . . summaries as evidence [when], in the court’s discretion, it would be inconvenient or unnecessarily time-consuming to [review all of the writings, recordings, or photographs].”).

In its summary judgment decision, the district court addressed Dubay’s objections to the evidence submitted by Furth and Gale. As to Furth’s summaries, the district court noted that the summaries were admissible under Rule 1006 given the sheer volume of the works at issue. Furthermore, the district court did not limit its review to the summaries, stating that it would “compare the characters for the purpose of the substantial similarity analysis using Furth’s summaries[;] *Eerie*, volumes 82–85, 87–88 in their entirety[;] and the other materials lodged with the court.” As to Gale’s expert report, the district court emphasized that it “[was] not left to rely on expert opinion alone to determine whether the protected expressions

of the work [were] substantially similar” because “[t]o the extent the works at issue have been lodged with the [district court], the works themselves have been scrutinized.”

As an initial matter, DuBay misapprehends the purposes of *Daubert* and Rule 1006. *Daubert* requires the district court “to act as a gatekeeper to insure that speculative and unreliable [expert] opinions do not reach the jury.” *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1237 (11th Cir. 2005). Similarly, “Rule 1006 allows the district court to admit . . . summaries as evidence [when], in the court’s discretion, it would be inconvenient or unnecessarily time-consuming to [present all the evidence to] the jury.” *United States v. Francis*, 131 F.3d 1452, 1457 (11th Cir. 1997). The purpose of both rules is to assist the ultimate fact finder. Here, however, the district court personally examined the works at issue that the parties submitted and determined that the case could not proceed to a jury because King was entitled to summary judgment. And because the case would not reach trial, there was no need for the district court to exercise its gatekeeping function.

In any event, DuBay’s arguments are meritless. DuBay argues that Furth’s summaries were unreliable and irrelevant and thus inadmissible under Rule 702 and *Daubert*. But Furth’s summaries were independently admissible under Rule 1006. See *WWP, Inc. v. Wounded Warriors Family Support, Inc.*, 628 F.3d 1032, 1039–40 & n.7 (8th Cir. 2011) (explaining that evidence was admissible either as

expert testimony under Rule 702 or as summary testimony to prove content under Rule 1006). DuBay does not dispute that the works at issue are voluminous or that it would have been inconvenient for the district court to review all the relevant material. Thus, DuBay does not argue that Rule 1006 was inapplicable. To the extent DuBay contends that Furth's summaries were affected by bias, the district court correctly observed that Furth's potential bias goes to the weight the district court should give the summaries—not whether they are admissible. *See, e.g., Adams v. Lab. Corp. of Am.*, 760 F.3d 1322, 1334 (11th Cir. 2014) (explaining that the “risk of bias . . . goes to the weight of . . . testimony, not its admissibility”). And because the district court independently examined the works the parties submitted, it was well positioned to determine what weight to give to Furth's summaries. In sum, DuBay has not shown that the district court abused its discretion by admitting Furth's summaries under Rule 1006.

DuBay's attempt to undermine Gale's expert report is similarly unpersuasive. DuBay maintains that Gale's expert report was not admissible under *Daubert* and Rule 702 because Gale conceded the unreliability of his own report. However, Gale made no such concession. DuBay's counsel asked Gale a hypothetical question: “If Roland Deschain is a time traveler in the traditional sense, then wouldn't that undermine the entire basis of your opinion?” Gale never entertained the hypothetical and repeatedly insisted that Deschain was “not a

traditional time traveler.” Thus, DuBay has not shown that the district court abused its discretion by failing to exclude Gale’s expert report.⁶

B. Substantial Similarity⁷

Next, DuBay argues that the district court erred when it granted summary judgment to King because a reasonable jury could conclude that the characters of Dane and Deschain are substantially similar. As DuBay sees it, the characters are substantially similar because they (1) have similar names, (2) interact with towers that are integral to time travel, (3) have bird companions, (4) are marked by knightly characteristics, (5) travel back in time to save a young boy who becomes a gunslinger, (6) wear Western garb, (7) survive a fictionalized Alamo, and (8) use

⁶ DuBay further challenges the district court’s decision to consider the expert report and the summaries by arguing that the district court abused its discretion by not affording him relief under Federal Rules of Civil Procedure 59 and 60. These motions purported to identify further evidence that Furth’s summaries were biased and unreliable and that Gale lacked the requisite expertise. On appeal, DuBay asserts—in two sentences—that the district court abused its discretion because it did not apply the *Daubert* standards for relevance or reliability to Furth’s summaries. Apart from this conclusory assertion, DuBay fails to “advanc[e] any arguments or cit[e] any authorities to establish” that the district court abused its discretion when it denied his post-trial motions. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). “[S]imply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal.” *Id.* (quotation omitted). Accordingly, we will not consider DuBay’s argument.

⁷ We review “a district court’s grant of summary judgment *de novo*, applying the same legal standards used by the district court.” *Galvez v. Bruce*, 552 F.3d 1238, 1241 (11th Cir. 2008). “Summary judgment is appropriate [when] there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” *Wooden v. Bd. of Regents of Univ. Sys. of Georgia*, 247 F.3d 1262, 1271 (11th Cir. 2001) (quotation omitted). We “draw all inferences and review all evidence in the light most favorable to the non-moving party.” *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1099 (11th Cir. 2019) (quotation omitted and alterations adopted).

knives. He also contends that Dane was the first character that combined these elements to create a distinctive character that King later copied.

The Copyright Act protects “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. § 102(a). “Because the Copyright Act protects ‘original works of authorship,’ the ‘*sine qua non* of copyright is originality.’” *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994) (citation omitted) (first quoting 17 U.S.C. § 102(a) and then quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)). Thus, non-original ideas and material, such as *scènes à faire*, are not copyrightable. *Id.* *Scènes à faire* are “sequences of events which necessarily follow from a common theme, or incidents, characters, or settings that are indispensable or standard in the treatment of a given topic.” *Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters.*, 533 F.3d 1287, 1302 (11th Cir. 2008) (citation and quotation marks omitted).

To establish a copyright infringement claim, a plaintiff must show two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns*, 499 U.S. at 361. When, as is the case here, there is no “direct evidence” of copyright infringement, a plaintiff must prove that: (1) “the defendant had access to the plaintiff’s work[,]” and

(2) “the defendant’s work is substantially similar to the plaintiff’s protected expression.” *Beal*, 20 F.3d at 459.

Like the district court, we assume that DuBay has proved that King had access to *The Rook*, and we will focus our analysis on substantial similarity.⁸ Substantial similarity exists when “an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1224 (11th Cir. 2008) (quotation omitted). But because a work may contain uncopyrightable elements, our task is to “determine[] both whether the similarities between the works are substantial from the point of view of the lay observer and whether those similarities involve copyrightable material.” *Id.* (quotation omitted) (alteration adopted).

We begin by narrowing down the alleged similarities to elements that are protected by copyright. First, we agree with the district court that character names do not merit copyright protection. *CMM Cable Rep, Inc. v. Ocean Coast Prop., Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (explaining that mere words and short

⁸ The district court concluded that it was unnecessary to decide the issue of access given the lack of substantial similarity between the characters. On appeal, the parties disagree about whether the evidence establishes that King had access to *The Rook*. We note that if a plaintiff cannot establish access, that plaintiff must meet a higher standard of “demonstrating that the works are so *strikingly similar* as to preclude the possibility of independent creation.” *Herzog v. Castle Rock Entm’t*, 193 F.3d 1241, 1249 (11th Cir. 1999) (emphasis added). On this record, we decline to decide that issue in the first instance. Therefore, we will assume that DuBay has demonstrated access and analyze whether the characters are substantially similar.

phrases, even if they occur in a copyrighted work, do not themselves enjoy protection against copying); *cf.* 37 C.F.R. § 202.1(a) (excepting from copyright protection “[w]ords and short phrases such as names, titles, and slogans”).

Second, we agree with the district court that there are certain similarities at issue in this appeal that lack originality. Even assuming that the characters share some similarities concerning their knightly heritage, travel to different times and parallel worlds, Western attire, fictionalized Alamo histories, and knife-wielding, these similarities are *scènes à faire* that are too general to merit copyright protection. *See Peter Letterese*, 533 F.3d at 1302; *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102 (2d Cir. 2014) (“[T]he doctrine of ‘*scènes-à-faire*’ teaches that elements of a work that are ‘indispensable, or at least standard, in the treatment of a given topic’—like cowboys, bank robbers, and shootouts in stories of the American West—get no protection.” (quotation omitted)).

Finally, we turn to what remains: the alleged similarities between the characters’ relationship to towers and tower imagery, the presence of bird companions, and the fact that both characters save a young boy from a different time. Although these elements are similar in the abstract, they are not substantially similar because the elements are portrayed in different ways. To begin, the towers serve very different functions for each character. Dane resides in a house that resembles a rook chess piece and builds time machines with a similar appearance.

By contrast, the Dark Tower is neither Deschain's home nor a time machine.

Deschain is on a quest to *find* the Dark Tower, which is the nexus that ties different worlds and dimensions together.

Next, the characters interact with bird companions and imagery in different ways. Dane is associated with bird symbolism because he wears a belt buckle with the image of a rook bird and, on at least one occasion, puts on a pair of rook wings and flies into battle alongside a rook bird. Deschain, on the other hand, encounters a talking crow and briefly allies with a fighting hawk before sacrificing the hawk to serve his own ends. Unlike Dane, who only associates with bird allies, Deschain symbolically becomes the hawk upon its demise.

Finally, the characters' interactions with young male companions are dramatically different. Dane travels back in time to the Battle of the Alamo and, by chance, saves the life of a young boy who turns out to be Dane's great-great-grandfather. Deschain also saves and bonds with a young boy, but Deschain later betrays and sacrifices the boy for the sake of his quest. Even if these elements bear some similarity, the portrayals of these elements are distinguishable. Given these distinctive presentations, "no reasonable jury upon proper instruction would find that the two works are substantially similar." *Beal*, 20 F.3d at 459.

In addition to asking us to analyze substantial similarity by comparing each element side by side, DuBay urges us to consider whether the characters'

combinations of those elements are substantially similar. DuBay submits that Dane is a unique expression of those combined elements and that Deschain is a copy of that expression.

We have recognized the pitfalls of scrutinizing each alleged similarity in isolation. *See Beal*, 20 F.3d at 460 (“The district court correctly noted that . . . lists [of similarities] are inherently subjective and unreliable, particularly where the list contains random similarities. Many such similarities could be found in very dissimilar works.” (citation and quotation marks omitted)); *Leigh v. Warner Bros.*, 212 F.3d 1210, 1215 (11th Cir. 2000) (“This circuit has noted . . . that lists of similarities between works are inherently subjective and unreliable.”). But by asking us to take a broader view of the characters, DuBay hurts rather than helps his case because this more holistic analysis further highlights the distinctiveness of each character.

Dane possesses many attributes of a traditional comic book hero. He is a courageous gunslinger and an honorable man. He always does the “right thing.” He travels through time and fights a variety of villains. And Dane’s character arc remains constant throughout *The Rook* series. Deschain, however, is far more complex. He is courageous and skilled with a gun yet lacks the idealism and morality integrity of a traditional hero. He uses and sacrifices others out of self-interest. And Deschain is on an external quest for the Dark Tower and The Man in

Black and an internal quest for self-knowledge and redemption. Deschain is best described as a troubled anti-hero. As a result, these characters are surrounded by different stories and contexts, thereby rendering any similarities superficial.

For these reasons, and those explained in the district court's thorough opinion, "no reasonable jury upon proper instruction would find that the two works are substantially similar." *Beal*, 20 F.3d at 459. Accordingly, the district court did not err by granting King's motion for summary judgment.⁹

III. CONCLUSION

For the reasons explained, we affirm the district court in full.

AFFIRMED.

⁹ Because there was no direct copyright infringement, DuBay's contributory and vicarious copyright infringement claims fail. See *Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enter.*, 533 F.3d 1287, 1298 n.11 (11th Cir. 2008) (explaining that there "can be no contributory infringement without a direct infringement" (quotation omitted)); *Leonard v. Stemtech Int'l Inc.*, 834 F.3d 376, 386 (3d Cir. 2016) ("[T]o prove a claim of contributory or vicarious infringement, a plaintiff must first show direct infringement by a third party.").

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

February 23, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-11224-DD
Case Style: Benjamin Dubay v. Stephen King, et al
District Court Docket No: 3:17-cv-00348-HES-MCR

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.

Please use the most recent version of the Bill of Costs form available on the court's website at www.ca11.uscourts.gov.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Bradly Wallace Holland, DD at 404-335-6181.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1A Issuance of Opinion With Costs

19-11224 Benjamin Michael DuBay v. Stephen King, et al.

ERRATA:

On page 11, the word “export” has been changed to “expert”.

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

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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April 16, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-11224-DD
Case Style: Benjamin Dubay v. Stephen King, et al
District Court Docket No: 3:17-cv-00348-HES-MCR

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Bradley Wallace Holland, DD/lt
Phone #: 404-335-6181

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11224-DD

BENJAMIN MICHAEL DUBAY,

Plaintiff - Appellant,

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Plaintiff,

versus

STEPHEN KING,
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IMAGINE ENTERTAINMENT,
SONY PICTURES ENTERTAINMENT,
MARVEL ENTERTAINMENT, et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before NEWSOM and BRANCH, Circuit Judges.*

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

*After Judge Martin heard this case at oral argument, facts arose that required her recusal. She did not, therefore, participate in this decision, which is rendered by a quorum. 28 U.S.C. § 46(d).

APPENDIX B

Eleventh Circuit Original Opinion.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11224

D.C. Docket No. 3:17-cv-00348-HES-MCR

BENJAMIN MICHAEL DUBAY,

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STEPHEN KING,
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MARVEL ENTERTAINMENT, et al.,

Defendants - Appellees.

Appeal from the United States District Court
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(February 23, 2021)

Before NEWSOM and BRANCH, Circuit Judges.*

BRANCH, Circuit Judge:

In this copyright infringement action, Benjamin DuBay appeals the district court's grant of summary judgment to Stephen King, Media Rights Capital, Imagine Entertainment, Sony Pictures Entertainment, Marvel Entertainment, and Simon & Schuster (collectively, "King"). DuBay owns the copyright for a comic book series called *The Rook*, which recounted the adventures of Restin Dane. King is the author of *The Dark Tower* novel series, which features the character Roland Deschain as its protagonist. DuBay sued King for copyright infringement, alleging that Roland Deschain is a copy of Restin Dane. DuBay also sued the other defendants for contributory and vicarious copyright infringement for their respective roles in publishing King's novel series and adapting the book series into graphic novels and a motion picture. After careful consideration and with the benefit of oral argument, we affirm.

I. BACKGROUND

Because the parties are familiar with the facts of this case, we recount only those facts that are necessary to the disposition of this appeal.

* After Judge Martin heard this case at oral argument, facts arose that required her recusal. She did not, therefore, participate in this decision, which is rendered by a quorum. 28 U.S.C. § 46(d).

William DuBay and two other individuals created the comic book character Restin Dane, a.k.a. “The Rook,” in the 1970s. On January 19, 1977, Dane first appeared in a Warren Publications horror/fantasy comic magazine entitled *Eerie* (vol. 82). In 1979, Warren Publications published a comic book series dedicated to *The Rook*. *The Rook* comic book series sold more than 5 million copies from 1977 to 1983.

As the evidence presented in the underlying proceeding established, Restin Dane is a wealthy scientist/inventor who lives in Arizona in a house shaped like a rook chess piece, which is known both as “Rook Castle” and “Rook Manor.” Dane is a time traveler. He invents his own time machines (two resemble rook chess pieces) and “will go anywhere—any *time*—in search of adventure!” During his time-traveling adventures, Dane battles a variety of villains. Dane shares numerous attributes with other traditional heroes from comic books. He is handsome, masculine, courageous, and honorable. Dane is selfless and can always be counted on to “do the right thing.” Dane does not engage in much introspection; his character arc remains constant throughout *The Rook* series. In short, Dane is a traditional comic book hero.

Stephen King is one of the best-known authors of the last half-century. Although King has written more than 50 works of fiction, this case involves what he describes as his “magnum opus”—*The Dark Tower* series. *The Dark Tower* is

comprised of eight novels and a novella, published between 1982 and 2012. In or around April 1970, King began writing the first novel in the series, *The Gunslinger*. First published in book form in 1982, *The Gunslinger* introduced Roland Deschain, the protagonist of *The Dark Tower* series. Between 2007 and 2017, Marvel published licensed graphic novels that were based on *The Dark Tower* novels. And in 2017, Media Rights Capital, Imagine Entertainment, and Sony Pictures Entertainment produced a motion picture adaptation of *The Dark Tower* series by the same name.

Throughout *The Dark Tower* series, Roland Deschain pursues an elusive structure called the Dark Tower—the linchpin of the space/time continuum—and a sorcerer called The Man in Black who serves The Crimson King.

Deschain is a complex character. He is courageous and skilled with a gun, yet he lacks the idealism and morality of the traditional hero. Deschain is a loner who does not value the lives of others and is, thus, willing to sacrifice those who get in his way. Sometimes he appears heartless and uncompassionate; other times he displays an emotional and romantic side that allows him to engage in introspection and—ultimately—change his behavior. Deschain’s character arc throughout *The Dark Tower* series is marked by his search for self-knowledge and redemption. Thus, Deschain’s journey is not only external—chasing the Dark Tower and its sorcerer—but also internal. Deschain’s personal journey is difficult.

He undergoes illness, aging, amputation, and terrible, heart-rending loss. Deschain ultimately realizes that he cannot find redemption until he reflects on his life and admits the evil he has done. In short, Deschain is best described as an anti-hero.

Approximately 35 years after the first publication of *The Gunslinger*, Benjamin DuBay—the nephew of William DuBay¹—sued King for copyright infringement. DuBay brought one count of copyright infringement against all defendants; one count of contributory copyright infringement against Media Rights Capital and Imagine Entertainment; and one count of vicarious copyright infringement against King, Sony Pictures Entertainment, Marvel Entertainment, and Simon & Schuster. DuBay alleged that the similarities between Deschain and Dane were so “shocking and extraordinary” that King must have copied DuBay’s artistic expression.

During discovery, DuBay moved to compel the production of King’s private journals from January to May 1977. King objected and argued that the journals were irrelevant, such production would invade his privacy, and that the request for the journals was overbroad. After conducting an *in camera* review of the relevant

¹ William DuBay died in April 2010. Benjamin DuBay claims that he received an assignment of William DuBay’s ownership in *The Rook*’s copyright. The district court concluded that “the issue of ownership is far from clear.” So it assumed without deciding that Benjamin DuBay owned a share in the relevant copyright. We also assume for purposes of this appeal that Benjamin DuBay owns an interest in the copyright.

journal entries, a magistrate judge denied DuBay's motion. DuBay did not file objections to the magistrate judge's ruling.

King eventually moved for summary judgment. He submitted a copy of the first novel, *The Gunslinger*; *The Dark Tower* motion picture; and excerpts from *The Dark Tower* graphic novels. Given the volume of the works at issue (totaling approximately 4,200 pages), King supported his motion with an expert report written by Michael Gale, which analyzed the issue of substantial similarity.² King also engaged Robin Furth to write character and plot summaries and analyze quotations from the works at issue.³

In his opposition to the motion for summary judgment, DuBay did not enter any additional works into the record. DuBay argued that King had access to *The Rook* and that the characters were substantially similar because they shared similar literary and visual elements. DuBay also argued that the "overall look and feel" of the characters was substantially similar.

² Gale is an accomplished writer (best known for co-authoring the 1985 motion picture *Back to the Future*) and has read extensive collections of science fiction in comics, including the works at issue in this case. Gale has also provided expert testimony in numerous other copyright cases.

³ Furth was a research assistant to King and wrote *Stephen King's The Dark Tower: The Complete Concordance* as a writer's tool for King's use. Furth has also published more than 50 articles about *The Dark Tower* series, co-authored the Marvel graphic novels based on *The Dark Tower* series, appeared in documentaries and interviews related to the series, and served as a consultant for the 2017 motion picture and a forthcoming television franchise.

The district court concluded that the characters were not substantially similar and granted summary judgment to all defendants.

DuBay then moved for relief from judgment under Fed. R. Civ. P. 59(e), 60(b)(1), and 60(b)(3), urging the court to reconsider its decision for various reasons. The district court denied those motions. DuBay timely appealed.

II. DISCUSSION

DuBay raises two issues on appeal. First, DuBay contends that the district court abused its discretion by failing to exclude Furth's character and plot summaries and Gale's expert report. Second, he contends that the district court erred when it found that the characters were not substantially similar.⁴ We address each issue in turn.

A. Expert Evidence⁵

First, DuBay contends that the district court abused its discretion by failing to apply the *Daubert* standard to the evidence provided by Furth and Gale. *See*

⁴ Dubay also challenges the district court's denial of his motion to compel production of King's journals. Dubay, however, abandoned this claim by failing to object below. *See* Fed. R. Civ. P. 72(a) (providing that when a magistrate judge decides a "pretrial matter not dispositive of a party's claim or defense," a "party may serve and file objections to the order within 14 days after being served with a copy" of the decision, and, "[a] party may not assign as error a defect in the order not timely objected to."). Because DuBay failed to object to the magistrate's denial of his motion to compel within 14 days, he "waived his right to appeal [that] order[] in this Court." *Smith v. Sch. Bd. of Orange Cty.*, 487 F.3d 1361, 1365 (11th Cir. 2007). Accordingly, we will not consider DuBay's argument.

⁵ We review decisions regarding the admissibility and reliability of expert testimony for abuse of discretion, and we will "not reverse an evidentiary decision of a district court unless the

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). DuBay argues that Furth’s character and plot summaries were inadmissible because those summaries were unreliable and irrelevant. According to DuBay, Furth’s summaries were unreliable because she had a financial interest in the outcome of the case, and she misrepresented *The Dark Tower* series by claiming that Deschain does not travel through time. Furthermore, he contends that the summaries were irrelevant because they covered elements that were not at issue and, therefore, did not assist the district court. DuBay also argues that Gale’s expert report was unreliable because Gale conceded that if Deschain were a traditional time traveler, the premise of his expert report would be completely undermined.

Expert testimony is admissible if: (1) “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;” (2) “the testimony is based on sufficient facts or data;” (3) “the testimony is the product of reliable principles and methods;” and (4) “the expert has reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702; *see also Crawford v. ITW Food Equip. Grp., LLC*, 977 F.3d 1331, 1338 (11th Cir. 2020) (explaining that *Daubert* requires courts to assess reliability by considering “(1) whether the expert’s testimony can be and has been

ruling is manifestly erroneous[.]” *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc) (quotation omitted).

tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community” (quotation omitted)).

The Federal Rules of Evidence separately permit a party to introduce “a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.” Fed. R. Evid. 1006; *see also United States v. Francis*, 131 F.3d 1452, 1457 (11th Cir. 1997) (“Rule 1006 allows the district court to admit . . . summaries as evidence [when], in the court’s discretion, it would be inconvenient or unnecessarily time-consuming to [review all of the writings, recordings, or photographs].”).

In its summary judgment decision, the district court addressed Dubay’s objections to the evidence submitted by Furth and Gale. As to Furth’s summaries, the district court noted that the summaries were admissible under Rule 1006 given the sheer volume of the works at issue. Furthermore, the district court did not limit its review to the summaries, stating that it would “compare the characters for the purpose of the substantial similarity analysis using Furth’s summaries[;] *Eerie*, volumes 82–85, 87–88 in their entirety[;] and the other materials lodged with the court.” As to Gale’s expert report, the district court emphasized that it “[was] not left to rely on expert opinion alone to determine whether the protected expressions

of the work [were] substantially similar” because “[t]o the extent the works at issue have been lodged with the [district court], the works themselves have been scrutinized.”

As an initial matter, DuBay misapprehends the purposes of *Daubert* and Rule 1006. *Daubert* requires the district court “to act as a gatekeeper to insure that speculative and unreliable [expert] opinions do not reach the jury.” *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1237 (11th Cir. 2005). Similarly, “Rule 1006 allows the district court to admit . . . summaries as evidence [when], in the court’s discretion, it would be inconvenient or unnecessarily time-consuming to [present all the evidence to] the jury.” *United States v. Francis*, 131 F.3d 1452, 1457 (11th Cir. 1997). The purpose of both rules is to assist the ultimate fact finder. Here, however, the district court personally examined the works at issue that the parties submitted and determined that the case could not proceed to a jury because King was entitled to summary judgment. And because the case would not reach trial, there was no need for the district court to exercise its gatekeeping function.

In any event, DuBay’s arguments are meritless. DuBay argues that Furth’s summaries were unreliable and irrelevant and thus inadmissible under Rule 702 and *Daubert*. But Furth’s summaries were independently admissible under Rule 1006. See *WWP, Inc. v. Wounded Warriors Family Support, Inc.*, 628 F.3d 1032, 1039–40 & n.7 (8th Cir. 2011) (explaining that evidence was admissible either as

expert testimony under Rule 702 or as summary testimony to prove content under Rule 1006). DuBay does not dispute that the works at issue are voluminous or that it would have been inconvenient for the district court to review all the relevant material. Thus, DuBay does not argue that Rule 1006 was inapplicable. To the extent DuBay contends that Furth's summaries were affected by bias, the district court correctly observed that Furth's potential bias goes to the weight the district court should give the summaries—not whether they are admissible. *See, e.g., Adams v. Lab. Corp. of Am.*, 760 F.3d 1322, 1334 (11th Cir. 2014) (explaining that the “risk of bias . . . goes to the weight of . . . testimony, not its admissibility”). And because the district court independently examined the works the parties submitted, it was well positioned to determine what weight to give to Furth's summaries. In sum, DuBay has not shown that the district court abused its discretion by admitting Furth's summaries under Rule 1006.

DuBay's attempt to undermine Gale's expert report is similarly unpersuasive. DuBay maintains that Gale's expert report was not admissible under *Daubert* and Rule 702 because Gale conceded the unreliability of his own report. However, Gale made no such concession. DuBay's counsel asked Gale a hypothetical question: “If Roland Deschain is a time traveler in the traditional sense, then wouldn't that undermine the entire basis of your opinion?” Gale never entertained the hypothetical and repeatedly insisted that Deschain was “not a

traditional time traveler.” Thus, DuBay has not shown that the district court abused its discretion by failing to exclude Gale’s expert report.⁶

B. Substantial Similarity⁷

Next, DuBay argues that the district court erred when it granted summary judgment to King because a reasonable jury could conclude that the characters of Dane and Deschain are substantially similar. As DuBay sees it, the characters are substantially similar because they (1) have similar names, (2) interact with towers that are integral to time travel, (3) have bird companions, (4) are marked by knightly characteristics, (5) travel back in time to save a young boy who becomes a gunslinger, (6) wear Western garb, (7) survive a fictionalized Alamo, and (8) use

⁶ DuBay further challenges the district court’s decision to consider the expert report and the summaries by arguing that the district court abused its discretion by not affording him relief under Federal Rules of Civil Procedure 59 and 60. These motions purported to identify further evidence that Furth’s summaries were biased and unreliable and that Gale lacked the requisite expertise. On appeal, DuBay asserts—in two sentences—that the district court abused its discretion because it did not apply the *Daubert* standards for relevance or reliability to Furth’s summaries. Apart from this conclusory assertion, DuBay fails to “advanc[e] any arguments or cit[e] any authorities to establish” that the district court abused its discretion when it denied his post-trial motions. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). “[S]imply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal.” *Id.* (quotation omitted). Accordingly, we will not consider DuBay’s argument.

⁷ We review “a district court’s grant of summary judgment *de novo*, applying the same legal standards used by the district court.” *Galvez v. Bruce*, 552 F.3d 1238, 1241 (11th Cir. 2008). “Summary judgment is appropriate [when] there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” *Wooden v. Bd. of Regents of Univ. Sys. of Georgia*, 247 F.3d 1262, 1271 (11th Cir. 2001) (quotation omitted). We “draw all inferences and review all evidence in the light most favorable to the non-moving party.” *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1099 (11th Cir. 2019) (quotation omitted and alterations adopted).

knives. He also contends that Dane was the first character that combined these elements to create a distinctive character that King later copied.

The Copyright Act protects “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. § 102(a). “Because the Copyright Act protects ‘original works of authorship,’ the ‘*sine qua non* of copyright is originality.’” *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994) (citation omitted) (first quoting 17 U.S.C. § 102(a) and then quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)). Thus, non-original ideas and material, such as *scènes à faire*, are not copyrightable. *Id.* *Scènes à faire* are “sequences of events which necessarily follow from a common theme, or incidents, characters, or settings that are indispensable or standard in the treatment of a given topic.” *Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters.*, 533 F.3d 1287, 1302 (11th Cir. 2008) (citation and quotation marks omitted).

To establish a copyright infringement claim, a plaintiff must show two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns*, 499 U.S. at 361. When, as is the case here, there is no “direct evidence” of copyright infringement, a plaintiff must prove that: (1) “the defendant had access to the plaintiff’s work[,]” and

(2) “the defendant’s work is substantially similar to the plaintiff’s protected expression.” *Beal*, 20 F.3d at 459.

Like the district court, we assume that DuBay has proved that King had access to *The Rook*, and we will focus our analysis on substantial similarity.⁸ Substantial similarity exists when “an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1224 (11th Cir. 2008) (quotation omitted). But because a work may contain uncopyrightable elements, our task is to “determine[] both whether the similarities between the works are substantial from the point of view of the lay observer and whether those similarities involve copyrightable material.” *Id.* (quotation omitted) (alteration adopted).

We begin by narrowing down the alleged similarities to elements that are protected by copyright. First, we agree with the district court that character names do not merit copyright protection. *CMM Cable Rep, Inc. v. Ocean Coast Prop., Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (explaining that mere words and short

⁸ The district court concluded that it was unnecessary to decide the issue of access given the lack of substantial similarity between the characters. On appeal, the parties disagree about whether the evidence establishes that King had access to *The Rook*. We note that if a plaintiff cannot establish access, that plaintiff must meet a higher standard of “demonstrating that the works are so *strikingly similar* as to preclude the possibility of independent creation.” *Herzog v. Castle Rock Entm’t*, 193 F.3d 1241, 1249 (11th Cir. 1999) (emphasis added). On this record, we decline to decide that issue in the first instance. Therefore, we will assume that DuBay has demonstrated access and analyze whether the characters are substantially similar.

phrases, even if they occur in a copyrighted work, do not themselves enjoy protection against copying); *cf.* 37 C.F.R. § 202.1(a) (excepting from copyright protection “[w]ords and short phrases such as names, titles, and slogans”).

Second, we agree with the district court that there are certain similarities at issue in this appeal that lack originality. Even assuming that the characters share some similarities concerning their knightly heritage, travel to different times and parallel worlds, Western attire, fictionalized Alamo histories, and knife-wielding, these similarities are *scènes à faire* that are too general to merit copyright protection. *See Peter Letterese*, 533 F.3d at 1302; *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102 (2d Cir. 2014) (“[T]he doctrine of ‘*scènes-à-faire*’ teaches that elements of a work that are ‘indispensable, or at least standard, in the treatment of a given topic’—like cowboys, bank robbers, and shootouts in stories of the American West—get no protection.” (quotation omitted)).

Finally, we turn to what remains: the alleged similarities between the characters’ relationship to towers and tower imagery, the presence of bird companions, and the fact that both characters save a young boy from a different time. Although these elements are similar in the abstract, they are not substantially similar because the elements are portrayed in different ways. To begin, the towers serve very different functions for each character. Dane resides in a house that resembles a rook chess piece and builds time machines with a similar appearance.

By contrast, the Dark Tower is neither Deschain's home nor a time machine.

Deschain is on a quest to *find* the Dark Tower, which is the nexus that ties different worlds and dimensions together.

Next, the characters interact with bird companions and imagery in different ways. Dane is associated with bird symbolism because he wears a belt buckle with the image of a rook bird and, on at least one occasion, puts on a pair of rook wings and flies into battle alongside a rook bird. Deschain, on the other hand, encounters a talking crow and briefly allies with a fighting hawk before sacrificing the hawk to serve his own ends. Unlike Dane, who only associates with bird allies, Deschain symbolically becomes the hawk upon its demise.

Finally, the characters' interactions with young male companions are dramatically different. Dane travels back in time to the Battle of the Alamo and, by chance, saves the life of a young boy who turns out to be Dane's great-great-grandfather. Deschain also saves and bonds with a young boy, but Deschain later betrays and sacrifices the boy for the sake of his quest. Even if these elements bear some similarity, the portrayals of these elements are distinguishable. Given these distinctive presentations, "no reasonable jury upon proper instruction would find that the two works are substantially similar." *Beal*, 20 F.3d at 459.

In addition to asking us to analyze substantial similarity by comparing each element side by side, DuBay urges us to consider whether the characters'

combinations of those elements are substantially similar. DuBay submits that Dane is a unique expression of those combined elements and that Deschain is a copy of that expression.

We have recognized the pitfalls of scrutinizing each alleged similarity in isolation. *See Beal*, 20 F.3d at 460 (“The district court correctly noted that . . . lists [of similarities] are inherently subjective and unreliable, particularly where the list contains random similarities. Many such similarities could be found in very dissimilar works.” (citation and quotation marks omitted)); *Leigh v. Warner Bros.*, 212 F.3d 1210, 1215 (11th Cir. 2000) (“This circuit has noted . . . that lists of similarities between works are inherently subjective and unreliable.”). But by asking us to take a broader view of the characters, DuBay hurts rather than helps his case because this more holistic analysis further highlights the distinctiveness of each character.

Dane possesses many attributes of a traditional comic book hero. He is a courageous gunslinger and an honorable man. He always does the “right thing.” He travels through time and fights a variety of villains. And Dane’s character arc remains constant throughout *The Rook* series. Deschain, however, is far more complex. He is courageous and skilled with a gun yet lacks the idealism and morality integrity of a traditional hero. He uses and sacrifices others out of self-interest. And Deschain is on an external quest for the Dark Tower and The Man in

Black and an internal quest for self-knowledge and redemption. Deschain is best described as a troubled anti-hero. As a result, these characters are surrounded by different stories and contexts, thereby rendering any similarities superficial.

For these reasons, and those explained in the district court's thorough opinion, "no reasonable jury upon proper instruction would find that the two works are substantially similar." *Beal*, 20 F.3d at 459. Accordingly, the district court did not err by granting King's motion for summary judgment.⁹

III. CONCLUSION

For the reasons explained, we affirm the district court in full.

AFFIRMED.

⁹ Because there was no direct copyright infringement, DuBay's contributory and vicarious copyright infringement claims fail. See *Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enter.*, 533 F.3d 1287, 1298 n.11 (11th Cir. 2008) (explaining that there "can be no contributory infringement without a direct infringement" (quotation omitted)); *Leonard v. Stemtech Int'l Inc.*, 834 F.3d 376, 386 (3d Cir. 2016) ("[T]o prove a claim of contributory or vicarious infringement, a plaintiff must first show direct infringement by a third party.").

APPENDIX C

District Court Order (Rehearing).

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

BENJAMIN MICHAEL DUBAY,

Plaintiff,

v.

Case No. 3:17-cv-00348-J-20MCR

**STEPHEN KING; MEDIA RIGHTS
CAPITAL; IMAGINE
ENTERTAINMENT; SONY
PICTURES ENTERTAINMENT;
MARVEL ENTERTAINMENT;
SIMON & SCHUSTER,**

Defendants.

ORDER

THIS CAUSE is before the Court on Plaintiff Benjamin Michael Dubay's "Motion for Relief from Judgment" (Dkt. 136) and "Motion for Leave to Supplement, with New Evidence, Plaintiff's Pending Motion for Relief from Final Judgment Pursuant to Fed. R. Civ. P. 60(b)" (Dkt. 143) as well as Defendants Stephen King, MRC II Distribution Company L.P.,¹ Marvel Entertainment, Simon & Schuster, and Sony Pictures Entertainment's (collectively "Defendants") "Opposition to Plaintiffs' Motion for Relief from Judgment" (Dkt. 140) and "Opposition to Plaintiff's Motion for Leave to Supplement his Motion for Relief from Final Judgment Pursuant to Fed. R. Civ. P. 60(b)" (Dkt. 144).

Plaintiff brings his "Motion for Relief" (Dkt. 136) based on Federal Rules of Civil Procedure 59(e) and 60(b)(1) and (3). He argues that the Court's Order (Dkt. 130) finding an

¹ Sued as "Media Rights Capital."

absence of substantial similarity of the works at issue was made in error because it was based on misrepresentations by Defendants. The misrepresentations, Plaintiff reasons, were proffering “methodologically flawed” expert opinions filled with “clear bias.” (Dkt. 136 page 2). Plaintiff particularly takes issue with the expert opinion of Robin Furth and offers “newly discovered evidence” regarding her bias and truthfulness. (*Id.* and Dkt. 143).

A district court has the discretion to reconsider and alter or amend an order that it has entered pursuant to Federal Rule of Civil Procedure 59(e). *Mincey v. Head*, 206 F.3d 1106, 1137 (11th Cir. 2000) (quoting *Am. Home Assurance Co. v. Glenn Estess & Assocs.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985)). However, the law in the Eleventh Circuit is clear: “[t]he only grounds for granting a [Rule 59] motion are newly-discovered of evidence or manifest errors of law or fact.” *United States v. Marion*, 562 F.3d 1330, 1335 (11th Cir. 2009) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (per curiam)). Rule 59(e), does not allow a party to “relitigate old matters, raise argument or present evidence *that could have been raised prior* to the entry of judgment.” *Michael Linet, Inc. v. Vill. of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005) (emphasis added) (citations omitted). *See also O’Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992)(citation omitted)(“[Rule 59(e)] [m]otions to amend should not be used to raise arguments, which could and should, have been made before the judgment was issued.”).

Rule 60(b) of the Federal Rules of Civil Procedure is yet another path for a post judgment relief. *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F. 2d 800, 806 n.5 (11th Cir. 1993) (citations omitted). The portions of Rule 60(b) Plaintiff alleges are relevant here provide that “the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . . (3) fraud . . . , misrepresentation, or misconduct by an opposing party.” To prevail under Rule

60(b)(3), Plaintiff must “‘prove by clear and convincing evidence that an adverse party has obtained the verdict through fraud, misrepresentation, or misconduct.’” *Cox Nuclear Pharm., Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007) (quoting *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1287 (11th Cir. 2000)). Additionally, Plaintiff “‘must [] show that the conduct prevented the losing party from fully and fairly presenting his case or defense.’” *Id.*

Upon consideration of the filings and the relevant case law, the Court sees no reason to reconsider its prior determination. Plaintiff essentially reargues and reorganizes his Opposition to Defendants’ Motion for Summary Judgment and attacks the credibility and veracity of Plaintiffs’ experts in a more detailed way. Plaintiff does little more than to ask the Court “to reexamine an unfavorable ruling.” *Jacobs v. Tempur-Pedic Intern., Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010). “Reconsidering the merits of a judgment, absent a manifest error of law or fact is not the purpose of Rule 59.” *Id.*

In the Motion before the Court, Plaintiff submits fifty-seven exhibits, made up of 940 pages, and two MP3 files. (Dkt. 136). While a few of these exhibits were already considered,² the majority of these exhibits were not previously submitted by Plaintiff to the Court, despite their availability. Plaintiff does not articulate any sensible reason for failing to reference or include the majority of the evidence contained in his Motion for Reconsideration in his previously filed, 39-page Opposition to Summary Judgment (Dkt. 120).³ “Denial of a motion to amend [under Rule 59] is ‘especially soundly exercised when the party has failed to articulate any reason for the failure to raise an issue at an earlier stage in the litigation.’” *O’Neal*, 958 F.2d

² See e.g. Dkt. 136, Exhibits 4, 47, 54, 55, 56, 57.

³ It appears most of these Exhibits were known to Plaintiff through the discovery process or were available to the public at the time Plaintiff filed his Opposition. See Exhibit 140, Exhibit 1-Declaration of Lorelee Sundra. However, Plaintiff does not address this issue in his papers. Furthermore, upon review of Plaintiff’s Motion to Reconsider (Dkt. 136), the Court is not persuaded that any of this material would have changed the Court’s original opinion.

at 1047 (quoting *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990)). To the extent any of the exhibits are in fact newly discovered,⁴ they are either not probative or irrelevant to the grounds in which the Court explained at length was the basis of its previous Order granting summary judgment⁵: the works at issue were not substantially similar in protectible expression.

Plaintiff does not identify what conduct or position was a “mistake, surprise or excusable neglect.” Fed. R. Civ. P. 60(1). Thus, he fails to make a showing of the presence of any of the enumerated circumstances listed in Rule 60(b)(1) to grant relief from judgment. Finally, Plaintiff has failed to show the occurrence of fraud, within the meaning of Rule 60(b)(3), that would have prevented him from fully presenting his position in this matter, including his position regarding the evidence proffered by Defendants experts.⁶

Plaintiff has also requested leave to Supplement the Plaintiff’s Pending Motion for Relief from Final Judgment (Dkt. 143). He seeks to submit March 21, 2019 and June 24, 2019 Twitter

⁴ Exhibits 43, 45, 46, 52 and 53 of Dkt. 136 and Exhibits 1-4 of Dkt.143.

⁵ The Court did not reach the element of “access” or assess the evidence of “independent creation” in its Summary Judgment Order (Dkt. 130). As the Court explained, even assuming there is evidence of access without evidence of substantial similarity, a plaintiff cannot succeed on a claim of copyright infringement. *See* Dkt. 130, section VIII. Additionally, “[p]roof of access and substantial similarity raises only a presumption of copying which may be rebutted . . . with evidence of independent creation.” *Calhoun v. Lillenas Publ’g*, 298 F.3d 1228, 1232 (11th Cir. 2002) (quoting *Original Appalachian Artworks, Inc. v. Toy Loft*, 684 F.2d 821, 829 (11th Cir. 1982)).

⁶ Complaints of bias go to the weight to be given to expert testimony, not the issue of admissibility. *Dugas v. 3M Co.*, Case No. 3:14-cv-1096-J-39JBT, 2016 WL 1271040, *5 (M.D. Fla. Mar. 29, 2016) (collecting cases).

Moreover, the concerns raised by Plaintiff with respect to Defendants’ experts, Ms. Furth and Robert Gale, are not new and were previously raised in the relevant opposition papers. *See* Dkt. 120, page 18 (internal citations omitted)(“Furth directly benefits from the outcome of this action . . . [M]ost of Furth’s income since 2000 has been derived from The Dark Tower and/or Stephen King works. . . . Furth also wrote each of the infringing comic book issues for Defendant Marvel.”); *Id.*, pages 19-20 (describing Mr. Gale as an uneducated and biased “glamour witness” who Plaintiff argued was further unqualified due to his involvement in a previous lawsuit alleging “intellectual property theft.”).

posts by a writer from Amazon Studios and a June 24, 2019 Twitter post by Ms. Furth. Plaintiff argues the posts are relevant because they are further evidence of Ms. Furth's bias. In light of the Court's reasoning herein, that Motion is also due to be denied.

"The Man Who Time Forgot!" will not soon be forgotten— but he is out of this Court.

Accordingly, it is **ORDERED**:

1. Dubay's "Motion for Relief from Judgment" (Dkt. 136) is **DENIED**;
2. Dubay's "Motion for Leave to Supplement, with New Evidence, Plaintiff's Pending Motion for Relief from Final Judgment Pursuant to Fed. R. Civ. P. 60(b)" (Dkt. 143) is **DENIED**;
3. Defendants' shall have **fourteen (14) days** from entry date of this order to modify their Motions for costs and fees, should they desire to do so.

DONE AND ORDERED at Jacksonville, Florida, this 25th day of November, 2019.


HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

Copies to:

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APPENDIX D

District Court for the Middle District of Florida Order (Granting
Summary Judgment).

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

BENJAMIN MICHAEL DUBAY,

Plaintiff,

v.

Case No. 3:17-cv-00348-J-20MCR

**STEPHEN KING; MEDIA RIGHTS
CAPITAL; IMAGINE
ENTERTAINMENT; SONY
PICTURES ENTERTAINMENT;
MARVEL ENTERTAINMENT;
SIMON & SCHUSTER,**

Defendants.

ORDER

THIS CAUSE is before the Court on Defendants' Dispositive Motion for Summary Judgment and Memorandum of Law in Support (Doc. 115) and Plaintiff's Response and Memorandum of Law in Opposition thereto (Doc. 120). After careful consideration of the issues presented, Defendants' Motion for Summary Judgment (Doc. 115) is granted. The Court's analysis in support of that conclusion is as follows:

I. Background

Benjamin Michael DuBay ("Plaintiff") is a nephew of William Bryan DuBay, one of the creators of "Restin Dane" also known as "The Rook." The Rook is a comic book character whose first story was published in 1977 in a Warren Publications horror/fantasy comic magazine entitled *Eerie* volume 82 (hereinafter "*Eerie 82*"). According to Plaintiff, The Rook character was distributed in "greater than five million comic magazine copies, throughout the United

States from January 1977 thru March 1983” (Doc. 6, ¶18). The Rook comic remains available to the public today in comic books, graphic novels and electronic forms (Doc. 6, ¶ 20).

3 . Defendant Stephen King is the author of the widely successful series of novels entitled *The Dark Tower*. First published in 1982, *The Dark Tower* has evolved into an eight-volume series, reimagined and interpreted through various mediums, including film and graphic novels. Roland Deschain also known as “The Gunslinger,” is the protagonist of the series.

Approximately 35 years after the world first officially¹ met Roland Deschain, Plaintiff brought this action alleging that Roland Deschain is so shockingly and extraordinarily similar to The Rook that Defendant King must have unlawfully copied and appropriated The Rook character. (Doc. 6, ¶¶1, 24).² Plaintiff has identified the infringing works as: the eight novels of *The Dark Tower* series written by Defendant King and published by Defendant Simon & Schuster; 16 of *The Dark Tower* graphic novels licensed by Defendant Marvel; and the 2017 feature film *The Dark Tower* produced and/or distributed by Defendants MRC,³ Imagine Entertainment and Sony Pictures Entertainment. Plaintiff argues that because Roland is the central character in this large volume of works, all works infringe on Plaintiff’s validly held copyright of The Rook character.

¹The entire contents of Defendant King’s first *Dark Tower* novel, *The Gunslinger*, were initially published in five-installments in *The Magazine of Fantasy and Science* beginning in 1978. (Doc. 115-19, ¶ 11).

4 . ² Plaintiff acknowledges that Defendant Kings manuscript for *The Dark Tower* may have predated The Rook’s publication. However, he argues that “Defendant King made significant transformations characteristically, symbolically, and literarily to his unnamed protagonist featured in the manuscript after having gained access to Restin Dane.” Plaintiff argues, “[t]hese transformations can only be explained through willful copying and fraudulent concealment.” (Doc. 6, ¶ 36).

³ Sued as Media Rights Capital.

On March 28, 2017, Plaintiff filed a two-count complaint against Defendant King alleging claims for Copyright Infringement and Vicarious Copyright Infringement (Doc. 1, pgs. 28-31). Shortly thereafter, Plaintiff filed an amended complaint naming the remaining Defendants and adding an additional count for Contributory Copyright Infringement against Defendants MRC and Imagine Entertainment (Doc. 6, pgs. 44-46).

II. The Relevant Copyright

Plaintiff claims he is the owner of the copyright for the work entitled “The Rook,” registered with the United States Copyright Office under Registration Number B188968. The registration date is February 4, 1977. The initial publication date is January 19, 1977. The deposit copy for No. B188968 is *Eerie 82*. (Doc. 6, ¶ 21). It is by and through this copyright for *Eerie 82* that Plaintiff claims ownership of the copyright the Defendants are accused of infringing. For the purposes of this analysis, the Court will treat Plaintiff as the owner of the relevant copyright for The Rook character.⁴

III. Summary Judgment Standard

Summary Judgment is proper if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of showing the Court there is an absence of a genuine issue of material fact to be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A party seeking summary judgment has the initial responsibility of “identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file,

⁴ The Court notes the issue of ownership is far from clear. (See Doc. 118). Nevertheless, the Court will proceed in the same manner as the Parties, with the assumption that Plaintiff owns the copyright upon which this action is based (Doc. 120, pg. 4; Doc. 115, pgs. 3, 8).

together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323 (quoting Fed. R. Civ. P. 56(e)). Once the moving party has met its burden, the non-moving party must present specific facts showing there is a genuine issue of fact for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing Fed. R. Civ. P. 56(e)).

An issue of fact is "genuine" if the record could lead a trier of fact to find for the non-moving party. *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997). A "material" fact is one that "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When reviewing a summary judgment motion, "The district court should resolve all reasonable doubts about the facts in favor of the non-movant and draw all justifiable inferences . . . in his favor." *Hickson Corp. v. Northern Corssarm Co., Inc.*, 357 F.3d 1256 (11th Cir. 2004) (quoting *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437-38 (11th Cir. 1991)) In so doing, a Court cannot weigh conflicting evidence or determine issues of credibility. *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011). Instead, the Court is "limited to deciding whether there is sufficient evidence upon which a [fact-finder] could find for the non-moving party." *Georgia State Conference of NAACP v. Fayette Cty Bd. of Com'rs*, 775 F.3d 1336 (11th Cir. 2015) (quoting *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003)).

IV. Infringement Analysis

Despite what many may think, "Not all copying . . . is copyright infringement." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). To make out a prima facie case for infringement of a copyright, "two elements must be proven: (1) ownership of a valid

copyright, and (2) copying of constituent elements of the work that are original.” *Id.*; *Peter Letterese and Assoc., Inc., v. World Inst. of Scientology Enter.*, 533 F.3d 1287, 1300 (11th Cir. 2008). Because evidence of direct copying is rare, courts have “developed methods by which copying can be found indirectly.” *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994). Absent direct evidence of copying, a plaintiff must demonstrate (1) the defendants had access to the copyrighted work and (2) the works are substantially similar to the protected expression. *Id.* (citing *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 829 & n.11 (11th Cir. 1982)). Plaintiff must show both access *and* substantial similarity to prove copying. *Id.* at 460.⁵

a. Summary Judgment in the Infringement Context

Some courts have found summary judgment to be inappropriate in a copyright infringement lawsuit because of the “inherently subjective nature of the inquiry.” *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1223 (11th Cir. 2008) (citing *Beal*, 20 F.3d at 459 (11th Cir. 1994)). Nevertheless, non-infringement has been found as a matter of law and summary judgment granted where, *either*, “the similarity between two works concerns only non-copyrightable elements of the plaintiff’s work, or because no reasonable jury, properly instructed, could find the works are substantially similar.” *Herzog v. Castle Rock Entm’t.*, 193 F.3d 1241, 1247 (11th Cir. 1999) (per curiam) (district court opinion affirmed and annexed to Eleventh Circuit ruling)(citations omitted)(emphasis added); *Oravec*, 527 F.3d at 1223 (same);

⁵ Even if a plaintiff is unable to demonstrate access, he may establish copying by demonstrating that his work and the infringing works are strikingly similar. *Calhoun v. Lillenas Publ’g*, 298 F.3d 1338, 1232 n.6 (11th Cir. 2002). Striking similarity exists where the proof of similarity in appearance is “so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded.” *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984).

13 . *Beal*, 20 F.3d at 459 (same).⁶ This analysis is sometimes called a two-pronged test: (1) an extrinsic, objective test, and (2) an intrinsic, subjective test. *See Herzog* 193 F.3d at 1257 (citing *Beal v. Paramount Pictures*, 806 F.Supp. 963, 967 (N.D. Ga., 1992)), *aff'd*, *Beal*, 20 F.3d 454; *Lil' Joe Wein Music, Inc. v. Jackson*, 245 Fed. App'x. 873, 877 (11th Cir. 2007).

14 . Under the extrinsic test, a court will inquire into whether, as an objective matter, the protected expression of the works are substantially similar. *Id.* If, under the extrinsic test, the plaintiff “seeks to protect only uncopyrightable elements” the court will grant summary judgment for the defendant. *Id.* Pursuant to the intrinsic test, the Court will consider whether a reasonable jury, properly instructed, would find the works substantially similar. If a plaintiff cannot meet either prong, a court may grant summary judgment. *Herzog*, 193 F.3d at 1257.

b. The Requirements of Originality and Expression

Just because a work holds a copyright does not mean that that copyright protection extends to every element of that work. Copyright protection extends to that which is original to the author. *Feist*, 499 U.S. at 348. “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .” 17 U.S.C. § 102(a). Thus “[t]he *sine qua non* of copyright is originality.” *Beal*, 20 F.3d at 459 (quoting *Feist*, 499 U.S. at 345). Original in this context means that the work was independently created by the author and possesses a minimal degree of creativity. *Feist*, 499 U.S. at 345 (citing 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A],[B] (1990)). Similarly, mere ideas, procedures, principles and concepts are not protectable by copyright regardless of the manner or form in which such ideas, procedures, principles and concepts take. 17 U.S.C. § 102(b); *Peter Letterese and Assoc., Inc.*,

⁶ *See also Lil' Joe Wein Music Inc. v. Jackson*, 245 Fed. App'x. 873, 877 (11th Cir. 2007) (noting the Second Circuit has approved the grant of summary judgment in copyright cases as it allows courts to put “‘a swift end to meritless litigation’ and avoid long and costly trials.”)(quoting *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980).

553 F.3d at 1302; *Herzog*, 193 F.3d at 1248. Thus, copyright law balances an author’s “[r]ight to their original expression,” while still “encourage[ing] others to build freely upon the ideas and information conveyed by the work.” *Feist*, 449 U.S. at 349-350.

c. *Scènes à faire*

15. In addition to non-original works and broad ideas, noncopyrightable material includes *scènes à faire*, which are stock scenes or, “‘sequences of events which necessarily follow from a common theme,’ or ‘incidents, characters of settings that are indispensable or standard in the treatment of a given topic.’” *Peter Letterese and Assoc.*, 533 F.3d at 1302 (quoting *Herzog*, 193 F.3d at 1248). See, e.g. *Herzog*, 193 F.3d at 1262 (holding that characters in a murder mystery who keep secrets are not protectable); *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996)(holding figures of muscular superheroes in fighting poses are examples of *scènes à faire*); *Beal*, 20 F.3d at 463 (noting that in all works involving courtship and marriage have a wedding, usually towards the end of the work); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986)(concluding no protection for “drunks, prostitutes, vermin, and derelict cars,” as well as “foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop” as they are common elements in police fiction); *Warner Bros. Inc. v. Am. Broad. Cos.*, 654 F.2d 204, 210 (2d Cir. 1981)(observing that the fact that both heroes fight villains is nothing more “than the classic theme of good versus evil”).

d. Substantial similarity

16. In the Eleventh Circuit, substantial similarity exists “where an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” *Original Appalachian Artworks, Inc.*, 684 F.2d at 829 (citations omitted). A Plaintiff must establish “specifically that the allegedly infringing work is substantially similar to the plaintiff’s

work with regard to its protected elements.” *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214 (11th Cir. 2010) (emphasis in original).

e. Evaluating competent evidence

Plaintiff urges the Court to ignore Defendants’ expert witness Robert Michael Gale. Plaintiff argues Gale’s expert opinion undermines the lay observer test for substantial similarity, especially because he does not “test[] the target audience.” (See Doc. 120, pgs. 12-13).

Expert testimony is appropriate in evaluating the “extrinsic” prong of the above-outlined test, i.e. whether, as an objective matter, the protected expression of the works are substantially similar. *Lil’ Joe Wein Music Inc. v. Jackson*, 245 Fed. App’x. 873, 877 (11th Cir. 2007). “Under the extrinsic test, expert testimony and analytic dissection are appropriate.” *Herzog*, 193 F.3d at 1257. Additionally, the Court is not left to rely on expert opinion alone to determine whether the protected expressions of the work are substantially similar. To the extent the works at issue have been lodged with the Court, the works themselves have been scrutinized.⁷

f. Characters are protectable by copyright separate from the work in which they appear

Courts may consider the copyrightability of a character apart from the work in which the character appears. 1 Nimmer on Copyright § 2.12[A][1] & [2] (2018). However, the character must be “distinctively delineated” in the plaintiff’s work. *Id.* As Judge Learned Hand reasoned, “[t]he less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.” *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d. Cir 1930). Thus, Courts have held characters to have standalone protection where they have displayed “consistent, widely identifiable traits.” *Rice v. Fox Broad. Co.*, 330

⁷ This issue is discussed further in Section X., *infra*.

F.3d 1170 (9th Cir. 2003). *See, e.g., Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F. Supp. 1287, 1295-97 (C.D. Cal. 1995) (James Bond protectable apart from the works in which he appeared); *D.C. Comics Inc. v. Unlimited Monkey Bus., Inc.*, 598 F.Supp. 110 (N.D. Ga. 1984) (Superman protected by copyright); *Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (Mickey Mouse and other Disney characters protected by copyright).

The Court finds that the distinctive delineation analysis is encompassed in the analysis for substantial similarity. The same factors utilized in evaluating distinctiveness are analyzed by the Court in the discussion of the characters 'similarities *infra*. *See* 1 Nimmer on Copyright §2.12[A][1] ([t]he inquiry into copyright protection for a character from a work of fiction, along with whether infringement of the character has taken place belong not to . . . the discussion of copyright's subject matter, but instead to the inquiry into substantial similarity.'").

g. The Works Examined

"When called upon to adjudicate a copyright dispute, a court must compare the works in question." *Beal*, 20 F.3d at 456 (citing *Autoskill, Inc. v. Nat'l Edu. Support Sys. Inc.*, 994 F.2d 1476, 1490 (10th Cir.), *cert denied*, 510 U.S. 916 (1993)). Plaintiff does not allege that any of the written works of Defendant King infringe on The Rook character or comics in a specific, individual capacity. *Cf. Beal*, 20 F.3d 454 (11th Cir. 1994) (The movie "Coming to America" was accused of infringing upon a novel entitled *The Arab Heart* by author Alveda King Beal). Plaintiff instead relies on a broader theory; the works featuring The Rook and Roland Deschain are substantially similar based on the characters featured and the themes pursued. (*See* Doc. 115, Exhibit 41). Specifically, Plaintiff argues that The Rook and Roland Deschain are "substantially similar in their unique elements" and their "unique combination of common traits" (*See* Doc. 120, pg. 15).

It is the Plaintiff's position that the unique elements of The Rook "became well-delineated in a two-part story published in *Eerie* 82 in March 1977, where the character Restin Dane, aka The Rook was introduced," (Doc. 120, pg. 15).⁸ To that end, Plaintiff has included in his summary judgment response the full stories featuring The Rook appearing in *Eerie*, volumes 82-85, 87-88 (Doc. 120, Exhibits 1, 1A, 1B, 1C, 1D, 1E).

Defendant King's novels alone compromise approximately 4,000 pages written over 25 years. Due to the volume of the works at issue, Defendants engaged Robin Furth to author summaries of Roland Deschain's character arc plot summaries for both Defendant King's prose and Marvel's graphic novels. Due to Plaintiff's character-based, thematic and general allegations of infringement, the Court will compare the characters for the purposes of the substantial similarity analysis using Furth's summaries, *Eerie*, volumes 82-85, 87-88 in their entirety,⁹ and the other materials lodged with the Court.¹⁰

⁸ Plaintiff specifically claims that, "[I]n the inaugural arc, Restin Dane's name, anachronistic cowboy look, time traveling heroism, black bird companion, tower relationship, and the Alamo history are well established unique elements." He further claims that the "unique combination of the otherwise common elements described in Plaintiff's amended complaint, are afforded protection" Doc. 120, pg. 15.

⁹ *Eerie* 86 was not included in the materials provided to the Court. The Court is not aware if The Rook appeared in *Eerie* 86.

¹⁰ Federal Rule of Evidence 1006 allows a party to "use a summary, chart, or calculation to prove the content of voluminous writings . . . that cannot be conveniently examined in court," provided they are made available to the opposing party. Fed. R. of Evid. 1006. *See United States v. Francis*, 131 F.3d 1452, 1457 (11th Cir. 1997) (noting that Rule 1006 allows a District Court to admit summary evidence, where, in the court's discretion, it would be "inconvenient or unnecessarily time-consuming" to review the full evidence) (citations omitted). Defendants invited Plaintiff to lodge the full works with the Court, if they deemed it necessary due to a belief in the inaccuracy of the summaries. Plaintiff chose not to lodge the Defendant King's works for the Court's review in analyzing this matter and does not contest the accuracy of the summaries. Rather, Plaintiff disputes the accuracy Furth's deposition testimony, arguing that Furth has motive to lie about the relevant issues because she has an employment relationship with Defendant King and authored the alleged infringing graphic novels. (*See* Doc. 120, pgs. 18-19).

To proceed with the analysis, the Court will first examine the general characteristics and story arc of The Rook. The Court will then examine the general characteristics and story arc of Roland Deschain arc as featured in the alleged infringing work of the Defendants.¹¹ The Court will then identify the similarities between each work and examine which of those similarities are *scènes à faire*. The Court will then conduct the substantial similarity analysis between the original expression of The Rook and the alleged infringing works featuring Roland Deschain. *Beal*, 20 F. 3d at 459. *See also Leigh*, 212 F.3d at 1215.

V. The Rook

a. Creation

William M. Dubay, Budd Lewis and James “Jim” Stenstrum, created The Rook during the fall of 1976. Mr. William Dubay died in 2010. Mr. Stenstrum is the only surviving member of the trio. Plaintiff describes The Rook as a “time-traveling, parallel/alternate world traveling, monster-fighting, romantic adventure hero; who has a penchant for dressing as a cowboy from the Old West and is symbolized by a rook bird” (Doc. 6, ¶16). A few years after his initial debut in *Eerie*, The Rook was given his own magazine, entitled *The Rook*. After his title magazine was cancelled, The Rook again appeared in *Erie* magazine. Warren Publishing eventually went bankrupt and ceased all further publication of The Rook character. The Rook series again appeared in a mini-series was revived by Dark Horse Comics in 2015 and is available and by GooglePlay in a mobile video game (Doc. 6, ¶ 20).

The issues raised by Plaintiff are relevant weight to be given to Furth’s testimony, not its admissibility or sufficiency.

b. *The Man Who Time Forgot!*

“He was born . . . Restin Dane but he calls himself . . . THE ROOK!” An exciting and light-hearted comic, The Rook character is first introduced to readers in *Eerie* 82 in classically exciting, catchy and heroic terms: “The Most Exciting New Hero in Comics!” and “The Master of the Past, Present and Future!” The Rook is a hero in the traditional mold. He is self-made, likeable, charming and a successful adventure hero. Restin Dane calls himself The Rook because of the “shrewd killer chess piece” in the shape of “an impregnable castle,” that he travels through time in and because he moves through time as quickly and mysteriously as “the black bird of prey . . . known also as . . . The Rook!”

Like Batman’s Bruce Wayne, The Rook is a wealthy inventor/techno physicist, who experiments with the science of physics, computers and advanced robotronics. The Rook designed the time traveling devices he uses. He most commonly uses a time machine in the shape of a large rook chess piece, although a time machine shaped as a knight chess piece is also featured in the series. He calls traveling through time “castling.” The Rook has also built robots to serve as his team of assistants. The most prominently featured robot is a computer robot butler named “Manners.” Two more rudimentary robots, aptly named “Nuts” and “Bolts” are also mentioned.

Eventually, The Rook’s crime fighting team is comprised of himself, his great, great grandfather Bishop Dane, an outlaw gunfighter whom he rescued from 1874 and Manners. (See *Eerie* 85, 120-1C). The action primarily takes place in the Old American West, but The Rook lives in modern day Arizona in a house called “Rook Manor” or “Rook Castle” which is also shaped like a giant rook chess piece. The Rook has built an underground headquarters there, where he stores his time machines.

The Rook is a bachelor. He is young, ruggedly handsome, square jawed with dark hair and thick sideburns and a muscular physique. The Rook does not age and remains in his prime, despite passing years. Although The Rook's attire changes slightly as his adventures progress, he basically subscribes to the same old American West look throughout.¹² He mostly wears dark jean or black, bell bottomed pants, a torn white or light, long sleeve collared shirt, a dark vest, leg holster, and a belt with a large buckle containing the image of a rook bird, an animal similar in appearance to the common crow. The Rook often, but not always, wears a black cowboy hat with a somewhat reflective silver, hatband. He is frequently armed on his adventures with a revolver, a Bowie knife, and a machine gun.

The Rook's desire "to escape the time in which he is imprisoned" and interest in his ancestral history initially motivates his time travel. Resourceful and brave, The Rook strives to do the right thing, even if it means sacrificing himself or placing himself in harm's way. The Rook's main adversary in *Eerie* is Gat Hawkins. Hawkins wants to be the "Master of All Time" and torments The Rook in his quests (*Eerie* 84, Doc. 120-3). In *Eerie* 87, Granny Gadget is also introduced as a villain (Doc. 120-4).

c. *As Featured in Eerie 82*

The Reader learns The Rook spent a lifetime preparing to time travel, and when he was finally able, his goal was to travel to save Parrish Dane, a relative, who died in the Battle of the Alamo. The Rook character's main storyline in this comic surrounds the Battle of the Alamo and his attempts to save Parrish Dane. The Rook goes castling in his rook time machine, to the famous 1836 battle. The Rook introduces himself to Davy Crockett, Colonel William Travis, Colonel James Bowie, and Parrish Dane, who he fights alongside defending The Alamo. The

¹² Plaintiff labeled the image of The Rook contained on page 21 of the complaint to define the look of his character (Doc. 6).

Rook desperately wants to save all the fighters at the Alamo, but even he and his modern weaponry could not survive the onslaught of the Mexican army. Although he cannot save Parrish Dane, The Rook saves a boy, who was fighting alongside Colonel Bowie. The Rook sweeps the boy, who is later revealed to be Bishop Dane, into his time machine and transports him to the day after the climatic Battle of the Alamo, ensuring the boy's survival. The boy appears to be the sole survivor of the Battle, except for The Rook. The Rook returns to Rook Manor, awash in failure, and in deep despair he could not fulfill his life's mission of saving his ancestor Parrish Dane.

VI. Roland Deschain

a. *Creation*

According to Defendant King, the character of Roland Deschain, also known as the Gunslinger, was developed over three decades, beginning in 1970. (See Doc. 115-19, ¶¶ 9,14). The seventh volume of *The Dark Tower* series was published in 2004. In 2012, Defendant King published a standalone novella, *The Wind Through the Keyhole*, that fits chronologically between the fourth and fifth *Dark Tower* novels.

35. Defendant King identifies a variety of sources as his inspiration for Roland and *The Dark Tower* novels, including: J.R.R. Tolkien's *The Lord of the Rings*; Robert Browning's poem, "Childe Roland to the Dark Tower Came," which is about a young man, "on a quest for a mysterious dark tower" (Doc. 115-19, ¶ 5);¹³ Clint Eastwood's character, "The Man With No Name" featured in spaghetti westerns beginning in the 1960s, including the film *The Good, The Bad, and The Ugly*, and author Clifford Simak's science fiction novel *Ring Around the Sun*. (Doc. 115-19, ¶¶5-8).

¹³ Defendant King points to several other elements present in the poem that purportedly heavily inspired *The Dark Tower*, such as a great black bird, knights, and a character named Cuthbert, a horn, and the notion that Roland Deschain is the final gunslinger. *Id.*

Defendant King purports to have had little to do with the illustrations of Roland. (Doc. 115-19, ¶¶ 15-16). He points out that the illustrations of The Gunslinger vary greatly from book to book and The Gunslinger played by actor Idris Elba in the film, *The Dark Tower* did not “strictly conform” to the image of Roland he wrote. *Id.* at ¶16.

b. *The Gunslinger*

In the first installment of *The Dark Tower* series, *The Gunslinger*, Roland lives in a post-apocalyptic Mid-world. Mid-world is a parallel, alternate version of our world that is a compilation of familiar settings: the Old American West, a feudal society, a magical universe, wasteland and a distant future. Within Mid-world, there are remnants of familiar technologies and appliances such as defunct oil derricks, tanker trucks, robotics and machinery, and mostly empty but seemingly technologically advanced cities. In the Court’s view, Mid-world may be considered as the hub, while all other parallel worlds are spokes off the central hub.

Roland is descended from Mid-world royalty, Arthur Eld, an architype of King Arthur. He has no living relatives. He can enter the consciousness of people and has the power to hypnotize. He is a deft and accurate shooter of his western-style revolvers and can reload them in an instant. Roland was born in a feudal city-state called Gilead. At the top of the feudal society were the Gunslingers, reminiscent of knights, who dressed like cowboys, and were lethal shots. Gilead falls, and only Roland was left alive, the last Gunslinger. His quest is to find the Dark Tower, the nexus of all worlds and the linchpin of space and time, and protect it from destruction by The Man in Black; who goes by different names and appears in different iterations, including Walter O’Dim, Randall Flagg, and Marten Broadcloak.

At the very least, Roland is a complex protagonist, who as the novels progress, is revealed to be an anti-hero, a profoundly tortured and flawed individual. He does not always do

the “right thing.” His actions are, at best, ethically ambiguous. He smokes, drinks, lies, manipulates and commits crimes.

For Instance, in *The Gunslinger*, Roland acts with depravity. Believing that a mad preacher, Sylvia Pittson, had engaged in sexual relations with the villainous Man in Black and is pregnant with a demon, Roland rapes her with a gun. Angry, Pittson sends her congregation after Roland. They are armed with stones, wood and other primitive weaponry. Roland starts shooting her congregation in self-defense, however it quickly turns to murder. By the end of the encounter, Roland has shot and killed 39 men, 14 women, including his lover, and five children. After the massacre, he goes to a honky-tonk, has burgers and beer and then falls asleep.

One character who plays a major part in the series is Jake Chambers, who is introduced in *The Gunslinger*. Jake was from New York City and died when he was hit by a car. In an unexplained way, Jake is transported to Mid-world after his death. Roland hypnotizes Jake and grows to love him, but believes he is a trap set by the Man in Black. Roland promises to take care of Jake, all the while knowing he will eventually kill him. Eventually, Roland leaves a teetering Jake to fall to his death, choosing instead to pursue the Man in Black. Roland realizes he has damned himself. This act begins Roland’s evolution from a heartless killer to a character capable of love and compassion. *The Dark Tower* series is not Roland’s literal journey to the Dark Tower, but a morality play for Roland’s inner quest for redemption.

Roland does travel between parallel worlds in the works. In *The Drawing of Three*, Roland sees three, magical stand-alone doors, with each leading to the mind of a person from New York City. The first door is to the mind of Eddie Dean; the second is to the mind of Odetta Susannah Holmes/Detta Walker, and the third is to the man who originally killed Jake. Eddie is a heroin addict, and Odetta is amputee with multiple personality disorder. Odetta’s two

personalities eventually merge, and she then calls herself Susannah. Eddie and Susannah become part of Roland's group. Roland, who at first cared little for others, begins to show compassion and reforms his ways. Roland eventually draws a magic doorway and draws Jake back into Mid-world. Roland promises to protect Jake.

Throughout his quest, Roland interacts with many science-fiction and supernatural elements, such as a monster that bites off two of his fingers, and a gang of cannibalistic mutants. Roland grows old throughout the series and is afflicted with rheumatism. His epic quest ends on a metaphysical tone. When he finally reaches the Dark Tower, he is faced with all of his sins. Roland learns his true adversary is himself. He is doomed to repeat his journey again and again, until he learns to change.

c. *The Graphic Novels*

The graphic novels focus on the adventures of Roland in his quest for the Dark Tower. Most of the graphic novels center on the many trials and tribulations that transformed Roland from a young, learning gunslinger, to a hardened killer.

d. *The Dark Tower Feature Film*

The actors Idris Elba and Matthew McConaughey play Roland and The Man in Black in the 2017 *The Dark Tower* movie. The movie deviates from the books. The main characters are Roland, Jake Chambers, and the Man in Black. The plot involves The Man in Black abducting psychic children to use their mental abilities, called "the shine," to bring down the Tower, allowing darkness to reign. The first act features Jake being transported to Mid-world where he encounters Roland. The pair have a series of action-packed encounters. The Man in Black and Roland eventually fight in New York City, with Roland emerging victorious. Roland saves the

Tower, Jake and the abducted children. The movie ends with Jake and Roland returning to Mid-world.

Movie Roland looks quite different than the Roland featured in the artwork in the novels and graphic novels. He is clad in tight, black leather. He is African American and does not age. A significant portion of the novels is spent examining Roland's past, this is less prevalent in the movie. Movie Roland is more one dimensional and goes through far less character development. The movie's theme is centered on external rather than internal redemption.

VII. Analysis of Substantial Similarity

In an effort to illustrate the similarities between the two protagonists, Plaintiff describes that Roland Deschain, like The Rook,

is a quasi-immortal time-traveling, monster-fighting, romantic adventure hero who descends from an immortal, is symbolized by a rook bird, dresses in cowboy garb despite not being from the Old West and who descends from Gilead, a homage to Goliad "The Other Alamo", who traverses time through dimensional doors connected to a tower who is in the aesthetical likeness of Restin Dane as well as having been similarly named consistent with an admitted signature symbolization device of Defendant King's. . . .

(Doc 115-41)(grammar errors in original).¹⁴ "In determining whether a character in a second work infringes a cartoon character, courts have generally considered not only the visual resemblance but also the totality of the characters' attributes and traits." *Warner Bros. Inc. v. American Broad. Co., Inc.*, 720 F.2d 231 (2d Cir. 1983) (citations omitted).

The Court has examined all the purported similarities, including the totality of the characters' attributes and traits. However, "it would be neither useful nor judicious to detail each

¹⁴ Plaintiff describes the similarities slightly differently in each relevant document, however, the crux of the description remains the same.

and every one.” *Beal*, 20 F.3d at 460. The Court will instead detail the analysis of those claimed similarities that are the most significant and representative. *Id.*

The Court finds Plaintiff’s characterization above, while somewhat true, analyzes the characters at such a high level of abstraction and generality that it does not truly reflect the characters or their shared traits. Analyzing most adventure heroes with such a high level of abstraction would lead to a finding of infringement. Plaintiff ignores the true details and context that makes each character unique in his own right.

Witness Gale illuminated how a high level of abstraction and generalization can lead to an erroneous conclusion. To illustrate, he compared two movies: *The Wizard of Oz* and *Star Wars*. (Doc. 115-6, pg. 67). Both films feature main characters who lives with an Aunt and Uncle in a rural environment, leave home to go on a quest, are accompanied by a character made of metal important to the success of the quest (the Tin Man/C3PO Robot) and a hairy character (The Cowardly Lion/Wookiee), and seeks a wise old man for help (The Wizard/Obi Wan Kenobi). The villains in both films dress completely in black (The Witch/Darth Vader) and wear distinctive headgear (Witch’s hat/Darth Vader’s helmet). Yet, no reasonable person would call the movies *Star Wars* and *The Wizard of Oz* substantially similar works. (Doc. 115-6, pg. 67).

An illustration of this adage was made by the Eleventh Circuit in *BUC International Corp. v. International Yacht Council Ltd.*, 489 F.3d. 1129, 1142-43 (11th Cir. 2007) in explaining the difference between copyright law protecting the expression of ideas and not the ideas themselves. Assuming the book *Moby Dick* was not in public domain the Court stated, “[t]he idea of hunting a formidable whale at the lead of an eccentric captain is not protected by copyright law. The expression of this ideas as it is encapsulated in the novel *Moby-Dick* however, is protected by copyright.” *Id.* at 1143.

a. *Adventure Seekers*

Both Roland and The Rook are the adventure-seeking protagonists of their stories. As Plaintiff points out, they are the stories to be told. The Rook seeks to do the “right thing.” He is upbeat and motivated by a desire to correct history, and make things better. In other words, The Rook is a classic hero.

Roland, however, is not a classic hero. He is at times, dark and brooding. He kills in cold blood, leaves Jake to die, sacrifices those around him to reach the Dark Tower and is on a quest for redemption. While Roland and The Rook are both adventurers, the comparison stops there; the Court does not find the type of adventures, motivations for the adventures, or the characters’ actions during the adventures to be substantially similar.

b. *Time Travel*

Time travel is an element in both works. Defendants point out that Roland does not time travel; rather he “visits parallel worlds that are not his own.” (Doc. 120, Furth Deposition, pg. 50) That distinction in label notwithstanding, the act of entering different time periods plays a different role in each work. The Rook’s desire to time travel and the adventures he has while time traveling are central storylines. Time travel is the hook; it is the thing that provides him adventure and a platform to succeed in adversarial situations. The Rook uses time travel in attempt to correct perceived wrongs in history, or to save those he loves. This is best illustrated by some of the catchy headlines associated with The Rook’s comics: “His time . . . was any time! Every time!” and “The Master of the Past, Present and Future!” The Rook can choose what time period he would like to travel to. For example, he travels to 1836 and the Battle of the Alamo. The Rook is technologically savvy. The machine most used in the *Eerie* series look like a rook

chess piece or a castle. It is time travel in the classic sense; he gets into a machine and arrives in a different time. Usually, The Rook can travel through time whenever and wherever he chooses.

In Roland's quest for the Dark Tower, time travel is not the adventure itself and is less central to the plot. Time travel is a means to an end. When he does travel, Roland does not use a time machine. Rather he travels through literal doorways to parallel worlds connected to a particular character. The worlds are not always synchronized in time, and the portals are sometimes thin, so that the parallel worlds mingle. Roland has no control over where and when he will travel to. Likewise, Roland cannot choose where the portals lead, only whether to enter them.¹⁵

The element of time travel in each work is not substantially similar. Even if this Court found that the element of time travel was a similarity between the two works, time travel in the general sense, is hardly a unique, original expression. *See, e.g.,* the films *The Time Traveler's Wife*, *Kate and Leopold*, *Back to the Future*, *The Time Machine*, and *Midnight in Paris*. At least one court has found that involuntary time travel is so pervasive, that it is not subject to copyright protection. *Feldman v. Twentieth Century Fox Film Corp.*, 723 F. Supp.2d 357, 366 (D. Mass 2010) (noting that warning signs of upcoming time travel, after effects showing time traveling is complete, a tragic romance related to time traveling, and significant consequences as a result of time travel are *scènes à faire* or stock scenes in the portrayal of time travel).

c. *Gunslingers*

Plaintiff claims that both Roland and Restin "descend from a familial line of gunslingers." Gunslingers as imagined by popular culture are personified by The Rook and

¹⁵ While both works mention traveling via time fragments or doorways, the Court finds that this similarity is animated in different ways. The Rook travels on fragments or doorways by using his time machine. Roland has no machine.

Bishop Dane, someone in the American West who carried a gun and was an excellent, quick shot. However, what it means to be a gunslinger on Mid-world is independently defined by Defendant King within *The Dark Tower* novels and contains only some pop-culture elements. As imagined by Defendant King, Gunslingers are a caste of elite, aristocratic gunfighters who train from childhood to be heroes. They have a code of honor. Roland is a descendent of royalty, and his father was a leader of the gunslinger caste.

Readers do not learn about The Rook's immediate ancestral history in *Erie*. However, readers do learn that his great, great grandfather Bishop Dane was performing as a classic, western, gun fighter before he met The Rook. While both The Rook and Roland have a familial history of gun fighting, those histories manifest in different ways and are not substantially similar.

d. *The Towers*

The Rook and Roland are similar to the extent that medieval towers play a large role in their adventures. However, the looks and function of each tower are different. Rook Manor is The Rook's lair. It is his tower-shaped home base where he stores his time machines, keeps his robots, watches recordings of his travels called "time tapes," and rests between adventures. The tower time machine serves as a vehicle by which The Rook goes on his time traveling adventures. Both towers look like cartoonish versions of their namesake, the rook chess piece.

Roland's Dark Tower serves as the linchpin of a time and space continuum; not a home, not a time machine. Its look is gothic, ornate and menacing. It is often featured rising out of a swath of hazy fog. In the illustrations, the Tower is often set far in the background, reminding readers that Roland is nomadic; his quest is long; and his redemption distant. The towers are not alike, and do not serve like roles in each work.

e. *Romantic*

Plaintiff claims that a point of similarity between the characters is that both The Rook and Roland romantically interact with women. Even if having a protagonist who has romantic interactions with women is an original expression, The Rook and Roland's interactions with women could not be more different. While Roland softens as his adventures continue, his interactions with women are often shocking and violent. He impregnates his first and only love Susan Delgado and then leaves her. She is then burned alive as he escapes, illustrating the sacrifices he is willing to make in his quest for the Dark Tower. His rape of Pittson with his firearm is shocking.

The Rook is classically dashing and romantic. For example, In *Eerie* 83, The Rook is romantically interested in January Boone and Kate McCall. When trouble ensues, Ms. Boone pleads with The Rook to keep himself safe and return to her. The pair then share a kiss. Later, while landing a punch against Hawkins and his allies, The Rook cheekily says, "This one is for Kate," "This one is for Jan."

f. *The Bad Guy*

Plaintiff points out that the nemesis of both characters is "the man in black." (Doc. 6, pg. 26, #14). What Plaintiff means is that both characters' nemesis wears black. However, both versions of Plaintiff's assertion are misstatements. The Rook, as he is featured in *Eerie*, has varied enemies. While it is true Hawkin makes an appearance in multiple episodes, the villain The Rook is tasked with defeating depends on the time traveling adventure he finds himself in.

Roland's nemesis throughout the books, though known by multiple names and incarnations is one being, The Man in Black. The Man in Black seeks to destroy the Dark Tower

and bring chaos to Mid-world. Roland has one constant and animating enemy throughout his quest.

Even if both characters had one significant adversary in their quests that only wore black, this is hardly original expression; Venom (*Spiderman*), Darth Vader (*Star Wars*), Black Manta (*Acquaman*) and The Wicked Witch of the West (*The Wizard of Oz*) are all villains who wear black.

g. Overall Look

The Rook and Roland's looks are similar. They both wear western gear and recall imagery of the Old American West. However, neither look is original or distinguished. The overall look of each protagonist is a mishmash of stock elements or *scènes à faire* of western heroes. Surviving Rook co-creator, Stenstrum's testimony is illustrative of this point (Doc. 115-60). Stenstrum testified that Mr. William Bill DuBay asked Stenstrum to make a costume for The Rook that he could quickly show Warren Publishing. Within minutes, knowing the comic was a Western, he "grabbed things [he] remembered from the past." (Doc. 115-60, pg. 53). Stenstrum best explains his inspiration for the look of The Rook:

There was the vest and the shirt from Rod Taylor¹⁶ and it was—the hat I remembered from a TV show. I'm not sure if it's the proper one, but it had a very interesting look. It was a —it had these kind of disks that were put together to form a kind of a band and it was a Anyway, I had taken that and I threw that hat together and — the black I took from—I always like Paladin from —the big old hat from "Have Gun — Will Travel.[]" ¹⁷ So I made him pretty much all black except for the white shirt

¹⁶ The actor Rod Taylor played H. George Wells in *The Time Machine*, the 1960 film based on the book by author H.G. Wells of the same name.

¹⁷ *Have Gun-Will Travel* was a Western TV series in the late 1950s early 1960s, featuring a man named Paladin, played by Richard Boone, who was a professional gunfighter who traveled around the Old West.

(Doc. 115-60, pgs. 53-54).

According to Defendant King, he did not create or supervise the illustrations or cover art for any of *The Dark Tower* novels, the film or the graphic novels. (See Doc. 115-19).¹⁸ Even assuming he had, the Court notes that Roland appears differently in each novel, each graphic novel, each version of the same novel. However, the look is similar at its core, a western, or cowboy looking loner in often desolate or eerie surroundings (See Doc. 115-32).

The Rook's look, that of a cowboy, is the customary, stock-treatment given to those characters set in the old west or worlds similar to the old west, it is the definition of *scènes à faire*. See *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d at 102 (“[E]lements of a work that are ‘indispensable, or at least standard, the treatment of a given topic’- like cowboys, bank robbers, and shootouts in the American West—get no protection.”) (quoting *Hoehling v. Universal City Studios, Inc.*, 618 F.2d, 972, 979 (2d Cir. 1980)). The variation in each character's western look between years and stories underscores this point. The characters do not have unique looks. One would expect a character who lives in Mid-world, akin to the Old West, to wear western gear.

¹⁸ Defendant King has indicated in his book *On Writing*, that he leaves space for the reader to fill in the physical details of his character's appearances. He writes,

I can't remember many cases where I felt I had to describe what the people in a story of mine looked like—I'd rather let the reader supply the faces, the builds, and the clothing as well. If I tell you that Carrie White is a high school outcast with a bad complexion and a fashion-victim wardrobe, I think you can do the rest, can't you? I don't need to give you a pimple-by-pimple, skirt-by -skirt rundown. We all remember one or more high school losers, after all; if I describe mine, it freezes out yours, and I lose a little bit of the bond of understanding I want to forge between us. Description begins in the writer's imagination, but should finish in the reader's.

(Doc. 115-19, pg. 6)

One would expect a character living in Arizona in the 1970s who frequently time travels to the Old West to wear western gear.¹⁹

The looks of both Roland and The Rook are so widely used to represent Western protagonists that they are not original. For instance, actors Clint Eastwood in the movie *Joe Kid*, Earl Holliman as Sundance in the TV series *Hotel De Paree*, and Rory Calhoun in *The Domino Kid* all look like The Rook, square jawed, cowboys, wearing wide brim dark hats. (See Doc. 116-6, pg. 23).

Plaintiff further argues that both The Rook and Roland have medium-length hair, that is dark, sometimes unkempt, with long-thick sideburns (See Doc. 6). The description Defendant King provides of Roland in his writings is someone who is thin with black hair, blue, eyes. These general physical characteristics are not protected by copyright. See *Whitehead v. Paramount Pictures Corp.*, 53 F.Supp. 2d 38, 50 (D.D.C. 1999)(noting that “general characteristics such as black hair, intelligence patriotism and slight paranoia . . . are not copyrightable and do not establish substantial similarity.”)

h. *Name*

Plaintiff argues that because both Roland Deschain and Restin Dane (“The Rook”) have the initials R.D, this is an indicia of copying. However, this is a similarity without import. Even if the protagonists were to share the same exact name, this “by itself is insufficient to establish substantial similarity between the characters.” *Hogan*, 48 F.Supp.2d at 3119. See also 37 C.F.R.

¹⁹ The Court does not agree with Plaintiff’s assertion that Roland is wearing a uniform out of his time. Defendant King has defined his own world for Roland, one which is akin to the Old American West. The Court also finds Plaintiff’s argument that The Rook’s look is anachronistic is contradicted by the comic itself. “His time . . . was any time! The Place he called home . . . The Old West!” (Doc. 120-1, *Eerie* 82)

§ 202.1(a) (“words and short phrases such as names, titles, and slogans . . . mere variations of typographic ornamentation, letting or coloring . . .” are excluded from copyright protection).

i. ***Historical References***

Plaintiff argues that *The Rook* and *Roland* are substantially similar because they both feature the Battle of the Alamo, an event where there were no survivors, yet manage to survive in their respective stories. (Doc. 6, ¶ 37). *Roland* was born and raised in a place called Gilead, which eventually falls, and all of *Roland*’s fellow gunslingers are slaughtered. Plaintiff claims that the name Gilead is an homage to Goliad, a massacre of the Texan Army by the Mexican Army in the Texas Revolution, sometimes known as “The Other Alamo.” *Id.* *The Rook*’s ancestral heritage is traced to the Battle of the Alamo, and in his inaugural story arc, *The Rook* time travels back to The Alamo and fights alongside James Bowie and Davvy Crockett.

This similarity is not subject to protection. The Battle of the Alamo, or the concept of a group of people under siege, is not unique. It is not original. It is a historical event “in the public domain, free for others to draw upon,” subject to the imagination and reimagination of artists. *Zalewski*, 754 F.3d 95 at 102. As one court has explained,

[A]ny author may draw from the history of English-speaking peoples, but not one may copy from *A History of English-Speaking Peoples*. Any artist may portray the Spanish Civil War, but no one may paint another *Guernica*. And anyone may draw a cartoon mouse, but there can be only one Mickey.”

Id. That both *Roland* and *The Rook* were the sole survivors of such battles does not change the analysis.

j. ***Birds***

Similar birds are featured in each work, but they are not featured in the same way. *The Rook* sees a rook who assists him in his mission in *Eerie* 83 and *Eerie* 84. In another episode,

The Rook puts on a pair of rook wings and flies besides the bird into battle. The image of the Rook bird, a kind of crow, is found on his belt buckle, but is not otherwise prominently featured. The rook chess piece is much more prominently featured. Roland encounters a raven named Zoltan in *The Gunslinger*, and as young boy, had a hawk that he sacrifices to win combat with his trainer. That a bird resembling a crow or hawk is featured on many of *The Dark Tower* novel covers is of no import.

k. Generalities

Plaintiff correctly points out that both Roland and The Rook are brave, excellent marksman, born leaders, determined, engage in hand to hand combat and fight monsters. However, these characteristics are *scènes à faire* of action adventure heroes.

1. Total look and feel

The Eleventh Circuit has recognized that lists of similarities and dissimilarities between works are inherently subjective and unreliable. *Leigh*, 212 F.3d at 1215. *See also Singleton v. Dean*, 611 Fed. App'x. 671 (11th Cir. 2015) (“lists of similarities between two works are inherently subjective and unreliable, particularly where the list contains random similarities, as many such similarities can be found in very dissimilar works”) (citing *Beal*, 20 F.3d at 460). Perhaps in response to this concern, some courts, including the Second Circuit, examine the total concept and feel of the characters at issue. *Warner Bros. Inc.*, 720 F.2d 231, 241 (citations omitted). *See also Sheldon Abend Revocable Trust v. Spielberg*, 748 F.Supp.2d 200, 208 (S.D.N.Y. 2010) (When analyzing two characters for similarities, courts examine the “‘totality of [the characters’] attributes and traits as well as to the extent to which the defendants’ characters capture the ‘total concept and feel’ of figures in [plaintiff’s work].” (citations omitted).

This Court has compared the totality of the works at issue. The Rook is a light, at times comical, campy science fiction comic. The Rook character is a hero that reflects that lightness. He is a mile wide and an inch deep. Roland is completely different. He is disturbed, introspective and at times, murderous. *The Dark Tower*, through Roland, explores some very dark themes. Roland is obsessed by his quest to the Dark Tower. The Rook rescues his great-great grandfather, who becomes his sidekick along with Manners. Roland has no living relatives. The group that Roland travels with shows the very different tone of the Dark Tower novels. He travels mostly with a heroin addict, an amputee with bipolar disorder and a 12-year-old boy. Roland has the power to hypnotize and enter the conscious of others. Restin has a time machine, but no super powers.

To the extent similarities that exist between Roland and Restin, they are similarities general ideas and *scènes à faire*. *Beal*, 20 F.2d at 464.²⁰ See *Hogan v. DC Comics*, 48 F.Supp.2d 298 (S.D.N.Y. 1999) (holding no substantial similarity of the characters, despite them both being young, male, half-vampire characters named Nicholas Gant with similar appearances, both of whom had flashbacks and killed others); *Cabell v. Sony Pictures Entm't Inc.*, 714 F. Supp.2d 452, 454 (S.D.N.Y. 2010) (no infringement where the main characters who were both military-trained hair stylists who fought crime and used hairdryers as weapons).

Plaintiff could still prevail on a claim for infringement if the way in which the works at issue here express the unoriginal ideas is substantially similar or the unoriginal elements “have

²⁰ As mentioned *supra*, characters have been afforded copyright protection separate and apart from the work in which they appear when the character has “developed a constant set of traits that distinguish [it] from other fictional characters.” *Toho Co., Ltd. v. William Morrow and Co., Inc.*, 33 F.Supp.2d 1206, 1216 (C.D. Cal. 1998)(affording Godzilla standalone copyright protection). This Court reaches no decision in terms of whether The Rook is ultimately sufficiently delineated to warrant standalone copyright protection. Even if this Court were to find the character sufficiently delineated for stand-alone protection, the characters and works at issue here are not substantially similar in original/protected expression.

been combined in an original way.” *Hogan*, 48 F.Supp.2d at 311 (citing *Walker*, 784 F.2d at 50). See *Feist*, 499 U.S. at 362 (Even a work that is entirely a compilation of unprotectible elements may be copyrightable under certain circumstances). For all the reasons discussed herein, that is not the case here.²¹ The combination of non-unique elements in each character is not substantially similar.

VIII. Access

The Court need not reach the question as to whether Defendant King²² had access to The Rook. Resounding evidence of access does not dispense of the necessity of finding substantial similarity. *Beal*, 20 F.3d 460. The proposition that overwhelming proof of access can substitute for the requisite degree of substantial similarity is often labeled the “Inverse Ratio Rule.” 4 Nimmer on Copyright §13.03[D] (2018). However, the inverse ratio rule is not the law of the Eleventh Circuit. *Dream Custom Homes, Inc. v. Modern Day Constr.*, 476 Fed. App’x. 190, 191 (11th Cir. 2012).

IX. Graphic Novels and Movie

For all the reasons set forth herein, Marvel’s graphic novels and *The Dark Tower* movie are not substantially similar to The Rook.²³

X. Plaintiff’s Expert Witnesses Fail to Raise a Genuine Issue of Material Fact

Plaintiff’s experts fail to raise a genuine issue of material fact on the issue of substantial similarity. Plaintiff argues that one of his experts, Tracy Buchanan demonstrates the substantial

²¹ Another example is the protagonist Rip Hunter from the *Rip Hunter Time Master* comic that ran in the 1950s and 1960s. Rip was an inventor/time traveler, used a machine of his own making and was a crack shot.

²² Or other defendants.

²³ The images at issue only have broad, stock elements as similarities.

similarities of the characters because he purportedly conducted research into the response of “lay audience.” (Doc. 120, pg. 14). Plaintiff’s arguments are misguided. *See Warner Bros. Inc.*, 720 F.2d at 245 (“When a trial judge has correctly ruled that two works are not substantially similar as a matter of law, that conclusion is not to be altered by the availability of survey evidence indicating that some people applying some standard of their own were reminded by one work of the other.”)

While the Court has real doubts as to whether Tracy Buchanan’s expert report is ultimately admissible at trial, as it summarizes Internet commentators remarking on the similarities of Roland and The Rook, the characteristics the commentators identify as common between the two protagonists are nothing more than *scènes à faire*. Moreover, legitimately reminding someone of a copyrighted character is not the same as infringement. *See Warner Bros.*, 720 F.2d at 242 (“Stirring one’s memory of a copyrighted character is not the same as appearing to be substantially similar to that character, and only the latter is infringement.”).

Plaintiff’s other expert, Richard Ardnt has failed to show substantial similarity of the protected elements of each work. *See Corwin v. Walt Disney Co.*, 475 F.3d 1239 (11th Cir. 2007) (holding that the District Court properly excluded expert reports that focused on concept and ideas of the works at issue rather than on the expression of those concepts and ideas) (emphasis in original).²⁴

XI. CONCLUSION

The similarities between The Rook and Roland concern only non-copyrightable elements.

²⁴ Plaintiff’s former expert Jeffrey Rovin has a conflict of interest in this matter. He offered an opinion prior to learning of that conflict and will not testify at trial. This Court, thus, has not considered his opinion in this matter. *See Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir.1999)(“inadmissible hearsay ‘cannot be considered on a motion for summary judgment.’”).

The protected elements of The Rook and Roland are dissimilar, even when viewed in the light most favorable to Plaintiff. No reasonable jury, properly instructed, could find the works substantially similar.

ACCORDINGLY, it is **ORDERED**:

1. Defendants' Motion for Summary Judgment (Doc. 115) is **GRANTED**;
2. The Clerk is directed to terminate all pending motions, enter Judgment in favor of Defendants and close this case.

DONE AND ORDERED at Jacksonville, Florida, this 28 day of February 2019.



HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

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