Excerpts from Appeals Brief Filed Dec. 21, 2005

By Lewis Perdue

To make the arguments for reversal easier to grasp quickly, this excerpting has eliminated most footnotes, all case citations and evidentiary details. This document is approximately half ther length of the filing. All excerpted details are available in full in the court filing. No words have been altered nor has the relative position of the remaining text been changed.

Most excerpts (usually entire paragraphs or pages of details or repetition) are marked: "MATERIAL EXCERPTED-- ORIGINAL FILING

In several cases, where less than a paragraph has been deleted, the missing words are marked by an ellipsis (...).

In one case, I used brackets [ ] to add an explanatory note which better defined "This court" as " [Second Circuit Court of Appeals]"

In some cases, I have highlighted sections I feel are particularly relevant.

Please note that references to "the Plaintiffs" refers to Random House, Dan Brown, Sony Pictures. etc.

Nothing more has been changed. I hope you will find the interest to dig deeper and read the entire brief.

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After treating the motion by Plaintiffs as one for summary judgment, the District Court granted Plaintiffs' motion and declared that Plaintiffs' authorship, publication and exploitation of the rights in and to Code do not infringe any copyrights owned by Perdue.. Notably, although Perdue had not moved for summary judgment, the District Court denied such a motion and dismissed

Perdue's counterclaims. Finally, the District Court did not mention the motion made by The Movie Defendants in the Order.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

First: Did the District Court err by filtering out elements it believed were unprotected while never considering each individual element in relation to each other?

Second: Did the District Court have an adequate evidentiary basis for filtering out allegedly unprotected elements from Perdue's novels?

Third: Did the District Court err by necessarily relying upon matters that were not part of the record?

Fourth: Did the District Court err in refusing to consider the Declarations of Perdue's two experts?

Fifth: Did the existence of questions of material fact require the denial of the summary judgment motions?

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both novels share a common pseudo-religious and pseudo-historical base, without which neither novel would have any meaning. It is precisely that common pseudo-religious and pseudo-historical base that the District Court erroneously determined was unprotectible under the copyright laws.

a. Introduction

Daughter and Code employ identical narrative strategies, dividing their attention evenly between a story in present time and a background story that sets the context for the present action. These novels share the same background story, not only in the personages and events they refer to, but more importantly, in the identical ways they distort these historical events to support their nearly identical stories. Both novels contain a back story and a front story. The back story is about the divine feminine, the suppression of the divine feminine and the role played by Constantine and the Council of Nicea in suppressing the divine feminine.[1] It was the back story that the District Court effectively found was unprotectible.The back story is related to the front story because it provides the exclusive motivation for all the action in both novels.

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It is therefore indispensable to both Daughter and Code that the Catholic Church be involved in a fourth century cover-up involving the existence of the divine feminine. Because, among other things, there is no historical evidence that such a cover-up ever occurred, and because Brown mimicked Perdue's description of the cover-up three years after Daughter was published, the evidence is overwhelming that Brown plagiarized Perdue when he wrote Code.

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While it is historically accurate to say that the Roman Emperor Constantine existed, that there was a Council of Nicea in the fourth century, and that the Council of Nicea adopted dogmas binding on members of the Roman Catholic Church, most of what Perdue wrote about that period and event in Daughter is an literary device and invention that he made up. While Perdue may have skillfully made it appear that his historical inventions were actual historical facts, they simply never happened. More importantly, Plaintiffs have presented no evidence to show that Perdue's historical inventions were instead actual historical facts, yet the District Court accepted Plaintiffs' arguments as to what was and was not history. Having failed to offer evidence to show that Perdue's pseudo-history is an

actual historical fact, Plaintiffs have failed to show that Brown, in Code, did not plagiarize Perdue because he adopted and copied Perdue's faux history lock, stock and barrel.

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Perdue contends that the District Court erred in holding that virtually the entire quasi-religious and quasi-historical sequence of the novels was unprotected, even though much of Perdue's "history" was not history at all but was created by him as a literary device and despite the fact that it was Perdue who originally expressed these historical distortions in entirely and new original ways (later copied by Brown) in order to create a more interesting work of fiction. Unlike Brown, who submitted no affidavit or declaration, Perdue submitted a lengthy Declaration...to demonstrate to the District Court that the core of Daughter was based, not on mere ideas or historical facts, but was Perdue's original creation.

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Perdue's brief, submitted to the District Court, contains numerous tables containing side-by-side comparisons of actual quotations from both Daughter and Code.[2] Those quotations are the expression of the authors of Daughter and Code. The quotations show that Perdue incorporated his original personal synthesis by way of actual expression in Daughter, as well as Perdue's faux history involving Constantine and the Council of Nicea and that Brown copied that expression in Code. Because Perdue's original personal synthesis, particularly its order, sequence and arrangement, became actual expression in Daughter, and because Perdue showed that Brown had copied that expression, Perdue contends that the District Court could not have properly determined that "Perdue has not alleged that his unique *expression* of these ideas and themes were copied." Such allegations of similar expression are there in black and white for all to see in Perdue's brief submitted to the District Court. Inexplicably, however, the District Court overlooked Perdue's side-by-side comparison of similarities in expression and instead held that Perdue "has made no factual allegations, however, to support a finding that Brown copied his *expression* of those ideas."

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[2] A *redacted* copy of Perdue's brief submitted to the District Court that contains the tables demonstrating the similarity of expression appears on pages 323 through 369 of the Joint Appendix. The memorandum of law was redacted upon Plaintiffs' insistence.

SUMMARY OF ARGUMENT

While the District Court was required to filter out unprotectible materials before determining substantial similarity, it nevertheless was required to consider those unprotectible materials in determining whether Perdue combined them in such a way so as to give rise to an original expression of artistic merit. Here, the District Court erred because it merely filtered out, and then discarded, unprotectible materials without considering how Perdue used those materials as part of his creative expression in his novels.

Plaintiffs offered no evidence to assist the District Court in determining the genre of the novels in question, what is and is not a historical fact, and what is and is not original to the genre of the novels.[3] Absent such evidence and absent expert testimony, the District Court had no basis upon which to hold that portions of Daughter contained materials that were unprotectible. Nevertheless, it did make such determinations, which were unsupported by the record.

While, as a general proposition, expert testimony may properly be excluded when determining the substantially similarity of literary works, its use *should* be allowed where necessary, in certain cases, to filter out unprotectible materials.

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[3] The mere fact that an author chooses to characterize something in the context of his writing as historical fact does not make it so for the purpose of making an analysis of similarities between works. The putative "historical facts" may, as in the instant case, be fictional and there would therefore be no reason to characterize such "facts" as unprotected elements. In plain English, one author cannot choose to inhabit a fictional universe created by another author.

Expert testimony may be necessary because knowledge of what is and is not protectible may beyond the ken of the average lay observer. Furthermore, while the opinions of experts might be excluded, there is no reason why an expert witness cannot testify as a fact witness.[4]

Finally, Perdue's Declaration made material factual assertions, namely his discussion of the divine feminine, concerning his original personal synthesis and his faux history which was his personal creation and not the product of historical research. Plaintiffs never rebutted these assertions. Therefore a question of material fact existed that precluded the granting of a summary judgment motion.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED BY FILTERING OUT ELEMENTS IT BELIEVED WERE UNPROTECTED WHILE NEVER CONSIDERING EACH INDIVIDUAL ELEMENT IN RELATION TO EACH OTHER

On page 13 of the Memorandum Opinion and Order, the District Court excerpted and isolated from Perdue's argument the components of Perdue's original expression that he claims had been plagiarized by Brown. The District Court then indicated that "[a]ll of these similarities, however, are unprotectible ideas, historical facts and general themes that do not represent any original

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[4] For example, a learned historian might well be necessary to distinguish between actual

elements of Perdue's work." After viewing in isolation each element that Perdue claimed showed substantial similarity, the District Court filtered out those elements from its analysis of substantial similarity on a number of different grounds, including that some isolated elements were mere ideas, others were based on historical facts, others were not original, and others were unprotectible *scenes a faire*.

Assuming, *arguendo,* that the District Court was correct in filtering out the elements that it did, it was nevertheless reversible error for the District Court to have considered those elements exclusively in isolation of one another. It was also reversible error for the District Court to have failed to consider how Perdue used those elements to construct an original story that was plagiarized by Brown.

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However, after filtering out one hundred percent of what was similar in the stories, which was the entire back story, the District Court then erroneously believed that it was free to consider only what was dissimilar. By eliminating the striking similarities that Daughter and Code have in common, which was the back

historical facts and the artificial contextual world that Perdue created and Brown copied.

story, the District Court could not help but to conclude, albeit erroneously, that the stories were not substantially similar.

This Court [Second Circuit]has recognized that:

> "in distinguishing between themes, facts, and scenes a faire on the one hand, and copyrightable expression on the other, courts may lose sight of the forest for the trees. By factoring out similarities based on non-copyrightable elements, a court runs the risk of overlooking wholesale usurpation of a prior author's expression."

A.A. Hoehling v. Universal Studios, Inc., 618 F.2d 972, 979-80 (2d Cir. 1980).

Unlike other media of creative expression, such as graphic design, it is almost impossible to conceive of a literary work that is not largely comprised of unprotectible elements. The events of life have been written about tens of thousands of times, and those events, viewed in isolation of one another, are not only unoriginal but may appear to be absolutely dull. It is only by combining these otherwise unremarkable events in an original way that an original literary work is created. Here, the error of the District Court was that it failed to discern the original expression in Daughter because it failed to consider how Perdue combined otherwise unprotectible events to create an original story when he wrote Daughter.

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A. Examples of How Perdue Used Matters Filtered Out By the District Court in His Creative Expression in Daughter

There are numerous examples of how Perdue used in a creative way matters that were filtered out, after which they were not again considered by the District Court.

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POINT II

THE DISTRICT COURT ERRED IN NOT LIMITING ITS DETERMINATION TO MATTERS IN EVIDENCE AND IN REFUSING TO CONSIDER THE TWO EXPERT DECLARATIONS SUBMITTED BY PERDUE

A. Introduction

As noted above, Perdue does not take issue with the legal conclusion that the question of substantial similarity must be decided by applying the standard of the average lay observer.[5] Indeed, the similarity between Perdue's novels and Code was originally brought to Perdue's attention by numerous lay readers who sent unsolicited emails to him on that subject.

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However, the act of determining substantial similarity and the act of filtering out unprotectible elements is not always the same thing. In the case of the former, no knowledge other than the content of the novels is required. However, that may not be true in the case of the latter, because the average lay observer may need assistance to make determinations as to the genre of a novel, the *scenes a faire* that are common to such genre, what are or are not historical facts, or what portions of a novel are and are not original. Similarly, after considering the unprotectible elements, their relationship to one another, and how they were used in a particular story, as discussed in Point I *supra*, the average lay observer may be left unable to know whether the author's use of those unprotectible elements has resulted in original creative expression for novels of a particular genre. Expert assistance may be required to determine questions of originality because such a determination may require a thorough understanding of other novels of the genre.

While that assistance, where necessary, might come in the form of evidence or expert opinion, here there was neither. Instead, the District Court determined, without the benefit of evidence or expert testimony, that almost 100% percent of the portions of the novels that Perdue contended were substantially similar, which were the back stories, were unprotectible. However, even if, as a result of its knowledge and training, the District Court possessed special skills that enabled it to make all needed determinations in the filtering out process, it still would have

been legally improper for the District Court to have relied exclusively on its special skills when there was no evidence in the record to support the conclusions reached by the Court.

B. The District Court Acted Improperly By Making Crucial Determinations For Which There Was No Evidence In The Record

A determination in this action may only be based on properly admitted evidence.

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Here, the District Court did not abide by those rules. Without the benefit of any evidence or expert guidance, and under circumstances that would make judicial notice inappropriate, the District Court proceeded to speak as only an expert can speak because many of its statements would have required an encyclopedic knowledge of the appropriate genre, as well as world and religious history. After determining that the novels were of a mystery/thriller genre, and without any evidence whatsoever,[6] the District Court arrived erroneous

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[6] Perdue did submit a declaration of Gary Goshgarian (A. 294-298), who is an English professor at Northeastern University, is himself a novelist and is a member of at least two associations of mystery/thriller writers. (A. 299-306). While that Declaration does not opine on substantial similarity, Mr. Goshgarian does say what is and is not common to a mystery/thriller. However, the District Court refused to consider the Declaration. Further, Plaintiffs submitted no evidence to show what was and was not common to novels of the mystery/thriller genre and their

conclusions, all without any basis in the record. As a result of those erroneous conclusions, the District Court filtered out materials that should have never been filtered out from the novels. Those erroneous conclusions involved: (a) originality and stock themes; (b) faux history, and; (c) scenes a faire.

1. Originality and Stock Themes

The District Court repeatedly filtered out portions of Daughter for the sole reason that it believed that those portions were not "original in this genre" or that other material was a "stock theme."

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The District Court committed reversible error in determining what is and is not "original" to mystery/thriller novels and what were the "stock themes" because the record is barren of any evidence as to what is and is not original to such novels and what are the "stock themes." Findings of the absence of "originality" could not properly have been based on judicial notice because what is and is not

arguments were based solely upon their attorneys' say-so. They did not even submit an affidavit from Brown.

"original" to a novel of any genre is not a matter of common knowledge and is not something anyone would expect the average lay reader to know.[7]

2. The Faux History

Without any evidence as to what was and was not an historical fact, the District Court filtered out all materials that sounded like they might have been based on history .[8] but actually were, as evidenced by the sworn statement of Perdue , fictional inventions of Perdue.

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As stated above, unless the District Court had a special historical expertise, it could not begin to decide what was and was not an historical fact. But even if the District Court did have such expertise, it would have been reversible error to rely solely upon such expert knowledge because that would have deprived Perdue of the ability to counter the historical opinions of the District Court with his own historical evidence.

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[7] This is especially the case here where the District Court determined that Daughter and Code involved the "unprotectible *idea* of a mystery thriller set against a religious background." While the *idea* of combining a religious background with a mystery thriller may be unprotectible, the combination is unusual. Because the combination is unusual, such combination cannot serve as a basis for filtering as scenes a faire out everything the Daughter and Code that mentions religion.

3. Scenes a Faire

The District Court determined that "both novels discuss Swiss bank accounts and gold keys or that the novels begin with the murder are unprotectible scenes a faire that precludes a finding of substantial similarity." The District Court also determined that the discussion of the Catholic Church was a scene a faire because "such discussion is expected from a thriller with religious themes and is an unprotectible *scene a faire*."

The District Court also held that "because [Daughter] and [Code] share a religious backdrop, Perdue's claims that the novels share a similar theme that 'people create their own gods,' and that both novels have 'discussions of Mother Earth' and 'discussions about communion' are not afforded copyright protection."[9]

As with our discussion of originality and faux history, there is no evidence in the record to support the findings by the District Court regarding scenes a faire.[10] Unless the District Court could rely upon its "expertise" on thrillers with religious themes[11] in the absence of any evidence in the record. Similarly, The District Court also found that solely because Daughter and Code share a religious

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[9] That statement is logically disconnected. Merely because the novels share a religious backdrop cannot mean that nothing in the novels involving religion can be afforded copyright protection. Were that the law, nothing in scholarly theological works would be entitled to copyright protection because all works of theology have a religious backdrop.

[10] It is perhaps telling that in most of these instances where the court opines on themes common to the genre, it fails to cite any other novel of the same genre incorporating such allegedly common elements.

background[12], themes that 'people create their own gods,' and that both novels have 'discussions of Mother Earth' and 'discussions about communion' are not afforded copyright protection." Because the record contains no evidence of what are and are not scenes a faire in thrillers with religious background, the District Court erred in filtering out what is believed, without justification, were scenes a faire.

4. Conclusions

To be able know what is and is not original in the genre, to understand that was and was not history, and to be able to know what was and was not a scene a faire, the District Court would have had to be an expert in the genre as well a being a expert on history. While perhaps the District Court was an expert, absent an evidentiary basis, the District Court should not be allowed to use that expertise to decide the motions because the determination would not be based on the evidence.

It is ironic that the District Court, while apparently acting as if it were an expert, would not even consider the declarations proffered by Perdue's experts. Hence, the District Court left Perdue with no means to refute the court's own ultimate determinations. Not only was there no basis in the record for determining what are and are not common themes in mystery/thrillers, what history is real and

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[11] The record is devoid of any indication as to whether thrillers with a religious backdrop are common or whether they are rarities.

[12] That is based upon pseudo-history.

what is made up, and what are the scenes a faire, but it is difficult to see how the average lay observer could have known that the foregoing represented "unprotectible stock themes common to the genre."[13] To have made such a determination would have required the average lay observer to be intimately familiar with both literature and history, something that offends the rule that generally such determinations can only be based upon the evidence that is presented in court.

C. In This Action, the District Court Should Have Considered the Declarations of Perdue's Experts

The District Court should have allowed the use of expert declarations on issues involving filtering out of unprotectible materials. Perdue submitted two such declarations. One was of Gary Goshgarian, who did not opine on substantial similarity. Instead, the thrust of his declaration was to state what was and was not original to novels of the mystery/thriller genre. The second expert declaration was that of John Olsson. While Mr. Olsson did opine on substantially similarity, he also expressed his observations as to the many similarities he observed after reading the novels. On the authority of *Denker v. Uhry*, 820 F.Supp. 722 (S.D.N.Y. 1992), the District Court refused to consider those declarations for any purposes whatsoever.

The determination as to whether to allow the testimony of an expert witness depends, in part, upon whether that testimony will assist the trier of fact in making its determination. *Nimely v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005).

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The present case, where the District Court proclaimed that certain matters were not "original" to mystery/thriller novels, is a perfect example. It is difficult to see how determinations of what is and is not original to a particular genre would not require expert testimony...Instead of considering what Mr. Goshgarian had to say, the District Court rejected his Declaration and then proceeded on its own to determine what was and was not original in novels of the relevant genre, which was precisely what Perdue wanted Goshgarian to do, but which the District Court would not allow.

In so doing, the District Court left Perdue powerless to affect the ultimate determinations by the Court because the findings of the District Court were based, not upon the evidence submitted by the parties, but rather on the personal perception of the District Court that it was capable of deciding, without evidence, what is and is not original to novels in whatever genre Daughter and Code belong.

The same is true of many of those matters held by the District Court to be *scenes a faire*. ... Certainly, the District Court should not have made its determination without any fact or opinion evidence.

The District Court should also have considered the Declaration of John Olsson. While Mr. Olsson did opine on substantial similarity, he also listed the factual similarities between the characters of the novels, and other similarities. Hence, the opinions he expressed could have been ignored while still considering his factual observations. Even if Mr. Olsson could not testify as an expert witness, he still should have been allowed to present his observations as a fact witness. This is more the case because the District Court held in footnote 4 of the Opinion: "Although Perdue also asserts infringement of his earlier novel, *The Da Vinci Legacy*, he offers no arguments in his moving papers in support of his claims." Perdue, however, has not abandoned his claims regarding Legacy. In fact, one basis of Perdue's claims in both Legacy and Daughter are found in the observations of Mr. Olsson, which the District Court refused to consider. For the District Court to say that Perdue has abandoned his arguments regarding Legacy, while also refusing to consider the Olsson Declaration, which contained Perdue's arguments regarding Legacy, was extremely unfair.

POINT III

BECAUSE PLAINTIFFS NEVER REBUTTED PERDUE'S FACTUAL

CLAIMS, WHICH WERE MATERIAL, THE DISTRICT COURT ERRED IN GRANTING PLAINTIFFS SUMMARY JUDGMENT

Plaintiffs' arguments, in support of their motion for summary judgment, suffer from the same infirmities as does the Opinion. For the most part, they constitute lawyers' arguments without the benefit of evidence, expert opinion or an affidavit or declaration of Dan Brown.

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Plaintiffs did not submit an affidavit of Dan Brown. While Plaintiffs' attorneys tried to act as Brown's surrogate by arguing what Brown did and did not do when he wrote Code, Brown never swore under oath that he conducted any research when he wrote Code, what books, if any, he read, that he never read Daughter or Legacy, and that he did not copy portions of Daughter or Legacy. Even after Perdue submitted his declaration stating that his discussion of the divine feminine was the product of his own personal synthesis, some of which he invented, and some of which he arranged by using matters in the public domain in an original way, Brown did not respond under oath.

Even after Perdue presented examples in his memorandum of law of the similarities in the expression between Daughter and Code, and even after Perdue accused Brown of having copied that expression, Brown *still* did not respond under

oath. Indeed, neither Brown, nor anyone else acting on his behalf, ever denied the charges made by Perdue in his Declaration. Because of flaws in the way in which Plaintiffs moved for summary judgment and because of their failure to adequately deny Perdue's charges of plagiarism, there existed questions of material fact requiring the denial of summary judgment.